Businesses & Human Rights: A Comparative Study of the United States, England and Denmark using Third World Approaches to International Law

Sara Helene Andersen

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Department of Law

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Sara Helene Andersen

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Thesis Summary

The doctoral dissertation assesses the effectiveness of the current solutions for transnational corporate accountability in regard to human rights focusing on the United States, England, and Denmark from a critical perspective of Third World Approaches to International Law (TWAIL). This issue has evolved because corporations increasingly face human rights challenges in a competitive global business environment across different industries, including the textile sector, the extractive industry, and the oil industry to name a few examples. The thesis mapped out the current binding human rights obligations of corporations and compared the efficacy of the three jurisdictions' use of transnational human rights litigation, multi-stakeholder initiatives (MSIs), the UN Guiding Principles on Business and Human Rights (UNGPs) and national action plans (NAPs).

The legal frameworks form a necessary postmodern polycentric governance approach to the issue but are insufficient from a comparative- and TWAIL perspective in preventing or remedying corporate human rights violations because of their incoherent, uncertain and non-binding nature. The current frameworks do not adequately address the reality of certain developing states' need to attract foreign direct investment by keeping their regulatory systems powerless. TWAIL scholars point out that in particular international financial- and economic institutions such as the World Bank, IMF, and WTO undermine developing states' human rights governance capacity. To address this problem, the thesis assessed the added value of the UN Business and Human Rights Treaty Proposal from a TWAIL perspective and found that it has potential to solve the structural imbalances between companies and host states.

However, the thesis proposes new treaty obligations for states, corporations, and international financial-and economic institutions to provide more legal certainty, greater democratic influence and access to justice for Third World human rights-holders than the current options provide. Compared to existing literature, this thesis contributes with a new profound legal and empirical analysis integrating recent case law to assess the efficacy of corporate accountability for human rights using both a Global North and TWAIL perspective. The thesis concludes that the proposed adjustments facilitate consensus on a binding multilateral treaty considering the economic and competitive advantages for both Global North- and South states and businesses as well as the empowerment of the transnational judicial system for Third World communities.

Chapter 1 Introduction

Setting and Background

The global marketplace is a catalyst for wealth and jobs in modern world economy. Products are sourced from faraway regions at low unit costs, whether Coca Cola from Columbia, oil from Nigeria, or clothes from Bangladesh. The spread of corporations across the globe means that an increasing number of companies have business operations causing negative human rights impacts beyond the reach of traditional corporate control mechanisms. The common historical understanding of human rights is that they protect individuals and private groups from state interference but not as limitations on private power including business operations.

This thesis suggest that in the beginning of the twenty-first century, we need a paradigm shift to tackle the human rights challenges brought about by patterns of economic globalization, because giant corporations in some parts of the world are stronger than states. They behave like private governments creating wealth and jobs and governing the economy, but with social cost side-effects. Due to the uncertainty of legally binding measures and enforcement against corporate transnational activities' negative impacts on human rights, there has been a growing consensus in Western societies on a non-binding concept of corporate responsibility. This has culminated in socio-political pressure on multinational corporations (MNCs) to adopt business practises in their global supply chains to substitute for host governments abroad that provide for scarce substantive legislation and poor enforcement of any protective regulations.[1] These initiatives can be classified under the umbrella term of corporate social responsibility (CSR), which relates to the way companies integrate social and environmental concerns in their business operations and their interactions with their stakeholders voluntarily.[2] To guide the corporations in regulating their own activities, governmental non-treaty obligations and private law initiatives beyond the state have come to the fore introducing various types of regulation including soft law standards, [3] industry self-

[1] *See infra* text accompanying notes 20-23 on The Accord and The Alliance.

[2] *Commission Green Paper: Promoting a European framework for Corporate Social Responsibility*, at 8, COM (2001) DOC/01/9 (July 18, 2001).

[3] E.g., U.N. Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy Framework,'* U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) *[hereinafter the UNGPs]*; *The Ten Principles in the areas of human rights, labour, the environment and anti-corruption*, UNITED NATIONS GLOBAL COMPACT https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Mar. 29, 2017); INTERNATIONAL LABOUR ORGANIZATION, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (2006);

regulation,[4] and certification standards[5] for labelling certain types of products in an attempt to fill the governance gap. In fact, 95 percent of the largest 250 global companies have CSR programs.[6] In several cases, these private initiatives lack the leverage to protect stakeholders from gross human rights abuses.

Appalling examples of tragic and severe violations of the right to life and security of person are the horrific fire accidents where hundreds of garment workers burned to death or were crushed from jumping out of the windows from the highest floors of the Ali Enterprise Factory in Karachi, Pakistan[7], the Garib & Garib Factory,[8] the Tazreen Factory, Bangladesh,[9] and the Kentex Manufacturing Factory, Philippines.[10] Five months after the Tazreen Factory fire, in April 2013, the eight-story garment factory Rana Plaza collapsed in the Savar district in Bangladesh. The Rana Plaza tragedy and its legal aftermaths demonstrate the unsatisfactory status of access to remedy for victims of corporate wrongs giving rise to transnational human rights litigation.Workers in five factories housed in the Rana Plaza building produced clothing for American, Canadian and European companies that had signed deals throughout several years with contractors operating the factories. Eighty percent of the Rana Plaza workers were young women, 18, 19, 20 years of age. Reportedly, the workers had refused to enter the factory building because there were large and dangerous cracks in the walls. However, they were threatened to lose a whole months pay and violently forced to get

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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011) [hereinafter OECD Guidelines]; *A renewed EU Strategy 2011 – 14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011) [hereinafter Commission Communication]. The Commission Communication was followed up by the EU Multi-stakeholder Forum on CSR, Feb. 3-4, 2015 in Brussels, Belgium, http://ec.europa.eu/growth/industry/corporate-social-responsibility/index_en.htm; INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO 26000:2010 - GUIDANCE ON SOCIAL RESPONSIBILITY (2010) [hereinafter ISO 26000].

[4]E.g. FAIR LABOR ASSOCIATION, FLA WORKPLACE CODE OF CONDUCT AND COMPLIANCE BENCHMARKS (2011), http://www.fairlabor.org/sites/default/files/fla_complete_code_and_benchmarks.pdf; *The Ten Principles*, INTERNATIONAL COUNCIL ON MINING AND METALS, SUSTAINABLE DEVELOPMENT FRAMEWORK, https://www.icmm.com/en-gb/about-us/member-commitments/icmm-10-principles/the-principles (last visited Mar. 29, 2017)

[5] E.g. *Certifying Fairtrade*, FAIRTRADE INTERNATIONAL, https://www.fairtrade.net/about-fairtrade/certifying-fairtrade.html (last visited Mar. 29, 2017).

[6] KPMG, CURRENTS OF CHANGE: THE KPMG SURVEY OF CORPORATE RESPONSIBILITY REPORTING 7 (2015).

[7] *Paying the Price for Clothing Factory Disasters in South Asia*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia.html (last visited Mar. 29, 2017).

[8] Martin Hickman, *21 Workers Die in Fire at H&M Factory*, THE INDEPENDENT (Mar. 2, 2010), http://www.independent.co.uk/life-style/fashion/news/21-workers-die-in-fire-at-hm-factory-1914292.html.

[9] Julfikar Ali Manik & Ellen Barry, *Months After Deadly Fire, Owners of Bangladesh Factory Surrender to Court*, N.Y. TIMES (Feb. 9, 2014), http://www.nytimes.com/2014/02/10/world/asia/owners-of-bangladesh-factory-surrender-in-deadly-fire.html?src=recg&_r=0.

[10] Floyd Whaley, *Death Toll in Philippine Factory Fire Climbs Above 70*, N.Y. TIMES (May 14, 2014), http://www.nytimes.com/2015/05/15/world/asia/death-toll-rises-in-valenzuela-philippines-factory-fire.html?_r=3.

to work.[11] According to a government inquiry report the factory collapse was triggered by a power cut that set the building's generators in motion, shaking the structure along with the vibration of thousands of sewing machines. The building had been constructed with weak materials, such as sub-standard steel rods and construction approvals were allegedly obtained through bribery.[12]

1.134 were confirmed dead at Rana Plaza and 291 of the dead were buried in a mass grave because they could not be identified. More than a year later, almost 300 remained missing and two years later, the Bangladeshi government reportedly lacked information about 85 victims[13], while the Agence France-Presse (AFP) reported that 135 remain unaccounted for.[14] 2.515 workers were injured including a female garment worker, who was found alive trapped under the rubble 17 days after the collapse.[15] 1.000 male and female garment workers were seriously injured including some that were trapped and had to have their arms and legs amputated without anaesthetics.[16] The horrendous collapse of the Rana Plaza building is, to date, the deadliest disaster in the history of the garment industry worldwide and has raised worldwide demonstrations against global fashion brands.

A few civil and public-interest cases have been filed in Bangladesh against the Rana Plaza operators and remain largely stalled in court bureaucracy.[17] It took over two years for the Bangladeshi government to announce prosecutions against clothing factory owners and officials, including the leading businessperson behind Rana Plaza, Sohel Rana. They are charged with causing workers' deaths through neglect and the regulatory failure to act on

[11] *Rana Plaza: A Look Back, And Forward*, INSTITUTE FOR GLOBAL LABOUR AND HUMAN RIGHTS (Apr. 24, 2014), http://www.globallabourrights.org/alerts/rana-plaza-bangladesh-anniversary-a-look-back-and-forward.
[12] Jim Yardley, *Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame*, N.Y. TIMES, May 22, 2013, at A5.
[13] *Debate still on about number of victims in world's worst workplace disaster in Bangladesh*, THE DAILY STAR (Apr. 22, 2015), http://www.thedailystar.net/frontpage/debate-still-about-number-victims-78594.
[14] *Two years on, Bangladesh factory collapse still haunts relatives of 'missing' victims*, MALAY MAIL ONLINE (Apr. 23, 2015), http://www.themalaymailonline.com/world/article/two-years-on-bangladesh-factory-collapse-still-haunts-relatives-of-missing.
[15] Syed Zain Al-Mahmood et. al., *Bangladesh Factory: Woman Found Alive in Rubble 17 Days after Collapse*, THE GUARDIAN (May 10, 2013), https://www.theguardian.com/world/2013/may/10/bangladesh-factory-collapse-survivor-rescue-dhaka.
[16] Sara Smyth, *Heroic Rescuer Forced to Amputate Trapped People's Limbs to Save Them from the Wreckage of Bangladesh Factory*, DAILY MAIL (May 4, 2013), http://www.dailymail.co.uk/news/article-2319439/Bangladesh-building-collapse-Rescuer-forced-amputate-trapped-peoples-limbs-save-wreckage.html.
[17] Michelle Chen, *A Western Company Could Finally Be Held Accountable for the Rana Plaza Disaster*, THE NATIONAL (Apr. 29, 2016), https://www.thenation.com/article/a-western-company-could-finally-be-held-accountable-for-the-rana-plaza-disaster/.

evidence of severe building hazards.[18] Almost five years after the tragedy, the murder trial has been delayed by appeals in the higher court. Sohel Rana has so far been sentenced three years in prison for corruption including failing to declare his personal wealth to the Bangladeshi Anti-Corruption Commission.[19]

Two major sets of reforms aimed at preventing future factory disasters were launched, known as the Accord on Fire and Building Safety in Bangladesh[20] and the Alliance for Bangladesh Worker Safety.[21] They are global collaborations of multinational clothing brands, labour groups, and safety authorities. The Accord is binding and often described as a "European" initiative including many top European companies, such as Benetton, Mango and H&M. The Alliance is not legally binding and comprises of North American brands, including J.C. Penny, GAP and Walmart.[22] The Accord monitoring programme's management has reported that over half of all "identified safety issues [have been] reported or verified as corrected by inspectors."[23] Nonetheless, of more than 1600 facilities inspected, just seven factories have actually completed initial remediation plans; nearly 1400 are behind schedule. Financing for future remediation is uncertain, especially as the programme is scheduled to end in 2018.[24] Although the Bangladeshi government vowed to step up safety regulations, another incident has happened in a Bangladesh packaging factory where more than 30 workers died after an explosion and fire.[25] Victims' families of the Rana Plaza disaster still struggle to meet basic needs despite the millions that MNCs have donated into the Rana Plaza Trust Fund that issues payments to survivors and households of the deceased.[26] The Trust Fund is managed by the ILO and funded by buyers and other private donors. An NGO as raised criticism about

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[18] Beenish Ahmed, *More Than 40 Charged With Murder For Bangladesh Garment Factory Collapse*, THINKPROGRESS (June 2, 2015), https://thinkprogress.org/more-than-40-charged-with-murder-for-bangladesh-garment-factory-collapse-c40ab860758f#.44axc047o.

[19] *Rana Plaza Owner Jailed for Three Years over Corruption*, ALJAZEERA (Aug. 29, 2017), http://www.aljazeera.com/news/2017/08/rana-plaza-owner-jailed-years-corruption-170829161742916.html

[20] ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, http://bangladeshaccord.org/ (May 15, 2013).

[21] ALLIANCE FOR BANGLADESH WORKER SAFETY, http://www.bangladeshworkersafety.org/ (July 10, 2013).

[22] Yo Shiina, *Two Years Since Rana Plaza: Why the Accord and the Alliance Are All the More Relevant*, RIGHTSWIRE – LEITNAR CENTER FOR INTERNATIONAL LAW AND JUSTICE (July 15, 2015), https://rightswireblog.org/2015/07/15/two-years-since-rana-plaza-why-the-accord-and-alliance-are-all-the-more-relevant/

[23] *Accord Statement on Rana Plaza and Steering Committee in Dhaka*, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH (Apr. 23, 2016), http://bangladeshaccord.org/2016/04/accord-statement-on-rana-plaza-and-steering-committee-in-dhaka/

[24] Chen, *supra* note 17.

[25] *Bangladeshi factory owner sued after fire kills more than 30*, EUROPE BALKAN LATEST NEWS (Sep. 12, 2016), https://eblnews.com/news/world/bangladeshi-factory-owner-sued-after-fire-kills-more-30-36466

[26] *Pressure Increases on Benetton as Nearly 1 million Activists Demand they Immediately Pay Into Rana Plaza Victims' Compensation Fund*, INTERNATIONAL LABOR RIGHTS FORUM (Feb. 11, 2015), http://laborrights.org/releases/pressure-increases-benetton-nearly-1-million-activists-demand-they-immediately-pay-rana

the transparency of the allocation process and paltry compensations. The amounts of money given to workers who lost an arm or a leg or to family members of the deceased was often $1.000. For a garment worker who survived on sewing with an entire family that depended on that income and having lost his or her ability to work getting $1.000 is wholly inadequate.[27]

Because of the halting progress, victims of the Rana Plaza collapse took legal action in the U.S. and Canada against fashion brands implicated in the factory collapse.[28] A class-action lawsuit was filed in the U.S. District Court for the District of Columbia in 2015 against retailers The Children's Place, Wal-Mart, J.C. Penney and the Bangladesh government for negligence and wrongful death.[29] The plaintiffs represented the families of the 1.134 killed in the tragedy, and the approximately 2.515 who were injured.[30] The case was shortly after voluntarily dismissed and filed in the Superior Court of the State of Delaware because the plaintiffs contended that the claim would not be time-barred under Delaware Law.[31] The Delaware court decided to dismiss the case on the basis that Bangladeshi law applies for the determination of the statute of limitations and the limitation period of one year for negligence and wrongful death had passed.[32] Delaware law governed the duty of care dispute and the Court stated that the defendants were not the plaintiffs' direct employer. The plaintiffs had failed to demonstrate a "special relationship", "peculiar risk", sanctioned illegal conduct, or an exception to the general rule protecting independent contractors from liability to justify a *prima facie* case for negligence and wrongful death.

The Canadian lawsuit was filed in Ontario Superior Court of Justice in 2015 against the Canadian multinational retailer Loblaws, including parent company George Weston, subsidiary Joe Fresh and their auditing firm Bureau Veritas. Plaintiffs argued breach of fiduciary duty and vicarious liability for the negligence of Loblaw's suppliers and sub-suppliers.[33] Plaintiffs' lawyer pronounced that Loblaw's business decisions, including its

[27] INTERNATIONAL LABOR RIGHTS FORUM DHAKA, BANGLADESH FACT-FINDING DELEGATION, FINDINGS AND RECOMMENDATIONS ON THE SECOND ANNIVERSARY OF THE RANA PLAZA DISASTER 8 (2015).
[28] Michelle Chen, *$1000 for a Dead Family Member – Is That Justice for Bangladesh's Garment Workers?* THE NATION (June 3, 2015), https://www.thenation.com/article/1000-dead-family-member-justice-bangladeshs-garment-workers/
[29] Rahaman v. J.C. Penney Corporation, INC., et al, No. 15-cv-619 (D.C. filed Apr. 23, 2015).
[30] Joan Verdon, *Victims of Factory Collapse File Lawsuit Against Children's Place, Others*, NORTHJERSEY.COM (Apr. 29, 2015), http://www.northjersey.com/news/business/factory-victims-file-suit-1.1321188
[31] Rahaman v. J.C. Penney Corporation, INC., et al, No. N15C-07-174 MMJ, 7 (Del. Feb. 3, 2016).
[32] Rahaman v. J.C. Penney Corporation, INC., et al, No. N15C-07-174 MMJ, 27 (Del. Feb. 3, 2016).
[33] Arati Rani Das et. al. v. Loblaws Companies Ltd. et al, no. CV-15-52662800CP (Ont. Super. Ct. filed Apr. 22, 2015).

decision to ignore its factory-auditing duties, are handled through its Canadian headquarters and that Canada's judicial system is far more willing and able than Bangladesh to handle this sort of complex class-action litigation. Plaintiffs sought $2 billion in damages to compensate as many as 3.850 victims of the collapse.[34] In 2017, the Court dismissed the case for failure to argue a viable cause of action.[35] The Court ruled insufficient proximity between the defendants and the putative class members to recognize a common law duty of care.[36] Foreseeability of harm, knowing about the notoriously dangerous buildings, was insufficient to create a duty of care to prevent a person from being harmed by a third party's criminal acts.[37] Also public policy concerns, including extension of liability on purchasers for suppliers' negligence in foreign lands and the spectre of indeterminate liability, were cited.[38] The vicarious liability claim was rejected referring to the absence of any direct control on Loblaw's part over the employees of an independent sub-supplier.[39]

The Rana Plaza case is just one example of how the global spread of supply chains has produced a global challenge in holding corporations liable, both in relation to corporation headquarters situated in large industrialized nations and small developing countries where they locate their subsidiaries. Victims of human rights violations in which a corporation was said to be involved have pursued redress for decades by filing class action lawsuits in the Western state where the corporation is founded. This has typically happened together with pro bono lawyers who cooperate with human rights organizations and other NGOs. In the American jurisdictions, corporate liability for human rights violations have mostly intersected through litigation filed pursuant to the federal Alien Tort Statute (ATS).[40] Adopted in 1789, it was originally intended to assure foreign governments that the US would act to prevent and provide remedies for breaches of customary international law especially breaches relating to a wave of piracy in the Caribbean in the late 18th century.[41] The statute reads that 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[42]

[34] Chen, *supra* note 17.
[35] Das v. George Weston Limited et al, [2017] ONSC 4129 (Can.).
[36] *Id*., at para. 526.
[37] *Id*., at para. 525.
[38] *Id*., at para. 536.
[39] *Id*., at para. 497.
[40] Title 28 of the United States Code, § 1350, 2006, originally enacted as part of the Judiciary Act in 1789. The Alien Tort Statute (ATS) is also known as the Alien Tort Claims Act (ATCA).
[41] Eugene Kontorovich, A Tort Statute With Aliens and Pirates (Northwestern University School of Law 2012). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094627.
[42] 28 U.S.C. § 1350.

Accordingly, the ATS is strictly jurisdictional and directed at aliens allowing U.S. federal courts to recognise certain causes of action based on customary international law and *jus cogens* norms[43] and treaties ratified by the U.S.[44] While plaintiffs have had success in reaching settlements for compensation, the U.S. Supreme Court delivered a judgment in 2013 defeating plaintiffs' chances radically for future foreign direct liability claims under the statute.[45] In the European jurisdictions, the claims have been filed on the basis of negligence claims in tort, rather than any equivalent of the ATS. In tort law claims, the language is usually not directly linked to human rights violations, which has been regarded as diminishing the significance of the harm caused to the victim. While legal action under tort law in some cases may provide for a viable and simpler route for redress than human rights law, it does not contribute to determining the standard of care for corporations under international human rights law. The complexity of seeking justice through transnational civil litigation will be addressed further in Chapter 3 of the thesis. In addition, I have chosen to author a case study in Chapter 4 to shed light on MNCs operating in the garment industry on global markets because of the high incidence of labour exploitation and environmental degradation violating human rights in the garment supply chain.[46] On the one hand neo-liberal orthodoxy pays tribute to MNCs for generating economic development and employment, for example, the garment sector is one of the largest and most dynamic in the global economy accounting for nearly 4 percent of the total global G.D.P., which is more than 1 trillion dollars per year.[47] On the other hand, economic historians and sociologists have published work documenting that market systems in industrial economies are deeply embedded in social divisions especially gender and ethnic divisions of labour.[48] My case study will assess the progress of businesses and other stakeholders in tackling the exploitation of female labour in the garment supply chain in India.

[43] Ordinary customary international law binds all States except for those who have persistently objected to its application. *Jus cogens* is a part of customary international law but distinguishes itself as a peremptory norm not subject to the persistent objector exception.
[44] Beth Stephens, *Corporate liability. Enforcing human rights through domestic litigation* 24 HASTINGS INT'L & COMP. L. REV. 401, 24 (2001); Alvarez – Machain v U.S., 331 F.3d 604 (9th Cir. 2003) 635; Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[45] Kiobel v. Royal Dutch Petroleum Co., 133 U.S.1659 (2013).
[46] FAIR TRADE USA, A BOLD EXPERIMENT IN ETHICAL CLOTHING: FAIR TRADE CERTIFIED APPAREL & LINENS PILOT LESSONS LEARNED 2010 - 2012, 6 (2012).
[47] GUILLERMO JIMENEZ & BARBARA KOLSUN, FASHION LAW 6 (2010).
[48] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944); RAYMOND EDWARD PAHL, DIVISIONS OF LABOUR (1984), LOUISE A. TILLY & JOAN W. SCOTT, WOMEN, WORK AND FAMILY (1978).

My research will focus on the international regulation of a mother company in the U.S., England, and Denmark for involvement in negative human rights impacts abroad. The thesis will demonstrate that the ex-post strategy of extraterritorial application of domestic tort theories in transnational human rights litigation against businesses has been limited, and it is questionable if victims can enforce human rights obligations of business corporations in this way moving forward. In lack of a multilateral agreement, it is challenging for courts to adjudicate foreign claims for abuses occurring abroad because of private international law concerns.

In order to solve this problem collectively, negotiations have commenced towards an international business and human rights treaty by the adoption of the Human Rights Council Resolution 26/9 in June 2014.[49] The resolution's sponsors were Ecuador and South Africa, supported by Bolivia, Cuba and Venezuela, however, a majority of votes in the Human Rights Council was not achieved. The EU and the U.S. indicated that they would not embark on a treaty negotiation, although, former UN Secretary General's Special Representative on Business and Human Rights, Harvard Professor John Ruggie, suspects that they eventually will. According to Ruggie, the issue is that the proposed approach has fundamental flaws in starting the process all over again and relying on a single overarching legal instrument.[50] Prior to the adoption of the resolution, Ruggie had developed the "Guiding Principles on Business and Human Rights for implementing the UN "Protect, Respect and Remedy" Framework" (UNGPs).[51] On 16 June 2011, the UN Human Rights Council endorsed the UNGPs providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The UNGPs do not create new international law obligations but address all states and business enterprises:

"the State duty to protect (…) lies at the very core of the international human rights regime; the corporate responsibility to respect (…) is the basic expectation society has of business in relation to human rights."[52]

The UNGPs have proved to be influential with incorporation into the OECD Guidelines for Multinational Enterprises,[53] the ISO 26000 Guidance on Social Responsibility,[54] and

[49] Human Rights Council Res. 26/9, U.N. Doc. A/26/22 (June 26, 2014).
[50] John Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* 4 (Harvard Kennedy School, 2015), http://ssrn.com/abstract=2554726.
[51] UNGPs, *supra* note 3.
[52] *Id.*, at 4.

implementation by the European Commission[55] to name a few examples. While endorsing the UNGPs, the Human Rights Council also established a Working Group on the issue of human rights and transnational corporations and other business enterprises in resolution A/HRC/RES/17/4. The Office for the High Commissioner for Human Rights (OHCHR) provides ongoing support and advice to the Working Group, which consists of five independent experts, of balanced regional representation, for a period of three years. The UN Working Group strongly encourages all states to develop, enact and update a national action plan (NAP) on business and human rights as part of the state responsibility to disseminate and implement the UNGPs. The UNGPs and their implementation in NAPs will be assessed in order to discover whether states have adopted sufficient legislative measures[56] or whether there is a need to build on the UNGPs and other existing solutions with a binding international legal instrument.[57]

In order to assess the feasibility of regulating human rights impacts of MNCs by international agreement, Chapter 6 will compare the monist and dualist approach to international law, exemplified through the U.S., England, and Denmark. The comparative analysis will serve to clarify whether an American mother company vis-á-vis European based mother companies, in England or Denmark, is more or less likely to be subjected to international regulation with respect to involvement in human rights violations caused by their foreign subsidiaries or contractual partners. Introducing an international regulatory approach agreed upon by the international community would also bypass the risk of certain developed countries being unwilling to hold companies incorporated therein accountable for overseas violations because doing so might put their companies in a competitive disadvantage vis-á-vis other companies. Also from an enforcement perspective, the rationale is that the legal proceedings with an international law framework in a Western home state would provide plaintiffs with a more expedient process than the time required for a thorough and complete prosecution in the subsidiary country under local law involving the mother company for a human rights violation.[58] In addition, compensation is likely to be much higher, if it is granted through a

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[53] OECD GUIDELINES, *supra* note 3.
[54] ISO 26000, *supra* note 3.
[55] European Commission, *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, SWD (2015) 144 final* (July 14., 2015).
[56] *See infra* Chapter 5.
[57] *See infra* Chapter 6.
[58] SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 5 (2004), Laura Maria Ferri, *La Gestione Dei Rischi Sociali E Ambientali Nella Catena Di Fornitura Globale Per Il Settore Tessile E Pelletteria*, in LA RESPONSABILITÀ SOCIALE D'IMPRESA IN TEMA DI DIRITTI UMANI E PROTEZIONE

judgment in the home country for the complicity of the mother company than through a judgment in the subsidiary country.[59]

I have chosen the U.S. because of its leading role in human rights litigation and because American companies have increasingly changed the composition of their workforce to cut costs without significantly affecting their profit making and production capabilities, especially in the garment industry.[60] This expansion has given rise to the Fair Labour Association (FLA), originally named "The Apparel Industry Partnership", which was formed in response to rising concerns about sweatshop scandals facing American based clothing companies.[61] The human rights issues and ethical concerns casting shadows over the business practices of the fashion industry has also given rise to academic attention from research institutions including The Fashion Law Institute, Fordham University, New York.[62] Also, the world's largest fashion retailer Wal-Mart and the world's leading supplier of athletic shoes and athletic apparel, Nike, are based in the U.S. and have been involved in controversies on human rights and labour issues connected to overseas operations. Harvard Law School in Cambridge, Massachusetts runs its own international human rights clinic which has litigated ATS cases on corporate accountability in support of communities and right holders before the U.S. Supreme Court and lower federal courts on corporate accountability.[63] Moreover, the U.S. has, just prior to President Trump's inauguration, published a National Action Plan for

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DELL'AMBIENTE, IL CASO DELL'INDIA 141, 161 (Mariarosa Cutillo et al. ed., 2012). See also the criminal case of the disaster of the Bhopal plant gas leak between the State of Madhya Pradesh and Union Carbide India ltd. and CEO Warren Anderson. The case against the mother company, its subsidiaries and the management of the companies pending from Nov. 11, 1991 was finally decided on June 7, 2010 in the Court of the Chief Judicial Magistrate of Bhopal in State of Madhya Pradesh vs. Warren Anderson & others, Cr. Case No. 8460 / 1996, June 7, 2010, http://www.countercurrents.org/UCIL.pdf.

[59] See Warren Anderson & others, Cr. Case No. 8460 / 1996, sentencing lenient criminal liability fines and prison terms for the subsidiary and its managers. See also the civil suit before the District Court of Bhopal in Union of India vs. Union Carbide Corporation, Regular Suit No. 1113/86, Sep. 5, 1986 resulting in a relatively small settlement amount brokered under the auspices of The Supreme Court of India in 1989.

[60] JIMENEZ & KOLSUN, *supra* note 47, at 202.

[61] The FLA has expanded to include also EU based corporate members such as Adidas, H&M and Puma. Already at an early stage, the FLA developed the Workplace Code of Conduct, Fair Labor Association, http://www.fairlabor.org/sites/default/files/fla_code_of_conduct.pdf (last visited Mar. 29, 2017) specifically aimed at the fashion business.

[62] The Fashion Law Institute is the world's first centre dedicated to legal issues facing the fashion industry, founded in 2010. Initiatives include a course on Fashion Ethics, Sustainability and Development exploring the intersection of fashion law and CSR, an annual symposium including a session on advertising, and the establishment of the Model Alliance to address issues involving the exploitation of primarily female fashion models.

[63] The clinic has served as co-counsel and regularly filed amicus curiae briefs in major ATS cases including In Re South African Apartheid Litigation, 56 F. Supp.3d 331 (S.D.N.Y. 2014); Kiobel v. Royal Dutch Petroleum Co., 133 U.S.1659 (2013), John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005); Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812 (5th Cir. 2004).

Responsible Business Conduct[64], which is interesting to include in a comparative analysis next to the Danish and English NAPs to determine the extent to which the countries have adopted sufficient legislative measures on the basis of the UNGPs from a TWAIL perspective.

For a European perspective, I have chosen to focus on the possibilities of regulating human rights impacts of an English or Danish company. I include Denmark because Danish Bestseller, one of the largest fashion companies in Europe, outsources production to countries like India and Bangladesh[65] that have economic development strategies relying heavily on FDI. In relation to the gender dimension of my research, these strategies seek to create a market in young female labour in order to suit the demands of a multinationally dominated export-industry. One of Bestseller's primary production countries is China[66], where gender inequality persists in spite of progress in improving the status of women.[67] Bestseller has been strongly criticized on the Danish national broadcasting corporation channel in a documentary revolving around the company for having their garments sown at starvation wages in the Far East under miserable working conditions.[68] Nevertheless, both the Danish fashion industry networking organization and the Danish government have established institutional mechanisms making Denmark a flagship country on initiatives relating to CSR. The Nordic Initiative Clean and Ethical (NICE), a project under the Nordic Fashion Association founded with the Danish Fashion Institute, has developed the first global ethical standards specifically aimed at the fashion business in collaboration with The UN Global Compact. [69] Moreover, Copenhagen Business School collaborates with other leading academic institutions, among others Stockholm School of Economics and the University of the Arts London, on the Mistra Future Fashion programme to develop sustainability solutions

[64] U.S. Secretary of State, Responsible Business Conduct, First National Action Plan for the United States of America [U.S. National Action Plan] (2016) https://www.state.gov/e/eb/eppd/csr/naprbc/265706.htm.
[65] SUSTAINABILITY REPORT 2015/2016, Bestseller, http://ipaper.bestseller.com/CorporateCommunication/CorporateSustainability/sustainability-report-20162017/?Page=1
[66] Ritzau, *Store danske firmaer ansætter 19.500 Kinesere på et år,* POLITIKEN, (Nov. 11, 2011), http://politiken.dk/erhverv/ECE1455584/store-danske-firmaer-ansaetter-19500-kinesere-paa-et-aar/ (only in Danish)
[67] UN DEVELOPMENT PROGRAMME, POWER, VOICE AND RIGHTS: A TURNING POINT FOR GENDER EQUALITY IN ASIA AND THE PACIFIC (2010), http://www.undp.org/content/dam/india/docs/power_voice_and_rights_turning_point_for_gender_equality_in_asia_and_pacific.pdf.
[68] *Frank går efter magten* (Danmarks Radio broadcast Apr. 28, 2014) https://www.dr.dk/tv/se/frank-gar-efter-magten/-/frank-gar-efter-magten-1-5 (only in Danish).
[69] Nordic Fashion Association, Nice Code of Conduct and Manual for the Fashion and Textile Industry (2012), http://ethics.iit.edu/codes/NICE2012.pdf (last visited Mar. 29, 2017).

for the fashion industry.[70] Another example is from the public domain where a Danish Mediations and Complaints Body opened on Nov. 1, 2012 to enforce the OECD Guidelines for Multinational Enterprises[71] holding Danish MNCs accountable for their supply and distribution chains.

I have chosen England because a political economics case study on the U.K. apparel industry documents how the U.K. mainstream and liberal approaches to MNCs and international relations exacerbate inequalities in the gendered labour force in host states.[72] Furthermore, the U.K. Companies Act 2006, section 172 (1) is an exception setting out a duty on directors to act in the way they "consider in good faith, would be most likely to promote the success of the company."[73] This can be regarded as a government's direct codification of CSR since the section stipulates that in discharging this duty the director must have regard to "the need to foster the company's business relationships with suppliers, customers and others"[74], "the impact of the company's operations on the community and the environment"[75], and "the desirability of the company maintaining a reputation for high standards of business conduct."[76] This implies that directors have the competence to take into consideration non-shareholder stakeholder interests and substantiates England's dedication to corporate sustainability interests.[77] Moreover, claims of English based companies failing their duty of care were raised in litigation before English courts with successful outcomes for the plaintiffs. In the case *Lubbe v Cape*[78], employees of the English Cape plc company's South African subsidiary brought action against the parent company before an English court, for health damage caused by exposure to asbestos. The question of jurisdiction went all the way to the House of Lords, which established in an *obiter dicta* that there was evidence to support the allegation that the parent company's own negligence was a cause of the harm. The *obiter dicta* was applied for the first time in *Chandler v Cape*[79] before the English High Court.

[70] *Mistra Future Fashion*, MISTRA (June 18, 2012) http://www.mistra.org/en/mistra/research/ongoing-research/mistra-future-fashion.html.
[71] OECD GUIDELINES, *supra* note 3.
[72] JUANITA ELIAS, FASHIONING INEQUALITY: THE MULTINATIONAL COMPANY AND GENDERED EMPLOYMENT IN A GLOBALIZING WORLD (2004).
[73] The Companies Act 2006 (46c) based on the two white papers "Modernising Company Law" (July 2002) and "Company Law Reform" (March 2005).
[74] The Companies Act 2006, Section 172 (1c).
[75] *Id.*, section 172 (1d).
[76] *Id.*, section 172 (1e).
[77] Doreen Mcbarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability, in* THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen Mcbarnet et al. eds., 2007).
[78] Lubbe v Cape plc, [2000] UKHL 41 (Eng.).
[79] Chandler v Cape plc., [2012] EWCA Civ 525 (Eng.).

David Chandler had developed asbestosis as result of exposure to asbestos during employment by English Cape Public Limited Company's wholly owned subsidiary company based in Essex, England. The Court held that Cape owed Mr. Chandler, an employee of the subsidiary company, a duty of care. The Court of Appeals affirmed the decision. The case is rare given that the defendant was not the plaintiffs' direct employer and the precedent has subsequently been applied to cases with transnational subsidiaries.[80] The *Chandler* Court's recognition of a duty of care where the parent knows or ought to have known about the violations and actually exercises direct and close control over its subsidiary's operations is becoming an important argument in transnational human rights litigation. This will be discussed further in Chapter 3 of the thesis.

Comparing elements of the U.S., England, and Denmark's approach to international regulation aims to determine the extent to which their systems differ due to their rooting in the common law and civil law inspired traditions and what consequence this might have on a global treaty on corporate responsibility. While common law countries may be influenced by liberalistic values and question the appropriate role for mandatory rules restraining companies, civil law countries in particular Scandinavian countries influenced by European social democracy may be reluctant to free their companies from mandatory rules to ensure respect for human rights and gender equality. The comparison will endeavour to confirm or disprove these notions appraising their approaches to regulating corporate human rights impacts in a global treaty. Moreover, the U.S. Department of State has highlighted the Danish and the British governments' National Action Plans for Responsible Business Conduct as inspiration to the American one.[81] Their initiatives will be compared in Chapter 5 of the thesis.

Theoretical Approach

In determining what type of legal sources to take into consideration when establishing what the valid rules in force are in the area of corporate accountability for human rights, the answer depends on what legal theoretical standpoint is chosen. A basic example of legal philosophical theory is the recurring theme of opposing legal theories: legal positivism and

[80] Lungowe and others v. Vedanta and KCM [2017] EWCA Civ 1528 (Eng.); HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell Plc and another [2018] EWCA Civ 191 (Eng.).
[81] *CRB Hosts White House Dialogue on National Action Plan for Responsible Business Abroad*, CENTRE FOR RESPONSIBLE BUSINESS, UNIVERSITY OF CALIFORNIA BERKELEY, https://businesssocialimpact.wordpress.com/2015/02/09/crb-hosts-white-house-dialogue-on-national-action-plan-for-responsible-business-abroad/ (Feb. 9, 2015).

natural law theory.[82] If a legal positivist standpoint is chosen, there is certainty that legal sources such as national legislation, administrative regulations, and EU-regulations are acknowledged. However, opinions vary as to whether international law including multilateral treaties should be taken into account. On the other hand, if a natural law standpoint is chosen, some legal sources can be excluded on the basis of a moral, religious, or rational censorship.[83] The thesis leans more toward the positivist end of a positivist-naturalist scale from the premise that it is generally more useful to treat law as a tool developed by society than as a natural truth like the law of gravity. However, the foundation of a positivist legal system is often the national state. Carrying on the traditional Westphalian system of sovereign nation states in today's international and pluralist legal order does not advance transnational application of human rights obligations to non-state actors.[84] Therefore, it is necessary to question the positivist legal system and apply a legal theory that is critical towards the positivist sceptisicm of international and non-state normative orders.

Positivist methodology challenges the authority of international law in its traditional doctrines of monism and dualism. Positivist international lawyers have elaborated dualism in opposition to natural law doctrines and monism was elaborated in opposition to dualism. Kelsen, the most famous positivist monist challenged dualism as transforming international law into a sort of "moral or natural law" depriving international law of its character of "real law", i.e. of "positive law".[85] By contrast to the dualist approach dividing international and domestic law in separate systems, the monist theory provides that they are one coherent system. Accordingly, international law does not need to be incorporated or rewritten to become a part of domestic law. This automatically happens at the acceptance of the international law obligation. The theoretical standpoint of this thesis draws on a monist approach from the premise that if a state enters a global treaty on business and human rights, it cannot be ruled out as irrelevant. The monist theoretical approach accepts international law and includes human rights as a source of law because it is entered by the nation state. This approach makes sense for the prospects of an international business and human rights treaty, however, there is also a need for polycentric governance, including soft law, civil society social compliance mechanisms, business enterprise transnational law-making and a public

[82] RUTH NIELSEN & CHRISTINA D. TVARNØ, RETSKILDER & RETSTEORIER 317 (2011).
[83] *Id.* at 300.
[84] Jacob Dahl Rendtorff, *Kritisk og Postmodernistisk Retsfilosofi, in* CORPORATE SOCIAL RESPONSIBILITY (CSR) SOM GENDSTANDSFELT FOR JURIDISK ANALYSE - TEORETISKE OG METODISKE OVERVEJELSER (Karin Buhmann ed. 2006).
[85] HANS KELSEN & ROBERT W. TUCKER, PRINCIPLES OF INTERNATIONAL LAW 551 (1966).

international legal framework.[86] The development in law and society are interconnected and along with globalization, law must deal with the injustice and immorality of leaving Third World victims of corporations' negative human rights impacts to their own devices while a corresponding victim in a developed country could expect reparation. Having a territorially confined national legal system as starting point does not suffice to provide an answer to this legal void.

The concept of postmodern polycentricity[87] in legal theory provides an answer to this legal void. It has been introduced in a postmodern form in the newer Nordic debate by a Danish legal philosopher, Henrik Zahle,[88] and developed in a manifest by Finnish legal philosophers, Lars D. Eriksson, Ari Hirvonen, Panu Mikkinen and Juha Pöyönen[89] to describe that there are several producers of legal sources with different scope as they aim at different addressees. The Nordic postmodern approach has developed and radicalized the thought of the polycentric and universal nature of legal sources. Likewise, it develops upon the legal pluralist thought of a multiplicity of legal orders in national and international communities placing the interlacing of several legal orders in the center of the polycentric legal order. It has an impact on the international business and human rights debate, e.g. as covering sector-specific regulation including human rights due diligence in conflict minerals legislation.[90] Ruth Nielsen and Christina D. Tvarnø illustrate the sovereign nation states in the 19th and 20th century with the Russian doll model.[91] Each sovereign doll (constitutional state/legal system) had its own territory, where his or hers command was in force, while one could say that polycentric law, similar to EU law, restructures the legal systems to a Russian doll, where several dolls are placed inside of each other on a common territory. Specific legal problems and legal actors are typically present at the same time in a plurality of dolls. This approach is helpful to illustrate a globalized world with transnational corporate actors in complex organisations and supply chains.

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[86] Ruggie, *Life in the Global*, *supra* note 50, at 2.
[87] Viewing legal sources as polycentric was initially introduced in Tom W. Bell, *Polycentric Law* 7 (Institute for Humane Studies Review Vol. 1, 1991/1992). A postmodern approach was developed in the research project "Polycentric Law" (1992-1995), led by professor Lars D. Eriksson, University of Helsinki.
[88] Henrik Zahle, *Polycentri i Retskildelæren*, in *Samfunn, Rett, Rettferdighet, Festskrift til Eckhoff* 752 (Anders Bratholm & Torstein Eckhoff eds., 1986).
[89] ARI HIRVONEN ET. AL., POLYCENTRICITY - THE MULTIPLE SCENES OF LAW (1998).
[90] Mark Taylor, *The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility*" 1 NORDIC JOURNAL OF APPLIED ETHICS 5 (2011); John Ruggie, *Incorporating Human Rights: Lessons Learned, and Next Steps, in* BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 64 (Dorothée Baumann-Pauly & Justine Nolan eds., 2016).
[91] NIELSEN & TVARNØ, *supra* note 82, at 303.

This conception of polycentricity as a fundamental condition of law in the postmodern society dissociates itself from legal monism basing law on the absolute sovereignty of the national state. In Denmark, postmodern polycentricity is understood as acknowledging several creators of legal sources and the scope of the legal sources differentiate in the sense that they apply to different legal subjects.[92] MNCs are sometimes more powerful and wealthier than nations in the Third World and therefore the theoretical approach of this thesis is that international law must go beyond its traditional subjects and encompass also private "governments". Accordingly, the polycentric postmodern theoretical standpoint is appropriate as it entails an ethical ideal of recognizing the complexity, decentralized division of power and polycentricity of legal sources.

The thesis introduces TWAIL as a normative approach so that the solutions presented for addressing business and human rights are evaluated from the perspective of Third World Communities. Best understood as a political grouping of loosely affiliated international legal scholars, TWAIL can be seen as encompassing both theoretical and methodological dimensions. TWAIL offers a post-colonial critique of international law and its role in creating and perpetuating racialised hierarchies and structural material inequalities. TWAIL is open about its emancipatory agenda to unsettle colonial power dynamics and liberate international law from its imperial and elitist shackles.[93] Taking cue from Karl Polanyi's political economy theories[94], it was not only the economic system that impoverished the communities of the Third World but also the fast pace of institutional transformation imposed on them by the First World. Polanyi's embedded capitalism theory and TWAIL scholarship caution against replicating the dominant/submissive binary of the colonial encounter where forced adoption of market economies led to the 'rapid and violent disruption of the basic institutions' of the Third World.[95] According to Polanyi's theory of market regulation, markets expand along with undesirable side-effects: instability, monopoly, and negative externalities. Market liberalization is inevitably followed by social resistance: '[T]he action of two organizing principles in society…economic liberalism, aiming at the establishment of a self-regulating market…[and] the other was the principles of social protection aiming at the conservation of man and nature as well as productive organisation.'[96] This double movement of market liberalization and resistance is regularly associated with Polanyi's concept of

[92] Zahle, *supra* note 88, at 752.
[93] JOHN REYNOLDS, EMPIRE, EMERGENCY AND INTERNATIONAL LAW 24 (2017).
[94] POLANYI, *supra* note 48.
[95] *Id.*, at 159.
[96] *Id.*, at 132.

'embeddedness of market institutions,'[97] which was further developed by sociologists and political economics scholars.[98]

The message when linking the concept of 'embeddedness' and TWAIL literature is that markets' undesirable side-effects cannot be solved by the market itself. Polanyis' argument is that a fully self-regulating market economy cannot be successful. Illustrated by sociologist Fred Block, 'disembedding' the market from social relations requires that human beings and the natural environment are turned into pure commodities and this assures the destruction of both society and the natural environment. Attempts to enhance market sovereignty raise the degree of tensions similar to stretching an elastic band. As the elongation continues, the band will eventually break, meaning complete social disintegration, or retract, meaning that the economy will go back to a more embedded position. [99] Rather than subordinating social life to the market mechanism, Polanyi argued that a set of regulatory mechanisms could make it possible to buffer both human beings and nature from the pressures of market forces.[100] He envisioned a set of global regulatory structures that would place limits on the play of market forces. With collaboration among governments to produce a set of agreements, developing nations would have more opportunities to improve the welfare of their people.[101] Like Polanyi, TWAIL scholars consider international law to have a transformative potential and they also believe in the ideal of law as a means of constraining power.[102]

From a TWAIL perspective powerful Northern states and their corporations have promoted and protected their economic interests by using international law and international financial institutions (IFIs) to undermine Third World states' governance capacity and control over foreign investments.[103] Mutua states that international law is a "predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the

[97] *Id.* at 68 *('…never before our own time were markets more than accessories of economic life. As a rule the economic system was absorbed in the social system…´).*
[98] Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIOLOGY 481 (1985). ROGERS HOLLINGSWORTH & ROBERT BOYER (EDS.), CONTEMPORARY CAPITALISM. THE EMBEDDEDNESS OF INSTITUTIONS (1997). NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS: AN ECONOMIC SOCIOLOGY OF TWENTY-FIRST-CENTURY CAPITALIST SOCIETIES (2001).
[99] Fred Block, *Introduction*, *in* THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME xxv (Karl Polanyi, 2001); POLANYI, *supra* note 48, at 44.
[100] KARL POLANYI, A LIFE ON THE LEFT 170 (2016).
[101] POLANYI, *supra* note 48, at 262.
[102] Anthony Anghie & Bhupinder Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 101 (2003).
[103] Bhupinder Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L., 1, 20 (2004).

West."[104] Okafor observes a historical continutity dating back from "at least the 16th century onward in international law's tolerance of, if not active support for, the negation and/or erasure of Third World (including of course African) agency."[105] When newly independent Third World states emerged from colonial rule as sovereign entities and attempted to assert their sovereignty and establish control over their natural resources, Northern states responded using legal doctrines such as state succession, acquired rights, contracts, and consent to protect the interests of their corporate nationals in these states.[106] What distinguishes more recent developments in international law from the colonial period are the means and manners through which this is accomplished. These developments include the lending practises and policies of the World Bank and the International Monetary Fund (IMF) as well as the growth of international trade and investment rules. The recipient states of World Bank- and IMF loans are required by these institutions to implement a particular set of economic policies to restructure their economies and reduce government intervention. TWAIL scholars have argued that structural reform programs, development- and good governance policies allowed the World Bank to increase its intervention in Third World states and relocate the economic governance of these states to the IFIs. The voting structure in these institutions has given Northern states a dominant voice in the decision-making process, imposing conditions on Third World states including the lowering of tariffs, the deregulation of labour markets privatization, and deregulation of business activity.[107] In addition the ruling elite of the Third World has been unable and/or unwilling to intervene with political and legal strategies to protect the human rights of Third World peoples. [108] E.g. the Uzbek government has persisted in using forced labour to harvest cotton and perform other fieldwork for economic development. Activists have reported that the cotton harvest runs from September to November and every year the government forces millions of citizens, including children to pick the cotton. This has resulted in many deaths including children down to 6-years old while working in the fields. Children were taken back to school when ILO visitors came and government officials coached people to say they worked in the field voluntarily.[109] The

[104] Makau Mutua, *What Is TWAIL?, in* GENERAL THEORY OF INTERNATIONAL LAW 493, 493 (Siegfried Wiessner ed. 2017).
[105] Obiora C. Okafor, *Poverty, Agency and Resistance in the Future of International Law: An African Perspective,* in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 95, 101 (Richard Falk et al. eds., 2008).
[106] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 211 (2004).
[107] Chimni, *International Institutions, supra* note 103, at 20.
[108] Bhupinder Chimni, *Third World Approaches to International Law: A Manifesto,* 8 INTERNATIONAL COMMUNITY LAW REVIEW 3, 23 (2006).
[109] Raveena Aulakh, *Uzbekistan's Cotton Crop a Deadly Harvest,* TORONTO STAR (Nov. 28, 2013), at A33.

system has been sustained by the World Bank by providing loans to the Government that are used for cotton production.[110]

Another concern with the structural reform programs supported by the World Bank and the IMF is that while they have strengthened the rights and access of investors to extractive resources, they have not addressed conflicting land classification schemes. Consequently, investors' rights to private extractive activity face an overlap with protected areas and indigenous reserves.[111] As a result indigenous protestors have undertaken peaceful blockades to which the host state government or the business itself have responded using private military security companies (PMSCs) or paramilitary groups to strike down on civilians. A long-standing issue in Indonesia's pulp and paper industry is involvement in illegal logging operations in Sumatra and mining operations in Papua on lands with pre-existing community claims causing rural conflict. Company security forces have been hired to provide security for the resource extracting industry and have been accused of shooting the local people and allowing the military to use its facilities to commit atrocities against the citizenry.[112]

In addition TWAIL argues that international trade and investment laws are also implicated in marginalizing Third World states' economic governance and the facilitation of transnational capital and corporate activity. TWAIL scholars argue that the thrust of international agreements on trade and investment, such as World Trade Organization (WTO) agreements and bilateral investment treaties have been almost uniformly to extend the freedom of foreign investors in host states to operate with fewer impediments. Meanwhile, the freedom of sovereign states to regulate economic activity has been restricted.[113] This is based on the fact that the WTO has an obligation to cooperate with the World Bank, the IMF, and other related agencies with the aim of "achieving greater coherence in global policy making."[114]

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[110] INTERNATIONAL LABOUR RIGHTS FORUM, FINANCING FORCED LABOUR 4 (2016), http://laborrights.org/sites/default/files/publications/Financing_Forced_Labor_1.pdf

[111] WORLD BANK GROUP EXTRACTIVE INDUSTRIES REVIEW, THE WORLD BANK GROUP, STRIKING A BETTER BALANCE: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW 30 (2003). http://www.ifc.org/wps/wcm/connect/294e55004ba934bca5adbd54825436ab/01.0+Volume+I+-+The+World+Bank+and+Extractive+Industries,+EI+Review+Report,+ENG.pdf?MOD=AJPERES (Last visited Mar. 29, 2017).

[112] HUMAN RIGHTS WATCH, WITHOUT REMEDY: HUMAN RIGHTS ABUSE AND INDONESIA'S PULP AND PAPER INDUSTRY (2003) https://www.hrw.org/reports/2003/indon0103/Indon0103.pdf (Last visited Mar. 29, 2017); DENISE LEITH, THE POLITICS OF POWER: FREEPORT IN SUHARTO'S INDONESIA 218-19 (2002).

[113] WILLIAM TABB, ECONOMIC GOVERNANCE IN THE AGE OF GLOBALIZATION (2004).

[114] Marrakesh Agreement Establishing the World Trade Organization, arts. III (5), adopted Apr. 15, 1994, 1867 UNTS 154.

It is also argued that the liberalization requirements imposed by the trade agreements – which WTO members states were required to adopt as a complete package – can and do have an impact on the ability of states to comply with their international human rights obligations.[115] The MNCs' contribution to the construction of gendered and ethnic inequalities is founded in economic development strategies of developing countries. These strategies are based upon the attraction of foreign direct investment (FDI), which is shaped by a gendered set of assumptions concerning the need to seek out a productive, low cost ethnic feminized workforce that operates at both the global and local level. The production of for example low-priced garment products is therefore literally shouldered by ethnic women in developing countries under poor working conditions. Although liberal writings of economic globalization describe MNCs as gender and race-neutral rational-economic actors,[116] exploited labour in the garment industry often has a female face and both gender and ethnic divisions of employment are inherent to the outsourcing supply chain. In particular, women working in factory facilities in East and Southeast Asia and South and Central America are exposed because gender discrimination is widespread in the lack of appropriate legal mechanisms and/or the political will to enforce relevant mechanisms.[117] First, women will have had minimal education or their education will be curtailed by a need to assume family responsibilities or to commence work.[118] Second, women frequently face discrimination, particularly in relation to wages and labour promotion,[119] sexual harassment, invasive medical examinations (e.g. compulsory pregnancy tests) and possibly social exclusion where women are rejected by their local communities. Finally, women are expected to discharge family responsibilities even when working, and where pregnant, if not immediately dismissed, will frequently find that concessions are not made for their condition, which will in turn bring its own consequential health problems.[120] Since the predominantly exposed in

[115] Chimni, *International Institutions*, *supra* note 103, at 25.
[116] RICHARD J. BARNET & JOHN CAVANAGH, GLOBAL DREAMS: IMPERIAL CORPORATIONS IN THE NEW WORLD ORDER (1995); THOMAS LAIRSON & DAVID SKIDMORE, INTERNATIONAL POLITICAL ECONOMY: THE STRUGGLE FOR POWER AND WEALTH (1997); SYLVIA OSTRY, *THE DOMESTIC DOMAIN*, *THE NEW INTERNATIONAL POLICY ARENA* 1 TRANSNATIONAL CORPORATIONS 7 (1992); UNCTAD, WORLD INVESTMENT REPORT 1994, TRANSNATIONAL CORPORATIONS, EMPLOYMENT AND THE WORKPLACE (1994).
[117] INTERNATIONAL CENTER FOR RESEARCH ON WOMEN (ICRW), RECOGNIZING RIGHTS, PROMOTING PROGRESS: THE GLOBAL IMPACT OF THE CONVENTION OF THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) (2010).
[118] Olga Martin-Ortega & Rebecca Wallace, *The Interaction Between Corporate Codes of Conduct and International Law: A Study of Women and Children in the Textile Industry*, *in* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 304 (Stephen Tully ed. 2005).
[119] INTERNATIONAL LABOUR ORGANISATION, LABOUR PRACTICES IN THE FOOTWEAR, LEATHER, TEXTILE AND CLOTHING INDUSTRIES. REPORT FOR DISCUSSION AT THE TRIPARTITE MEETING ON LABOUR PRACTICES IN THE FOOTWEAR, LEATHER, TEXTILES AND CLOTHING INDUSTRIES (2000).
[120] OXFAM INTERNATIONAL, TRADING OUR RIGHTS AWAY: WOMEN WORKING IN THE SUPPLY CHAINS (2004).

the global outsourcing industry are women and Third World peoples, it is important to ensure equity between stakeholders and economic growth when coming up with solutions to address business and human rights.

In order to combat powerlessness and victimization of the Third World and marginalized communities, TWAIL seeks deliberate complicity and alliances with like-minded movements in all societies, including in the West.[121] Many of the TWAIL concerns about the structure of the international legal system share concepts with feminist international law scholarship. As Bhupinder Chimni notes, "we need to strike alliances with other critics of the neo-liberal approach to international law. Thus, for instance, both feminist and third world scholarship address the question of exclusion by international law […] In other words, we should collaborate with feminist approaches to reconstruct international law to address the concerns of women and other marginal and oppressed groups."[122] Moreover, the term 'Third World feminism' has arisen to refer to the approaches developed by women in the South and women of colour in the North in the form of anticolonial/anti-imperialist struggles.[123] Third World feminists have been concerned with the ways in which the global economy perpetuates poverty and how the economic success of Northern states rest to a considerable degree on the exploitation of the Third World that is supported by the institutions and structures of international law. For example, free trade zones established in third world countries to encourage investment by MNCs depend upon a cheap unregulated workforce of which the majority are women. [124] Moreover, Human Rights Watch have reported a pattern of extreme sexual violence against indigenous Porgera women and girls by private security personnel and police officers working for a multinational Canadian mining company in Papua New Guinea.[125] Third World feminists have argued that attention must be raised to the complex interaction of gender, race, class, colonialism and global capitalism placing women in particular disadvantage in the international economic system.[126] They also argue that first

[121] Mutua, *What Is TWAIL?*, *supra* note 104, at 504.
[122] Chimni, *Third World Approaches*, *supra* note 108, at 22.
[123] Geraldine Heng, *A Great Way to Fly: Nationalism, the state, and the varieties of third-world feminism, in* FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES 30 (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997).
[124] ELIAS, *supra* note 72, at 4.
[125] Christopher Albin-Lackey, *Papua New Guinea: Serious Abuses at Barrick Gold Mine – Systemic Failures Underscore Need for Canadian Government Regulation*, HUMAN RIGHTS WATCH (2011) https://www.hrw.org/news/2011/02/01/papua-new-guinea-serious-abuses-barrick-gold-mine.
[126] U.N., *Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action*, at 10 & 110, U.N. Doc. A/CONF. 177/20 (1996), http://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf (last visited Mar. 29, 2017).

world feminists must acknowledge their partnership in, and the benefits that their societies reap from, the oppression of the Third World.[127]

In addition to TWAIL's findings that the interests of Third World peoples are neglected in the international legal order, Third World women are doubly marginalised. Feminist legal theorists have demonstrated that womens' concerns are on the margins of the international legal system.[128] International law protects male interest including privileging and protecting commercial activity and leaves regulation of corporate involvement in human rights abuse and environmental breaches to the private and national sphere.[129] Feminist scholars point to how international legal discourse rests on sharp distinctions including "objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence, binding/non-binding, international/domestic, intervention/non-intervention, sovereign/non-self-governing". [130] These dichotomies in international law feature a gendered coding with the first term signifying 'male' or superior characteristics and the second 'female' inferior characteristics.[131] This is not in the sense that all women or men actually possess these contrasting qualities. It is rather that using the vocabulary of objectivity, logic, and order positions a person as being manly automatically giving their words a higher value, while the use of subjective, emotional or disordered discourse is coded as feminine and thus weakens a statement or argument.[132] Hilary Charlesworth and Christine Chinkin assert that these 'binary oppositions'[133] have gendered consequences, for example international law's distinctions between "public" and "private" formally removes 'private' concerns from its sphere while at the same time strongly influencing them. Certain concerns that may have an impact on women may therefore for political reasons be left to be addressed by the domestic law of the state, even where this may result in, or allow for, the subjugation of women.[134] While women and Third World peoples seek to be included and protected by international law, business

[127] Bell Hooks, *Sisterhood, Political Solidarity Between Women, in* FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT 29 (Sneja Gunew ed. 1990).
[128] HILARY CHARLESWORTH & CHRISTINE M. CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 218 (2000).
[129] *Id.*, at 56. Karen Engle, *Views from the Margins: A Response to David* 105 UTAH L. REV. 108-9 (1994).
[130] Charlesworth & Chinkin , *supra* note 128, at 49.
[131] Carol Cohn, *War, Wimps and Women: Talking Gender and Thinking War, in* GENDERING WAR TALK 227, 231 (Miriam Cooke & Angela Woollacott eds., 1993).
[132] *Id.* at 229-30.
[133] Charlesworth & Chinkin, *supra* note 128, at 49.
[134] *Id.*, at 57.

entities strive to avoid international law's intervention in their operations.[135] Chapter 4 will focus on the concerns of Third World women, since gendered subordination is a serious negative impact of global business outsourcing. Without deviating from the TWAIL analysis, contributions of TWAIL perspectives to women's rights will be applied to Chapter 4 challenging the sufficiency of multi-stakeholder initiatives (MSIs) vs. an international human rights legal framework for businesses.

On this background the main points of TWAIL scholarship are that along with the interventions of IFIs in the economies of developing states, one of the most significant impediments to corporate human rights accountability is the structure of the international legal system itself. Powerful states have used international law and IFIs to protect and facilitate foreign investment and trade activity while at the same time undermining the ability of Third World states to control and regulate transnational corporate actors in compliance with their human rights obligations. However, TWAIL scholars still look to international law and its "transformative potential" in proposing solutions and remedies to reconstruct a just legal order for Third World peoples especially for women as a particularly marginalised groups within the marginalised peoples of the Third World.[136] By situating my analysis within TWAIL scholarship, I will take into account locally affected communities in the human rights discourse of how to organize, govern and regulate corporations across societies.

Objective

The thesis will assess, using comparative law and Third World Approaches to International Law (TWAIL), the effectiveness of the current solutions for transnational corporate liability in regard to human rights. The thesis will focus on the United States, England and Denmark and argue for a sustainable solution to the diminished governance capacity of host states by including Third World communities and developing international law and its institutions.

The thesis will also demonstrate that the fast pace of de-regulation and privatization risks augmenting legitimacy concerns on the private sector's exertion of power. It has been documented that companies are spending millions on small piecemeal fixes while lobbying against regulation that would do far more. A study by Professor of Business, Government and

[135] Engle, *supra* note 129, at 108-9.
[136] Anghie & Chimni, *supra* note 102, at 101.

Society Brian Kelleher Richter [137] finds that CSR activity and corporate lobbying are commonly observed in the same firms. Data from the Center for Responsive Politics demonstrates that nearly 30 percent of firms in the KLD database, a widely used database for social responsibility research, also participate in lobbying, often for less regulation in the name of faster growth.[138] Even though MNCs spent a total of $20 billion on CSR-programs in 2013 [139], it is clear that corporate complicity in negative human rights impacts and environmental damage are far from eradicated. Existing soft legal liability regimes and CSR initiatives (such as a companies' self-initiated due diligence an impact assessment) have not evidenced the capacity to fully evolve and furnish stakeholders with the necessary safeguards to unwarranted power leverage. Therefore the emergence of a gap in the tremendous hybridity of transnational private regulation and international soft law has inevitably transpired. The thesis aims to provide a full picture of the global business and human rights frameworks and offers not only an account of public demands but also an empirical study on private governance of women's labour rights in the garment industry. The study will demonstrate what has worked when companies include stakeholders and integrate soft law and CSR initiatives in their internal processes and where these mechanisms fall short.

Methodology

The thesis will employ both the legal dogmatic method and the empirical method. The legal dogmatic method is predominantly an analytical method that interprets and systematizes legal material whereas the empirical method uses for example interview-studies, questionnaire surveys, or the like. Each chapter will both evaluate the effectiveness of the presented solutions to address the governance gap in business and human rights and ability to satisfy TWAIL's objectives. Using TWAIL as a normative approach in the thesis for a human rights regime applying to corporations implies a human rights regime that is inclusive vis-á-vis locally affected communities and their stated political goals.[140] The suggested framework must not exploit power dynamics and be credible and inclusive from the perspective of those who will be directly affected by it. According to TWAIL, classical international law was

[137] Brian K. Richter, *'Good' and 'Evil': The Relationship Between Corporate Social Responsibility and Corporate Political Activity* (University of Texas at Austin, Research Paper, 2011) http://ssrn.com/abstract=1750368.
[138] Jean-Etienne de Bettignies & David T. Robinson, *When Is Social Responsibility Socially Desirable?* (National Bureau of Economic Research, Working Paper, 2015) http://www.nber.org/papers/w21364.
[139] Gillian B. White, *The Inadequacy of Corporate Social Responsibility Programs*, THE ATLANTIC (July 23, 2015), https://www.theatlantic.com/business/archive/2015/07/corporate-social-responsibility/399206/.
[140] Obiora Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?* 10 INT'L COMMUN. LAW REV. 371, 375 (2008).

based on the supremacy of white European peoples over non-Europeans, and the "duty" of the former to civilize and control the latter.[141] TWAIL provides both theoretical and methodological tools for dissecting transnational dynamics[142] and essentially opposes an international legal regime that 'helps subject the Third World to domination, subordination, and serious disadvantage'.[143] TWAIL criticises how international human rights law itself has been co-opted in the service of economic globalization and that Third World subordination is an integral negative impact of the global MNC's operations.[144] The solutions presented in each chapter to address negative human rights impacts of business activity will be evaluated from a TWAIL perspective. The normative purpose is to end the subjugation of Third World peoples through an emancipatory approach to law. As mentioned above TWAIL methodology entails interdisciplinarity with a related call to learn from other critical approaches.[145] In fact, TWAIL believes that forming coalitions with like-minded movements, including in the West, is an essential strategy for combating powerlessness and the victimization of the Third World as well as marginalised communities in the West.[146] Since the case study in Chapter 4 focuses on Third World women, the TWAIL analysis in the chapter will be informed by feminist perspectives.

The thesis will use a number of TWAIL benchmarks to analyse whether the presented solutions for addressing business and human rights suffice from a TWAIL perspective. The objectives of TWAIL are firstly to unveil the underlying power structures of international law and its racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Secondly, TWAIL seeks to develop an international governance reform through law. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.[147] In order to support these values and objectives of TWAIL the business and human rights frameworks will be assessed throughout the thesis using the following benchmarks.

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[141] Makau Mutua, *Why Redraw the Map of Africa : A Moral and Legal Inquiry,* 16 MICH. J. INT'L L. 1113 (1995).
[142] Okafor, *Critical Third World, supra* note 140, at 371.
[143] Obiora Okafor, *Newness, imperialism, and International Legal Reform in Our Time: A TWAIL Perspective,* 43 OSGOODE HALL L. J. 171, 176 (2005).
[144] James T. Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law,* 5 BUFFALO HUM. RTS. L. REV. 107, 121-22 (1999).
[145] Michelle Burgis-Kasthala, *Scholarship as Dialogue? TWAIL and the Politics of Methodology,* 14 JOURNAL OF INT'L CRIMINAL JUSTICE 921, 934 (2016); Deborah Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law,* 65 NORDIC JOURNAL OF INTERNATIONAL LAW 341 (1996).
[146] Mutua, *What Is TWAIL?, supra* note 104, at 504 .
[147] *Id.*, at 494. Burgis-Kasthala, *supra* note 145.

TWAIL Assessment

1) Reinforcement of human rights governance capacity over MNCs in host states.

So far the regulation of MNCs has been left to domestic law which leaves Third World peoples to rely on their states' diminished governance capacity over MNCs. As Orford notes, the international economic system privileges "the property interests of […] corporations over the human rights of local peoples and communities."[148] Especially, the model of development imposed by the IMF and the World Bank in the Third World has created a climate in which human rights abuses are more likely to occur. As Sadasivam observes, economic, social, and cultural rights, such as the right to health or the rights to adequate food are made significantly less relevant in states required to engage in structural adjustment conditions: "Where the state appears to address only the interests of international economic institutions and corporate investors, the income disparity and the marginalization of women, the poor, and rural populations increase."[149]

The host state cannot effectively impose regulation on MNCs as the fear of capital flight supersedes any plans of advancing human rights and development.[150] An example is transnational corruption, or the bribery of government officials by foreign business interests, which is extremely harmful to economic and political systems of host states and their governance capacity to protect human rights against corporate abuse.[151] Leaving regulation of transnational bribery in the hands of the host country is not sufficient because host countries often experience periods of great transition and bribery tends to corrupt the very administrative systems that are asked to regulate bribery.[152] The U.S. government amended its Foreign Corrupt Practices Act (FCPA) in 1998, originally designed to target U.S. firms' management of their foreign subsidiaries, to more aggressively address foreign bribery.[153]

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[148] Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 171, 183 (1998).
[149] Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda*, 19 HUM. RTS. Q. 630 (1997).
[150] CIARA HACKETT, DEVELOPMENT IN AN ERA OF CAPITAL CONTROL: EMBEDDING CORPORATE SOCIAL RESPONSIBILITY WITHIN A TRANSNATIONAL REGULATORY FRAMEWORK 73 (2017).
[151] *Human Rights and anti-corruption*, United Nations Office of the High Commissioner for Human Rights http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx (Last visited Nov. 3, 2017); Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism* 1 ASIAN PAC. L. & POL'Y J. 16: 2 (2000).
[152] Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation* 24 YALE J. INT'L L. 257, 279 (1999).
[153] The Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977), 15 U.S.C., § 78 dd-3(a).

The amendments respond to the insufficiency of host states' anti-bribery laws to combat bribery.[154] E.g. U.S. corporations can be prosecuted under the FCPA for committing any act of bribery outside the U.S.[155] While some Third World nations like Indonesia find foreign anti-corruption laws intrusive and disrespectful,[156] African states have generally found that progress has been made by cooperating with Western states and applying their laws.[157] It is not to say that all Western nations give sufficient legitimacy to human rights obligations in their legal frameworks, e.g. the U.S. is reluctant to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR). TWAIL considers this reluctance as fear of the universalization of alienation to which the ICESCR draws attention, namely the absence of control over conditions of work and its product.[158] Despite their prioritization of private rights of their own individuals and corporations, advanced capitalist states are better positioned to regulate their corporate entities from committing transnational harm than dependent and dominated states. TWAIL even recommends to make each state responsible not only to its own citizens but also to the citizens of other states for transnational harm.[159]

However, TWAIL scholars generally argue against the application of home country laws because of moral and cultural differences between Western and non-Western states.[160] Assertion of culturally specific values in the shape of Western legal standards is perceived as an intrusion on the sovereignty of Third World states.[161] As Chimni observes "since the bourgeois state with the free and equal individual at its centre is superimposed on dependent and dominated societies, it is difficult to deliver on the promise of the realization of social

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[154] SIMEON OBIDAIRO, TRANSNATIONAL CORRUPTION AND CORPORATIONS: REGULATING BRIBERY THROUGH CORPORATE LIABILITY 2 (2013); OPEN SOCIETY JUSTICE INITATIVE, LEGAL REMEDIES FOR THE RESOURCE CURSE: A DIGEST OF EXPERIENCE IN USING LAW TO COMBAT NATURAL RESOURCE CORRUPTION 28 (2006), https://www.opensocietyfoundations.org/sites/default/files/legalremedies_20050906.pdf.

[155] Amendments were implemented following the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 21, 1997) [Hereinafter OECD Bribery Convention].

[156] Duncan, *supra* note 151, at 16:5.

[157] The Southern African Development Community has asked "the industrialised countries to criminalise the bribery of our citizens." Anvers Versi, *On Corruption and Corrupters*, AFR. BUS. (Nov. 1996) at 7 (quoting Dr. Frene Ginwalla, Speaker of the South African Parliament). John Hatchard, *Combating Transnational Crime in Africa: Problems and Perspectives*, 50 J. AFR. L. 145 (2006).

[158] Bhupinder Chimni, *An Outline of a Marxist Course on Public International Law* 17 LEIDEN J. INT'L L. 1, 25 (2004).

[159] *Id.*, at 27.

[160] Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 286 (1997); Steven R. Salbu 24 *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village* 24 YALE J. INT'L L. 223, 235 n. 70 (1999); Duncan, *supra* note 151, at 16:6.

[161] Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1023 (1998).

and economic rights."[162] In particular, the expansion of certification mechanisms by the U.S., e.g. in the area of human rights and environmental protection[163], has been criticized for defining substantive standards for other states. Aid to developing countries may be conditioned upon their adoption of the standards. Sanctions have been adopted if the standards have not been met.[164] If and when compromises are necessary, they usually involve only the U.S.' closest allies in western Europe.[165]

Also TWAIL has criticized U.S. courts for entrenching a bourgeois imperial international law outside the political process that generally structures the harmonization movement.[166] Chimni opposes the creation of a jurisdictional field that seeks to limit the jurisdictional competence of the postcolonial state to the advantage of the transnational corporate world. At the same time he also opposes the denial of "justice jurisdiction" by the courts of advanced capitalist states when confronted with transnational tort litigation or "mass torts"committed by MNC's in the Third World.[167] Chimni[168], Baxi[169], and Zhenjie[170] refer to the doctrine of *forum non conveniens* and the Bhopal case, in which a U.S. court applied the doctrine,[171] as an instance of jurisprudence of injustice to deny foreign mass disaster plaintiffs their day in their chosen forum under the U.S. federal Alien Tort Statute.[172] This implies that even though TWAIL is critical of extraterritorial application of Western standards, it advocates for Third World peoples having access to justice in Western forums applying Westerns standards because of the acknowledgement that host state regulation and - courts cannot provide sufficient justice for Third World victims. It appears that this discrepancy calls for a business and human rights solution that addresses imperialism concerns by providing Third World peoples with

[162] Chimni, *An Outline of a Marxist*, *supra* note 158, at 25.
[163] Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation* 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 217, 223 (1999)
[164] Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions* 26 YALE JOURNAL OF INTERNATIONAL LAW 1, 70 (2001).
[165] Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and U.S. Predominance in International Law, in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 164 (Michael Byers & Georg Nolte eds., 2003). European states and the Court of Justice of the European Union have adopted and enforced extraterritorial legislation but not to the same extent as the U.S., cf. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 310 (2008).
[166] Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance* 42 VIRGINIA JOURNAL OF INTERNATIONAL LAW 932, 972 (2002); Chimni, *An Outline of a Marxist*, *supra* note 158, at 19-20.
[167] Chimni, *An Outline of a Marxist*, *supra* note 158, at 20.
[168] *Id*.
[169] Upendra Baxi, *Mass Torts, Multinational Enterprise Liability and Private International Law* 276 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 297, 352 (1999).
[170] Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine* 48 NETHERLANDS INTERNATIONAL LAW REVIEW 143, 159 (2001).
[171] See *infra*, Chapter 3, text accompanying note 517.
[172] See *infra*, Chapter 2, text accompanying note 240.

influence, and at the same time improves human rights standards and access to justice on the same level as in the Western world. Therefore, the legitimacy of regulating MNCs' human rights obligations in their transnational activities from a TWAIL point of view depends on democratic inclusion of host state local communities.

2) Democratic inclusion that gives a voice to host state local communities.

TWAIL scholar Rajagopal argues that the state dominant approach to human rights law ignores the non-institutional spaces where most Third World peoples live and interact: in the family, the informal economy, and non-party political spaces.[173] Similarly, Sornarajah argues that the current international legal system silences the voices of the developing world impacted by the operations of MNCs.[174] Essentially, TWAIL calls for a solution that furthers the interest of subaltern classes[175], without undermining a rule-oriented approach. To achieve this aim, Chimni is sceptical of international organisations, including the UN, referring to their current task as "to realise the interests of an emerging transnational capitalist class in the international system to the disadvantage of subaltern classes in the third and first worlds."[176] Chimni believes the UN has embraced the neoliberal agenda by expanding the role of the private sector within the UN. E.g., by taking a benign approach to regulation of MNCs in the voluntary initative UN Global Compact[177] and turning to the corporate actor for financing the Organisation.[178] Increasing NGO influence in the UN does not compensate for the loss of influence by Third World states because there is a large number of pro-capitalist NGOs, including the International Chamber of Commerce and the World Economic Forum. At the same time a transparent and democratic decision-making process is strongly resisted by powerful states supressing the voices of Third World countries and peoples.[179] E.g. TWAIL observes that the UN favours civil and political rights over collective social and economic ones, allowing Western states to dominate the human rights agenda. Chimni and Kennedy criticise international human rights organisations (IHROs) for helping powerful states to deflect radical movements into official channels that can be controlled through procedural

[173] BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 2 (2003).
[174] Muthucumaraswamy Sornarajah, *Power and Justice: Third World Resistance in International Law* 10 SYBIL 19, 22 (2006).
[175] Antonio Gramsci identified the subalterns as groups that are excluded from a society's established institutions and thus denied the means by which people have a voice in their society, ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 202 (1971).
[176] Chimni, *An Outline of a Marxist*, *supra* note 158, at 1.
[177] NIGEL WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 24 (2017).
[178] Chimni, *International Institutions*, *supra* note 103, at 15.
[179] *Id.*, at 3.

formalities.[180] I.a., according to Chimni, international human rights organisations (IHROs) appear to be doing damage control in the Third World by taking on the task of creating conditions for the functioning of neo-liberal post-conflict states.[181] Also, a North-South divide is pointed out in regard to punishment before international criminal tribunals, namely the International Criminal Court, and the unlikeliness of them holding powerful states like the U.S. to account.[182] Chimni recommends a different development toward more IGO autonomy, deliberative democracy, decentralization, transparency, accountability and responsibility.[183] E.g, autonomy of the UN is important to free it from dependence, whether legally or factually, on developed states so that it can then better represent the "peoples of the United Nations".[184]

3) Access for Third World communities to enforce the measures.

Prominent civil society organisations have expressed on behalf of communities in the Global South that they want hard law and enforcement.[185] TWAIL calls for access to remedy that could be formed and negotiated with effective participation of victims and affected communities. This includes making sure that indigenous peoples and migrants have the same level of legal protection of their human rights that applies to the wider population. Particular attention must be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access procedures and outcome. Litigation involves very high financial costs for all concerned and companies may have a distinct advantage with market-based solutions such as litigation insurance for handling legal fees associated with litigation.[186] Access to remedy for Third World communities necessitates bringing down the costs of filing claims, supporting claimants in securing legal representations and options for class action procedures. From a TWAIL perspective, a solution for access to remedy must allow many ideas and voices to be heard to reconstruct a just legal order for Third World peoples.[187]

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[180] *Id.*, at 11; David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 HARVARD HUMAN RIGHTS JOURNAL 101, 102 (2002).
[181] Bhupinder Chimni, *Refugees and Post-Conflict Reconstruction: A Critical Perspective, in* RECOVERING FROM CIVIL CONFLICT: RECONCILIATION, PEACE AND DEVELOPMENT 163 (Edward Newman & Albrecht Schnabel eds., 2002).
[182] Chimni, *International Institutions*, *supra* note 103, at 13.
[183] *Id.*, at 32.
[184] WHITE, *supra* note 177, at 24.
[185] Interview with Clinical Professor of Law Tyler Giannini, co-counsel in Alien Tort Statute suits representing victims of human rights abuse, Harvard Law School, International Human Rights Clinic, in Cambridge Mass. (May 6, 2016).
[186] JOHN RUGGIE, JUST BUSINESS 103 (2013).
[187] Anghie & Chimni, *supra* note 102, at 101.

Research Questions

On this background the research question of the thesis is:

What is the effectiveness of the options for transnational corporate liability in regard to human rights comparing the United States, England and Denmark using a critical perspective of Third World Approaches to International Law (TWAIL)?

To answer the main question, I will explore a number of subset research questions. The following chapters will confront each of the research questions. Each chapter includes observations on the effectiveness of the different solutions for holding corporations accountable for human rights obligations and concludes with a TWAIL assessment of the solutions using the three presented benchmarks. The TWAIL assessment is an added value to the overall effectiveness perspective because it aims to suggest a sustainable solution inclusive of Third World peoples and reinforcement of host states' human rights governance of corporations.

Chapter 1 of the thesis (the current chapter) introduces the research questions and defines the theoretical approach and the methodology for the analyses accounting for the ways in which international corporate human rights regulation can be made sense of within the theoretical limits of traditional legal theories. The chapter provides an answer to 1) How can business and human rights regulation be made sense of within the theoretical limits of TWAIL?

Chapter 2 and 3 represent public regulation and judicial enforcement of corporate liability for human rights violations so far.

Chapter 2 provides the state of the art of human rights obligations of corporations under international-, regional-, EU-, and national law applied extraterritorially, in order to demonstrate the potential of these legal bases regulating business and human rights. The starting point of this study is that a precise legal basis of MNCs' human rights obligations and possible mechanisms for enforcing human rights standards are lacking. The current patchwork-quilt system of human rights protection against negative business impact is in need of political will to establish precise fundamental legal obligations rather than relying on optional measures and society's changing expectations. The chapter provides an answer to 2) What is the effectiveness of current binding human rights obligations of corporations for their operations outside their home state from a TWAIL perspective?

After having concluded on the prospects of the current approaches for legal accountability applying a TWAIL perspective, I move on to exploring further the prospects of enforcement using extraterritorial application of domestic tort law.

Chapter 3 lays down the development of judicial accountability for corporate human rights violations as well as the prospects moving forward of redressing victims through transnational human rights litigation. The chapter argues that unilateral extraterritorial regulation, where one state rules on conduct in another state's territory, sparks tension with international norms and state sovereignty and faces increasing limitations. This will be demonstrated with a comparative analysis of the private international law and state sovereignty approach to transnational human rights litigations against corporations in the U.S., England, and Denmark. For England and Denmark, EU law plays a dominant role in this area, and the chapter will account for its influence. The comparative analyses will include all relevant sources of law acknowledged as applicable in the U.S.,[188] EU,[189] England,[190] and Denmark.[191] The chapter will discuss the future of transnational human rights litigation in the U.S. and the EU following prominent corporate cases in these jurisdictions. The chapter provides an answer to 3) What are the current options and prospects for judicial accountability to address negative human rights impacts of corporations operating outside their home state comparing the U.S., England and Denmark using a TWAIL assessment?

After having assessed whether the transnational human rights litigation approach agrees with TWAIL, I move on to an assessment of the solutions offered by private and non-binding regulation.

Chapter 4 and 5 represent private regulation and soft law including companies self-regulation, MSIs, and non-binding or voluntary regulation adopted by states.

Chapter 4 illustrates with a case study strategies of CSR intervention by civil society, MNCs and other stakeholders which constitutes an essential component of the current regulatory arena within business and human rights. The case study assesses the MSI between the Ethical

[188] Judicial decision, legislation, court rules and secondary sources including restatements, legal treatises, and legal periodicals.
[189] Treaties established by the EU, secondary sources including unilateral secondary law and conventions and agreements, and supplementary sources including CJEU case law, international law and general principles of law.
[190] Case law, legislation, custom law, Roman law, authoritative texts, and legal literature.
[191] Regulation, precedents, customary law, and the merits of the case.

Trading Initiative (ETI) multinational clothing companies and Business for Social Responsibility (BSR) as well as the International Labour Organization's (ILO) work to promote suppliers' compliance with human rights standards in South India. Telephone- and face-to-face interviews have been held to gain insights on the initiative's CSR strategy, its monitoring measures to ensure achievement of project goals, and implementation of the UN Sustainable Development Goals.[192] On this background, the study aims to demonstrate how human rights violations in the garment industry in particular affect women in developing countries and to evaluate MSIs' prospects of improving the situation for women workers. The study includes examples of CSR initiatives ultra vires meaning that the initiatives support human rights beyond what is required within the sphere of compliance. These initiatives include preventing the issue with child brides, sexual health and maternal health for women in India's garment industry. Presenting both a compliance and ultra vires angle serves to provide a full picture of the concept of CSR including a discussion of their respective contributions to the field and the ways in which these instruments are implemented and enforced. The case study will assess what the project achieved, quantifying and qualifying which goals were met and which were not. Most importantly the study will evaluate future prospects of private regulatory schemes to effectively resolve the challenges for improving human rights standards. After having assessed whether private self-regulation adequately addresses the concerns of TWAIL scholarship, I will move on to evaluate the public aspect of soft law on business and human rights. The chapter provides an answer to 4) What are the current options and prospects in Multi-Stake-Holder-Initiatives (MSIs) for addressing negative human rights impacts of corporations operating outside their home state exemplified by an empirical case study using a TWAIL evaluation?

Chapter 5 provides an assessment of the leading international soft law framework, the UNGPs[193], focusing on the state duty to protect against the negative impacts of business enterprises on human rights and to ensure access to remedy. The focal point of this chapter will be to determine whether selected principles of UNGPs Pillar I (states' existing obligations under the human rights conventions [194]), UNGPs Pillar II (corporations' responsibility to respect human rights) and UNGPs Pillar III (access to remedy) properly

[192] *Transforming our World: the 2030 Agenda for Sustainable Development*, UNITED NATIONS, https://sustainabledevelopment.un.org/sdgs (last visited Mar. 29, 2017).
[193] UNGPs, *supra* note 3.
[194] The International Covenant on Civil and Political Rights (ICCPR) forms together with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights the international human rights rules.

address the concerns of TWAIL, and whether states have effectively implemented legislative measures accordingly. This will be done by accounting for the actions taken in the NAPs of the U.S, the U.K., and Denmark. After having concluded on the effectiveness of the domestic implementation of the UNGPs from a TWAIL perspective, I will move on to examining the possible added value of international binding regulation. The chapter provides an answer to 5) What is expected from states under selected UNGPs responding to TWAIL's concerns, and how do the United States, England, and Denmark relate to this in their NAPs?

Chapter 6 provides a critical review from a TWAIL perspective of the added value of the UN Business and Human Rights Treaty proposal to the exisiting solutions assessed in the previous chapters. A comparative assessment of the position of the United States, England and Denmark on the proposal as well as their monist and dualist approaches to international law will determine the feasibility of international agreement. Also, the chapter will propose possible treaty adjustments responding to the TWAIL benchmarks. The chapter provides an answer to 6) What is the potential of an international business and human rights treaty addressing corporate liability for human rights from the perspective of the United States, England, Denmark and TWAIL?

Chapter 7 provides a main conclusion on the prospect of implementing a global treaty on business and human rights.

Chapter 8 contains the bibliography.

The closing date for adding new information to the thesis was May 29, 2018.

Chapter 2 - Legal Accountability

Introduction

This chapter offers a comprehensive view of all the options of current human rights obligations of corporations under international law, regional human rights law, European law and national law applied extraterritorially. "Legal accountability" is used here as a term covering binding regulation on business and human rights that can be enforced through public civil or criminal adjudication. Multinational corporations (MNCs) have been accused of directly or indirectly committing acts that breach internationally recognised human rights. An example of a direct involvement could be if a corporation uses slave or child labour. An example of indirect involvement could be if an oil corporation provides weapons and transportation for a state's military that crush down local people in order to facilitate access of their land for oil exploration. Therefore, this chapter will examine if MNCs are effectively regulated to avoid negative human rights impacts. Do MNCs operate in a law-free zone or is there a rule of law in place protecting human rights in overseas business operations? The chapter will be concluded by assessing whether the current legal frameworks satisfy the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures.[195]

International Human Rights Law

A starting point to look for corporate liability for negative human rights impacts is in the International Bill of Human Rights[196]. It was adopted by the UN General Assembly in 1948 and consists of the Universal Declaration of Human Rights[197] (UDHR adopted in 1948), the International Covenant on Civil and Political Rights[198] (ICCPR adopted in 1966), and the International Covenant on Economic, Social and Cultural Rights[199] (ICESCR adopted in 1966). Other relevant international law instruments to human rights will be assessed in the following as to how they relate to corporations including the International Labour Organization (ILO) core conventions, international criminal law, international investment law

[195] *See Chapter 1 supra* text accompanying notes 148-87.
[196] International Bill of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[197] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[198] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.
[199] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

and international customary law. Although the premise is that under public international law, only the state is generally charged with duties to secure human rights for individuals, this chapter will seek to challenge the claims of corporations' immunity under international law.

International Bill of Human Rights

The UDHR lists thirty substantive human rights that are promulgated as a common standard of achievement for all peoples and all nations. 'Every individual and every organ of society' must strive to abide by the rights and freedoms in the Declaration and secure their universal and effective recognition and observance.[200] 'Individual' or 'every organ' could be interpreted to mean that UDHR includes juridical persons. However, as a declaration of the UN General Assembly, the UDHR does not create legal obligations in itself. It encourages non-state actors to 'strive' to promote respect for human rights rather than directly imposing any binding legal obligations.[201]

The ICCPR and the ICESCR are human rights treaties and clearly impose obligations on states to ensure that the rights they contain are both respected and protected. As part of this duty, states are required to ensure that the rights of individuals are not violated by third parties (such as corporations). The UN Human Rights Committee (HRC), when commenting on the nature of a state's obligations under the ICCPR, affirmed that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power.[202] Other more recent treaties refer directly to the obligations of states in specifically preventing human rights abuses by corporations. For example, the Convention on the Rights of Persons with Disabilities (CRPD) provides that states must act against discrimination on the basis of disability by any person, organisation, or private enterprise.[203] The Convention on the Elimination of Discrimination Against Women (CEDAW) provides that, under general international law and specific human rights covenants, states may be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and

[200] UDHR, *supra* note 197, preamble.
[201] David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 948 (2003-04).
[202] U.N. Human Rights Committee, General Comment 31: *The Nature of the General Legal Obligation on State Parties to the Covenant*, para. 8, UN Doc. CCPR/C/21/Rev.1.Add.13 (2004).
[203] Convention on the Rights of Persons with Disabilities, at art. 4 (e), Dec. 13, 2006, G.A. Res. 61/106, UN Doc. A/61/49.

punish acts of violence, and for providing compensation to victims of discrimination. [204] Moreover, it is demonstrated that international human rights law is evolving toward a standard of compulsory intervention by the state to private interference with human rights in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment stating that acts of torture must be prevented in any territory under the state's jurisdiction.[205]

However, these international human rights treaties are not well adapted to hold MNCs directly accountable for negative impacts on human rights. Generally, only the state is charged with duties to secure human rights for individuals within jurisdiction.

ILO Core Conventions

With respect to the human rights of workers, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work (hereinafter the ILO Declaration)[206] lays down the prohibition of forced labor (No 29[207] and No 105[208]), freedom of association (No 87)[209], the right to collective organization and bargaining (No 98)[210], the prohibition of discrimination in remuneration and employment (No 100[211] and No 111[212]), minimum age for child labor and the prohibition of the worst forms of child labor (No 138[213] and No 182[214]). These eight ILO core conventions govern employment relationships in the private sphere but it is left up to the ILO member states to implement and enforce the principles. The ILO is the only tripartite UN agency with government, employer, and work representatives and as such its unique governing structure includes corporate representatives. This structure breaches the classic orthodox separation between government and business, however, on the binding level, ILO instruments are still only concerned with the relations of

[204] Convention on the Elimination of Discrimination Against Women, Nov. 7, 1967, at art. 2 (e), UN Doc. A/RES/2263.
[205] Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2., Jun. 26, 1987, G.A. Res. 39/46, U.N. GAOR, 51 st Sess., U.N. Doc. A/39/51 (CAT).
[206] ILO Declaration on Fundamental Principles and Rights at Work, Jun. 18, 1998, 37 I.L.M. 1233 (1998).
[207] Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, *entered into force* May 1, 1932.
[208] Abolition of Forced Labour Convention (ILO No. 105), 320 U.N.T.S. 291, *entered into force* Jan. 17, 1959.
[209] Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87), 68 U.N.T.S. 17, *entered into force* Jul. 4, 1950.
[210] Right to Organise and Collective Bargaining Convention (ILO No. 98), 96 U.N.T.S. 257, *entered into force* Jul. 18, 1951.
[211] Equal Remuneration Convention (ILO No. 100), 165 U.N.T.S. 303, *entered into force* May 23, 1953.
[212] Discrimination (Employment and Occupation) Convention (ILO No. 111) 362 U.N.T.S. 31, *entered into force* Jun. 15, 1960.
[213] Minimum Age Convention (ILO No. 138), 1015 U.N.T.S. 298 *entered into force* Jun. 19, 1976.
[214] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S. 161, *entered into force* Nov. 19, 2000.

states. In response to the growing role and influence of MNCs in the 1960s and 1970s, the ILO did adopt a framework directed at businesses: The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[215] offers a set of core principles and guidelines for corporations with respect to employment, training, working conditions, and industrial relations. However, the instrument is voluntary. Any accountability corporations might face under the ILO instruments is limited to actions taken by states.

International Criminal Law

International criminal law differentiates between two categories of crimes, namely 'international crimes' and 'crimes under international law'. 'Crimes under international law' stand out from the wider category of 'international crimes' in that they are directly punishable under international law.[216] Accountability would be held under an international treaty or customary law without intermediate provisions of domestic law. By contrast 'international crimes' are prosecuted and punished under domestic law since international criminal law treaties obligate states to adopt municipal legislation for certain crimes. An international criminal law treaty establishing an international crime imposes an obligation on the state and not the corporation.[217] Individual criminal responsibility is enforced by national judicial systems, international criminal tribunals for Nuremberg[218], Tokyo[219], Rwanda[220] and Yugoslavia[221], and the International Criminal Court (ICC).[222] However, the international criminal tribunals hold no criminal jurisdiction over corporate entities but rest on the fundamental principle of individual criminal responsibility. This principle is defined in the Nuremberg Judgment against prominent members of political, military, judicial and

[215] ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 204th Session (Geneva, Nov. 1977) amended at 279th (Nov. 2000) and 295th Session (Mar. 2006).
[216] GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 36 (2005); ANTONIO CASSESE & PAOLA GAETA, INTERNATIONAL CRIMINAL LAW 11 (2013); MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 60 (2013).
[217] Andrew Clapham, *'The Question of Jurisdiction under International Criminal Law over Legal Persons'* in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 174 (Menno Kamminga and Saman Zia-Zarifi eds., 2000).
[218] The Nuremberg Military Tribunals were established by the Charter of the International Military Tribunal (Nuremberg Charter).
[219] The International Military Tribunal for the Far East (Tokyo Charter) was established by Special Proclamation of General MacArthur as the Supreme Commander in the Far East for the Allied Powers, Treaties and Other International Acts Series (TIAS) 1589 (1946).
[220] The International Criminal Tribunal for Rwanda (hereinafter ICTR) was established by U.N. Doc. S/Res. 955 of 8 November 1994.
[221] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter ICTY). The ICTY was established by U.N. Doc. S/Res. 827/1993 May 25.
[222] ICC's jurisdiction over international crimes is codified in the Rome Statute or the Statute of the International Criminal Court, art. 25, Jul. 17, 1998, U.N. Doc A/CONF.183/9.

economic Nazi Germany leadership, including leading industrialists for their conduct during the Nazi regime:

"Crimes against International Law are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provisions of International Law be enforced."[223]

The principle of individual responsibility for international crimes was repeated in the Affirmation of the Nuremberg Principles' Resolution[224] by the UN General Assembly and affirmed with the establishment of the ICTY [225] and the ICTR. [226] The ICC also has jurisdiction only over natural persons since a proposal for jurisdiction over corporations was rejected at the conference that drafted the court's statute.[227] Demands for responsibility under international criminal law for legal entities have been increasingly raised over the recent years.[228] E.g. the Special Tribunal for Lebanon has stated that corporate liability is possible under international law[229] and held that no definitive legal conclusion can be drawn from the omission of corporate criminal liability in the Rome Statute of the ICC. "[…] it is a reflection of the lack of a political (rather than legal) consensus to provide such jurisdiction in the Rome Statute."[230] Applicability of international criminal law to corporations would constitute a fundamental shift but it may be expedited by the new modes of international criminal corporate conduct. An example is corporate decision-making procedures becoming more complex. Thereby, the connection between an individual and criminal financial activities is blurred effectively making corporations a safe vehicle for international financial crime including drugs, money laundering, corruption, and terrorism financing. The OECD Bribery Convention, arts. 2 & 3 (2)[231] have been pointed out as an effort by states to apply binding

[223] Trial of Major War Criminals before the International Military Tribunal, Judgement, Nuremberg, 223, Nov. 14 1945 - Oct. 10 1946, Official Documents, 1947, Vol. I.
[224] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (11 December 1946) UNGA Res 95 (I).
[225] Arts 7 (1) and 23 (1) of the ICTY Statute, UNSC Res 827 (25 May 1993) UN Doc S/RES/827.
[226] Art 6 (1) of the ICTR Statute, UNSC Res 995 (8 November 1994) UN Doc S/RES/955.
[227] Justine Nolan, *All Care, No Responsibility?*, in CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 24 (Lara Blecher et al. eds., 2014).
[228] *Id.* at 25; ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 244 (2006); LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 55 (2002).
[229] Prosecutor v. *New TV S.A.L.* & Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction In Contempt Proceedings, ¶¶ 45 – 75 (Special Tribunal for Lebanon, Oct. 2, 2014) and Prosecutor v. *Akhbar Beirut S.A.L.* & Ibrahim Mohamed Ali Al Amin, Case No. STL-14-06/PT/AP/AR126.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction In Contempt Proceedings, ¶¶ 48-51, 68, 72, 73 (Special Tribunal for Lebanon, Jan. 23, 2015) (a corporation can be held liable for contempt).
[230] Prosecutor v. *New TV S.A.L.* & Karma Mohamed Tahsin Al Khayat ¶ 66.
[231] OECD Bribery Convention, *supra* note 155.

obligations on corporations under international law because they state that legal persons can be liable for bribery of foreign public officials.[232] However, the international obligation still hinges on states to adopt such measures as may be necessary to ensure that legal persons may be held liable. The reason for the cautious approach is the difference between domestic legal systems regarding the "standard of liability" of corporations under criminal law, and in some jurisdictions, there remains certain ambivalence with regulation corporations under criminal law.[233] It should be noted that the ICC could be used as a last resort in prosecution of a CEO in cases where national criminal jurisdiction fails.[234] Although the ICC does not have jurisdiction over legal persons, it has jurisdiction over natural persons for individual criminal responsibility, cf. the Rome Statute art. 25. The Rome Statute offers specific possibilities for victims' reparations, cf. Articles 15.3[235], 15.4[236] and 75[237]. This could be relevant, e.g. if the CEO committed crimes against humanity as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[238] An example of this could be a company's involvement in a military government's human rights violations against an indigenous community in order to gain the company access to extraction of minerals or oil. Harvard's International Human Rights Clinic is pursuing a criminal law approach in prosecuting the CEO of Chiquita Brands International, Inc. before the ICC. The claim is that the CEO provided support to Autodefensas Unidas de Colombia ("AUC"), a violent right-wing paramilitary group allegedly responsible for the kidnapping, torture and extrajudicial killing of civilians living in the banana-growing regions during a prolonged period of civil unrest in the Republic of Colombia. The CEO is American and the U.S. is not part of the ICC, which means in practice that the CEO would not be surrendered to the ICC by the U.S. However, it is possible that the CEO would travel to a jurisdiction that has

[232] Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility* 111 YALE L.J. 443, 482 (2001).
[233] MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 65 (2013), WILLIAM LAUFER, CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY 185 (2006).
[234] Juan P. Calderón-Meza et al., *An International Jurisdiction for Corporate Atrocity Crimes* 57 HARVARD INTERNATIONAL LAW JOURNAL, ONLINE SYMPOSIUM 1(2016).
[235] "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation."
[236] "If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation"
[237] "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."
[238] ICC, art. 7.

ratified the ICC in which case the jurisdiction in question would have an obligation to surrender the CEO to the ICC.[239]

Customary International Law

Exceptionally some human rights obligations under international law apply directly to non-governmental bodies including corporations. Non-governmental bodies are prohibited under customary international law as well as under certain treaties from committing universal crimes such as piracy, genocide, war crimes, and crimes against humanity. Direct responsibility under customary international law usually resides under the auspices of national courts in the lack of relevant international tribunals. An example of litigation in national courts pertaining to customary international law is the Alien Tort Statute (ATS)[240] in U.S. courts. ATS confers federal subject-matter jurisdiction when an alien sues for tort committed in violation of the law of nations, i.e. international law. In Kadic v. Karadzic[241] filed under the ATS, the U.S. Second Circuit held that universal crimes including genocide, war crimes and crimes against humanity[242] (brutal acts of rape, torture[243], piracy, slave trade[244]) and aircraft hijacking[245] violate customary international law regardless of whether offenders acted as individuals or under auspices of state. Subject matter jurisdiction also lies with the international criminal tribunals[246] and the International Criminal Court (ICC) to try individuals for war crimes, crimes against humanity, and genocide. It was stated by the Nuremberg Tribunals in United States v. Krauch[247] that legal entities are bound by Hague Regulations on the Laws and Customs of War of 1907.[248] The judgment affirms corporate entities' direct international customary law obligations. However, the international tribunals hold no jurisdiction *ratione personae* over corporations. Only 'natural' persons can be brought before them. Corporations' human rights obligations under customary international

[239] Interview with Juan Calderón-Meza, Clinical Advocacy Fellow on accountability for corporations, Harvard Law School, International Human Rights Clinic, in Cambridge Mass. (May 23, 2016).
[240] 28 U.S.C. § 1350 (2012). This was originally enacted as part of the Judiciary Act in 1789. The Alien Tort Statute (ATS) is also known as the Alien Tort Claims Act (ATCA).
[241] Kadic v Karadzic, 70 F.3d 232 (2nd Cir. 1995).
[242] *Id.* at 235.
[243] *Id.* at 237.
[244] *Id.* at 239.
[245] *Id.* at 240.
[246] *Supra* notes 218-21.
[247] United States v. Krauch (the IG Farben Case), 15 AD 668 (U.S. Nuremberg Military Tribunal July 29, 1948).
[248] *Id.* at 673 & 676.

law are dynamic and acknowledged over time by States. It is likely that the recognised customary duties will increase in the future.[249]

International Investment Law

MNCs operate in different states through foreign direct investment (FDI), meaning that the company has controlling ownership of a company based in another state, or through supply chains of goods and services. These business operations are governed to some extent by international investment law, which is a set of norms in international investment agreements, especially bilateral investment treaties (BITs) ruling the conditions around international investment in the recipient state. Investment protection provisions can also be found in free trade agreements (FTAs) between two or more countries. While BITs seek to promote investment between states by providing investors with protection from foreign regulatory measures, FTAs are mechanisms for trade liberalisation aiming to eradicate discrimination against imports by removing tariffs and other restrictions. Unlike BITs, FTAs may have more than two parties. International investment law's ability to regulate corporate responsibility for human rights should be presented in the context of investor-state disputes since they are the relevant stage where the rights and the obligations of the parties are enforced. Practise shows a discrepancy between international investment law and human rights law considering that states' duty to regulate health, safety, environment and labor rights interferes with foreign investments. Accordingly, investors have challenged the public interest regulation by investor-to-state disputes settlement (ISDS) mainly within the International Centre for the Settlement of Investment Disputes (ICSID)[250], the Permanent Court of Arbitration[251], the International Chamber of Commerce (ICC) Court of Arbitration, or other *ad hoc* tribunals established under the rules of the United Nations Commission on International Trade Law (UNCITRAL)[252]. The ISDS is an arbitration mechanism providing foreign companies with a possibility to circumvent national courts and sue host states if they find that state regulation is inconsistent with rules of an investment treaty. A current example is the on-going case of Phillip Morris Asia using ISDS to sue Australia for billions of dollars because of Australia's

[249] INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY (ICHRP), BEYOND VOLUNTARISM: HUMAN RIGHTS AND DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 122 – 23 (2002).
[250] Convention of the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 575 UNTS 159.
[251] Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 (1899).
[252] United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, June 21, 1985, 24 I.L.M. 1302 (1985).

tobacco policy to promote public health.[253] A Swedish company, Vattenfall has sued Germany for billions of euros challenging Germany's decision to phase out nuclear power.[254] Another example is the ISDS in the North America Free Trade Agreement (NAFTA)[255] between the U.S., Canada, and Mexico giving rise to 37 cases by U.S. companies against Canada making it the most sued country under the NAFTA. One of the cases demonstrates that the ISDS also allows companies to file suit against their own government. Canadian energy company Lone Pine Resources based in Calgary is using its U.S. affiliate incorporated in Delaware to access NAFTA's ISDS mechanisms and file suit against Canada for $250 million on the basis that Quebec's environmental regulation suspended fracking for oil and gas underneath the St Lawrence River.[256]

The catalyst behind the increasing trend of international investment arbitration for alleged breaches of BITs and FTAs is the fact that the investment protection provisions typically provide a foreign investor with a number of guarantees in return for the investments. It is rare for BITs and FTAs to impose corresponding obligations on investors in regard to human rights.[257] It seems that international investment law contains an inherent dysfunction when it comes to the need for ensuring stability for investors to attract FDI vis-à-vis the duty to promote human rights and development. However, Norway has introduced a new draft approach[258] to deal with the stability-flexibility dilemma. The Norwegian government has stated that it takes into account EU's recommendations in the proposed free trade agreement Transatlantic Trade and Investment Partnership (TTIP)[259] between the EU and the U.S. and the Comprehensive Economic and Trade Agreement (CETA)[260] between the EU and Canada.[261] The Norwegian Draft Model includes provisions on sustainable development both

[253] Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, Hague Ct. Rep. 12 (Perm. Ct. Arb. 2012).
[254] Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12).
[255] North America Free Trade Agreement, 32 ILM 289, Chapter 11 (1993).
[256] Lone Pine Resources Inc. v. Government of Canada (ICSID Case No. UNCT/15/2).
[257] Nicholas Hachez & Jan Wouters, *When rules and values collide: How can a balanced application of investor protection provisions and human rights be ensured?* H. R. & INT'L LEGAL DISCOURSE 301, 304-08 (2009).
[258] Agreement for the Promotion and Protection of Investments, The Kingdom of Norway Draft Model, Draft Version 130515, 2015, *available at* https://www.regjeringen.no/no/dokumenter/horing---modell-for-investeringsavtaler/id2411615/. [Hereinafter the Norwegian Draft Model].
[259] Resolution on the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP), Eur. Parl. Doc. 2228 (INI) (2014) available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN
[260] Consolidated Comprehensive Economic and Trade Agreement CETA Text, EU-Canada, Draft, 2014, *available at* http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
[261] Det Kongelige Nærings- og Fiskeridepartement [Ministry of Trade, Industry, and Fisheries] May 13, 2015, Modell for investeringsavtaler - alminnelig høring 3 (Nor.).

in the preamble[262] and corporate social responsibility (CSR) provisions in the text.[263] Moreover, it reserves the right to regulate to a wider extent than the TTIP and the CETA. The proposed TTIP, article 3, (1) reserves the right to regulate through: "a measure applied [….] in pursuance of legitimate policy objectives of public interest such as the protection of public health, human rights, labour rights, safety and the environment." The draft CETA stipulates that it "preserves the right to regulate […] to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity". In comparison, the right to regulate in the Norwegian Draft Model is emphasized more widely in article 12: "Nothing in this Agreement shall be construed to prevent a Party from adopting […] any measure […] appropriate in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns." Reserving more clearly in the investment agreement the right to regulate to protect human rights may encourage arbitral tribunals to incorporate human rights considerations into the interpretation of investment provisions and result in a more balanced approach to the stability-flexibility dilemma when cases are decided under the ISDS. Moreover, incorporation of CSR provisions in investment treaties can contribute to blurring the distinction between soft law and hard law, for example in the Norwegian Draft Model preamble: "reaffirming their commitment to [human rights]" and in article 31: "The Parties agree to encourage investors to […] compliance with the OECD Guidelines […], the UN Guiding Principles […] and to participate in the United Nations Global Compact." However, it takes more than an "encouragement" to impose direct human rights obligations upon investors by investment agreement. International investment law grants corporations the procedural right to challenge state actions but arbitral tribunals do not have substantive jurisdiction to rule on human rights issues. An arbitral tribunal is limited to decide on alleged violations of human rights in cases where the violation is at the same time a violation of the investor's rights in relation to its investment.[264] For instance relating to the human rights to property in order to decide whether an (indirect) expropriation has taken place (Lauder v. Czech Republic)[265], or to determine whether an investor has been denied fair and equitable treatment by the host state (Mondev International v. United States)[266]. Also it is possible for arbitral tribunals to interpret

[262] Norwegian Draft Model, *supra* note 258, at 1-2.
[263] *Id.* at 28.
[264] Hachez & Wouters, *supra* note 257, at 308.
[265] In the Matter of a UNCITRAL Arbitration between Ronald S. Lauder v. The Czech Republic, Final Award, 3 September 2001.
[266] Mondev International Ltd. v. United States of America, (ICSID Case No. ARB (AF)/99/2).

investment provisions considering human rights norms that have peremptory norms of international law status. The ICSID decided in the Plama Consortium Limited v. Bulgaria and Phoenix Action Ltd v. Czech Republic cases that gross violations by the investor of *jus cogens* void the tribunal's substantive jurisdiction and rendered the claims inadmissible. However, the arbitral tribunal lacks jurisdiction to award compensation to a host state let alone any individual human rights victim from the investor for violation of *jus cogens* norms. Any claim or counterclaim by a host state against an investor suspected of human rights violations will in most cases be considered inadmissible.[267] If international investment instruments explicitly included human rights obligations enforceable through arbitral awards it would bypass domestic jurisdictions and existing human rights adjudicatory bodies. Not only does horizontalization of human rights, i.e. placing duties on private actors, on the basis of different investment treaties enforced by different arbitral tribunals entail a democratic deficit. It would also be challenging to accomplish for technical reasons.[268] Therefore, international investment law does not provide a sufficient answer to the lack of coherent business and human rights regulation and enforcement.

Regional Human Rights Law

Regional human rights law encompasses three principal human rights instruments: The American Convention on Human Rights (ACHR)[269], The African Charter on Human and Peoples' Rights (ACHPR)[270], and the European Convention on Human Rights (ECHR)[271]. Traditionally, the human rights under these instruments are applied vertically: The state protects the human rights of its citizens. The ECHR does not mention private duties at all whereas the ACHR mentions duties in more general terms:

> "Every person has responsibilities to his family, his community, and mankind."[272]

Similar horizontal application is suggested in the ACHPR which declares that:

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[267] See however an exception in the Investment Agreement for the COMESA Common Investment Area, art. 28.9, admitting counterclaims by host states against investors that initiate the investor-state process in cases where: 'a COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages'.
[268] Hachez et. al., *supra* note 257, at 343.
[269] American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123 [hereinafter American Convention].
[270] African Charter on Human and Peoples' Rights, June 27, 1981, 1520 UNTS 217 [hereinafter African Charter].
[271] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221 [hereinafter European Convention].
[272] American Convention, Art. 32 (1).

> [T]he enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.[273]

The case law of the Inter-American Court of Human Rights has taken up the idea of a horizontal application of human rights (Drittwirkung) in an Advisory Opinion requested by the Mexican Government to clarify the rights of undocumented migrant workers:

> [T]he obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (erga omnes). This obligation has been developed in legal writings, and particularly by the Drittwirkung theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.[274]

The advisory opinion has been interpreted as accepting the Drittwirkung of human rights.[275]

The European Court of Human Rights (ECtHR) has also specified indirect private duties through its case law. In *Siliadin v. France*[276] the tort was committed by individuals against an illegal foreigner, who had served in a house for years without salary. The Court construed the European Convention's prohibition on slavery and forced labour as requiring each party to prohibit the practise altogether and to enforce the prohibition through criminal sanctions, on the ground that:

> [L]imiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective.[277]

Arguments have been advanced for the position that the international law on state responsibility does not apply in the context of the ECHR and that it ought to be interpreted so

[273] African Charter, *supra* note 270, preamble.
[274] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., 1406 (Sep. 17, 2003).
[275] YVONNE DONDERS & VLADIMIR VOLODIN, HUMAN RIGHTS IN EDUCATION, SCIENCE AND CULTURE 155 (2007); Javier Mijangos Gonzáles, *The Doctrine of the Drittwirkung der Grundrechte in the case law of the Inter-American Court of Human Rights*, 1 INDRET 1, 21 (2008).
[276] Siliadin v. France, no. 73316/01, Eur. Ct. H.R. (2005).
[277] *Id.* at para. 89.

that it is applicable where victims face abuses from private actors.[278] However, the question of private abuse of human rights arises only when the state is held responsible for a private violation before the ECtHR.[279]

Although regional human rights law has the legal capacity to place direct horizontal duties on all private actors not to violate one another's human rights[280], regional tribunals like the European and Inter-American Courts of Human Rights and the African Court of Human and People's Rights can generally only issue decisions that bind the state parties to the underlying treaties. They cannot enforce private duties directly. One exception is that The African Union has issued a Protocol, which broadens the list of international crimes that can be prosecuted before the African Court of Justice and Human Rights to include crimes defined in the Rome Statute and other crimes[281] and permits corporations to be prosecuted.[282]

However, generally speaking, the territorial scope of the regional human rights instruments and courts is limited. They oblige their Member States to secure the human rights and freedoms to everyone within their jurisdiction, which means that their protective scope is limited to individuals inside the territory of their Member States. The obligation for the Member States to ensure remedies for violations of the applicable human rights norms by private actors is also territorially limited, in the sense that it does not extend to violations that have taken place outside the Member States' territories.[283] Therefore, regional human rights instruments are not suitable to apply extraterritorially in transnational human rights cases against corporations.

EU Law

The EU's competences are limited within its supranational legal order in the sense that the legal instruments it adopts must have a legal basis in its foundational treaties and its competences must be exercised in line with the principle of subsidiarity (the EU acts in areas

[278] ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 188 (1993).
[279] Andrew Clapham, *The Drittwirkung of the Convention*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 163, 170 (Ronald St. John Macdonald et al. eds., 1993).
[280] See, however, from Scandinavian law the decision Nytt juridiskt arkiv [NJA] [Supreme Court Reports] 2007 p. 747 Ö 4869-06 (Trygg-Hansas filmning) (Swed.) in which the Swedish Supreme Court found that the ECHR does not have direct horizontal effect between individuals.
[281] These include including "mercenarism, corruption, genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and aggression." See PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS, Art. 14 adding, Art. 28A.
[282] African Union, Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights , Art. 22 adding Art. 46, 27 June 2014.
[283] CHRISTOPH GRABENWARTER, EUROPEAN CONVENTION ON HUMAN RIGHTS COMMENTARY 3 (2014).

where the objective can be more effectively achieved at its level than at the national or local level).[284] However, the EU has extended its policy agenda with the Treaty of Lisbon[285], which "expressly confirms the commitment of the EU to the eradication of world poverty and the protection of human rights worldwide." The Treaty also emphasizes that economic objectives are considered just as important as social, cultural, environmental and humanitarian objectives.

The main external human rights policy initiative is the EU Strategic Framework on Human Rights and Democracy adopted in June 2012.[286] The 2012/2014 Action Plan on Human Rights and Democracy, annexed to it, comprises 97 specific actions tailored to implement, streamline and promote human rights in all aspects of EU politics and policies, addressing EU institutions as well as Member States. It is inspired by the Commission's CSR Strategy from 2011[287] for which a public consultation was held in 2014 on the implementation of the UN Guiding Principles[288] at EU level as well as a European Multi-Stakeholder Forum on CSR in 2015.[289] Specifically aimed at business and human rights, the Action Plan emphasizes implementation of the Commission's CSR strategy and the UNGPs both on EU as well as Member State level. The Action Plan has also sparked a number of significant pieces of legislation in 2013 and 2014 with specific impacts on business and human rights, which will be presented in the following.

Since 2003, the EU has had a reporting requirement on social matters and environmental impacts pursuant to Company Law Directive 2003/51/EC.[290] The directive provides for EU Member States to "where appropriate" permit or require single unit corporations and corporate groups operating within the European Union to include information relating to environmental and social matters in their annual and consolidated annual report. Social reporting, which is not defined in the Directive, is commonly understood to refer to labour

[284] ANDREW CLAPHAM ET AL., HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW 20 (1991).
[285] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].
[286] Council of the European Union Press Release 11855/12, EU Strategic Framework on Human Rights and Democracy, (June 25, 2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.
[287] European Commission, *A renewed EU Strategy 2011 – 14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011).
[288] UNGPs, *supra* note 3.
[289] European Commission, *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play, SWD (2015) 144 final* 7 (July 14., 2015).
[290] Directive 2003/51/EC of the European Parlianment and of the Council of 15 July 2003 amending Council Directive 68/151/ECC, as regards disclosure requirements in respect of certain types of companies.

and community matters, which may also include human rights. Corporations may need to include information relating to the performance of their subsidiaries and their suppliers, in their accounts if this is material in order to give a true and fair view of the corporation's position. [291] The Company Law Directive reporting requirement has been supplemented by Accounting Directive 2014/95/EU[292] which, as of 2017, requires large companies and groups (listed companies, banks) with more than 500 employees to disclose information on their policies, main risks and outcomes relating to the environment, social and employee aspects, respect for human rights, anticorruption, bribery issues and diversity in their board of directors. The social reporting requirement may cause increased demands on compliance with international human rights, labour rights, anti-corruption and environmental law by the EU-based company to its subsidiaries and suppliers abroad. However, this would constitute a migration of norms into companies' self-regulation rather than a direct extraterritorial requirement under EU-law. The reporting requirement may be strengthened by the Commission's proposal under negotiation in the Council and the European Parliament for revising the Shareholder Rights Directive since 2014 which aims at incentivizing institutional investors and asset managers to take non-financial information better into account in investment decisions and engage with companies on such issues.[293]

Another reporting obligation was introduced in 2013 for large extractive and logging companies on payments they make to governments, the so called country-by-country reporting (CBCR).[294] This disclosure requirement aims at providing local communities with an insight into the payments made by EU companies to governments worldwide for exploiting local oil/gas fields, mineral deposits and forests. It also allows the communities to better hold governments accountable for how the money has been spent locally.[295]

In March 2014, the Commission proposed a regulation to deal with the problem of the use of trade in certain minerals for the financing of armed groups in conflict and high-risk areas

[291] DANIEL AUGENSTEIN & ALAN BOYLE, STUDY OF THE LEGAL FRAMEWORK ON HUMAN RIGHTS AND THE ENVIRONMENT APPLICABLE TO EUROPEAN ENTERPRISES OPERATING OUTSIDE THE EUROPEAN UNION 66 (2010).
[292] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[293] Commission Proposal for a Directive of the European Parliament and of the Council as regards the encouragement of long-term shareholder engagement and certain elements of the corporate governance statement, COM (2014) 0213 final (Apr. 9, 2014).
[294] Council Directive 2013/34, 2013 O.J. (L 182) (EU).
[295] European Commission, *Commission Staff Working Document*, *supra* note 289, at 10.

such as Africa's Great Lakes Region[296]. The regulation lays down supply chain due diligence obligations for Union importers who choose to be self-certified as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold.[297]

Another natural resource extraction sector prone to human rights risks is the forestry sector. The EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan aims to close the EU market to illegal timber products. Forestry management affects people in developing countries living in or off the forest, including indigenous groups, in terms of their cultural practises, land rights, and access to food and shelter.[298] The EU Timber Regulation[299] prohibits the sale of illegally harvested timber and derived products in the EU, and requires operators to exercise due diligence in order to minimise the risk of illegal timber in their supply chain.

In regard to EU environmental law there are regulations implementing particular international treaties including the Basel Convention, the Marpol Convention, the UNFCC, and the Aarhus Convention which apply extraterritorially at sea and within the territory or jurisdiction of other states.[300] A case example is the *Trafigura lawsuits*[301] regarding the unloading of a waste shipment at Abidjan, Côte d'Ivoire (Ivory Coast). The ship was chartered by the London office of Trafigura, a Dutch international petroleum trader. After the waste of the ship was discharged in Abidjan, residents living near the discharge sites began suffering from nausea, diarrhea, vomiting, breathlessness, headaches, skin damage, and swollen stomachs. In the aftermath, claims were filed against Trafigura in the United Kingdom,[302] the Netherlands,[303] and France.[304] The EU Regulation on shipments of waste[305] played a

[296] Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, COM (2014) 111 final (Mar. 5, 2014).
[297] *Id.*
[298] Karin Buhmann, *Defying territorial limitations: Regulating business conduct extraterritorially through establishing obligations in EU law and national law*, *in* HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS 281, 297 (Jernej Letnar Černič & Tara Van Ho eds. 2013).
[299] Council Regulation 995/2010, 2010, O.J. (L 295) 23.
[300] E.g. 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), 1973 International Convention for the Prevention of Pollution from Ships as modified by 1978 Protocol (Marpol Convention), 1992 UN Framework Convention on Climate Change (UNFCCC), 1998 Aarhus Convention on Access to Information, Public Participation in Decison-Making and Access to Justice in Environmental Matters (Aarhus Convention).
[301] *Trafigura lawsuits (re Côte d'Ivoire)*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, http://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire (last visited Mar. 29, 2017).
[302] Yao Esaie Motto v Trafigura Ltd. [2012] W.L.R. 657 (Eng.)
[303] Trafigura Beheer BV, Gerechtshof Amsterdam [Court of Appeals of Amsterdam], Dec. 23, 2011, Case No. 23-003334-10 (ECLI:NL:GHAMS:2011:BU9239) (Neth.).
[304] Trafigura lawsuits (re Côte d'Ivoire), *supra* note 301.

significant role in the claims filed in the U.K. and the Netherlands. The regulation, pursuant to the Basel Convention, has as its primary objective environmental protection through the control of transboundary movements of hazardous wastes and their disposal, not only within the EU but also in third states.

The EU has also targeted the negative effects of companies' overseas operations by adopting a series of code of conduct initiatives[306] in particular on the implementation of the UNGPs.[307] These initiatives will not be discussed further in depth because they largely rely on non-binding measures and their voluntary character provides no outlook for enforcement.[308]

Within criminal justice, specific legislation with regard to business-related human rights abuses is generally not in place. Trafficking in human beings is the only crime that is explicitly mentioned in the EU Charter of Fundamental Rights[309] (art. 5) and it is recognized as a human rights violation and a form of serious organised crime. Directive 2011/36/EU[310] on preventing and combating trafficking in human beings and protecting its victims as well as the EU Strategy towards the Eradication of Trafficking in Human Beings[311] acknowledge the fundamental role of the private sector and stakeholders in eliminating trafficking and protecting and assisting its victims. Both frameworks aspire to reduce demand for trafficking in human beings and develop supply chains that do not involve trafficking in human beings.

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[305] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste OJ L 190/1 (12 July 2006).

[306] Code of Conduct for Community Companies with Subsidiaries, Branches or Representation in South Africa, Nov. 19, 1985, 24 I.L.M. 1477 (1985); European Parliament, Resolution on a code of conduct for arms exports [1998] OJ C167/226 (1998); European Parliament, Resolution on EU standards for European enterprises operating in developing countries: Towards a European Code of Conduct, A4-0508/1998, [1999] OJ C 104/176 (Jan. 15, 1999); *Sustainability Compact for Continuous Improvement in Labour Righs and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh*, (July 8, 2013), http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf.

[307] EUROPEAN COMMISSION, EMPLOYMENT & RECRUITMENT AGENCIES SECTOR GUIDE ON IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013); EUROPEAN COMMISSION, ICT SECTOR GUIDE ON IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013); EUROPEAN COMMISSION, OIL AND GAS SECTOR GUIDE ON IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2013); EUROPEAN COMMISSION, MY BUSINESS AND HUMAN RIGHTS. A GUIDE TO HUMAN RIGHTS FOR SMALL AND MEDIUM-SIZED ENTERPRISES (2013).

[308] *See* Nikolaus Hammer, *International Framework Agreements: Global Industrial Relations between Rights and Bargaining*, 11 TRANSFER 511, 514 (2005); ALEXANDRA GATTO, MULTINATIONAL ENTERPRISES AND HUMAN RIGHTS: OBLIGATIONS UNDER EU AND INTERNATIONAL LAW 188 (2011); MARJON VAN OPIJNEN & JORIS OLDENZIEL, RESPONSIBLE SUPPLY CHAIN MANAGEMENT, POTENTIAL SUCCESS FACTORS AND CHALLENGES FOR ADDRESSING PREVAILING HUMAN RIGHTS AND OTHER CSR ISSUES IN SUPPLY CHAINS OF EU-BASED COMPANIES (2011).

[309] European Commission, The Charter of Fundamental Rights of the European Union, O.J. C 303/01. (Dec. 14, 2007) [hereinafter the EU Charter].

[310] Council Directive 2011/36, 2011 O.J. (L 101) (EU).

[311] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, COM (2012) 0286 final (June 19, 2012).

Moreover, EU Member States can prosecute businesses registered in the EU for human rights abuses even if they commit their crimes outside the Union. In such cases Member States can recur to available national and international instruments including bilateral and multilateral treaties on extradition, mutual assistance or a transfer of the proceedings, cooperation with third countries and international organisations with a view to combat this abuse. In EU development cooperation work, strengthening judicial systems for access to remedies can also play a role.[312]

Overall, the EU plays a leading role in adopting external action policies on business and human rights and implementation of the UNGPs. The Commission supports several non-binding private sector initiatives for responsible supply chains. Also, some sectorial legislative measures have been introduced, e.g. EU Regulations and Directives set out due diligence requirements including the Conflict Minerals Regulation, the Non-Financial Reporting Directive, and the Timber Regulation. In the future, the European Court of Justice (CJEU) may be required to pronounce on the application of EU fundamental rights issues in relation to European corporations operating outside the EU[313] considering the adoption of the EU Charter of Fundamental Rights[314] which has binding legal effect on the EU and its Member States and EU's planned accession to the European Convention on Human Rights.[315] The Commission has already pronounced its support for establishing an EU policy in the area of access to justice in cross-border situations referring to the EU Charter of Fundamental Rights[316] and Articles 81 and 82 of the TFEU[317] (judicial cooperation in civil and criminal matters).[318] However, at this point, the EU plays a limited role in providing overall binding human rights regulation of operations of EU-based MNCs outside the EU.

The Corporate Veil

Plaintiffs pursuing liability through a liability claim by targeting the parent company of the MNC involved in a human rights harm taking place at its subsidiary's premises, generally face several obstacles not easily overcome. The main obstacle is that the corporate

[312] European Commission, *Commission Staff Working Document, supra* note 289, at 34.
[313] AUGENSTEIN & BOYLE, *supra* note 291, at 18.
[314] Adopted in the Treaty of Lisbon, *supra* note 309.
[315] In 2014, the European Court of Justice rejected the Draft Accession Agreement concluded in 2013 thereby stalling the accession in *Opinion pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - Compatibility of the draft agreement with the EU and FEU Treaties', (Dec. 18, 2014), opinion 2/13, [2014] ECLI:EU:C:2014:2454.*
[316] EU Charter, *supra* note 309.
[317] Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326 (Oct. 26, 2012).
[318] European Commission, *Commission Staff Working Document, supra* note 289, at 23.

constellation provides that shareholders are not personally responsible for liabilities of the company, since their liability is limited to their financial investment in the company. Therefore, in the case where the company organises its business so that one or more companies are established and owned or controlled by the founder company, the group of companies only form a unity from an economic point of view. From a legal point of view, the companies are separated from each other so that the corporate shareholder, the parent company that holds a majority of the subsidiary's voting stock, is protected from liability for the actions of the subsidiary. This protection is illustrated by the legal concept of "the corporate veil".

To avoid any misconceptions of the criteria for parent company liability under the law of torts vis-à-vis parent company liability based on veil piercing, an important distinction should be made from the outset. Application of the law of torts where the parent company is headquartered would require extraterritorial application of the law, because the harm in dispute would have occurred in the foreign country of the subsidiary. The argument is that the actions or omissions that arise in boardrooms at corporate headquarters are the causes of the plaintiff's harm, rather than the harmful behaviour of a subsidiary corporation in another country. Proving this exercise of control by the parent company to state a claim requires evidence that the control was exercised over *the conduct,* which gave rise to the tort at issue. Similarly, but not to be confused with the control test under the law of torts, one argument for piercing of the corporate veil is that the level of control exercised by the parent company may be so extreme as to consider the parent identical to the subsidiary. This is feasible, because having a majority of the voting stock enables the parent company to dictate the policies or materially influence the management of its subsidiary. [319] However, the control test of veil piercing is distinguishable from that of direct parent company liability under the law of torts, because the issue is *control by the parent over the subsidiary* and not the *control by the parent over the tortious conduct at issue.* In exceptional circumstances courts are willing to expose shareholders to liability for the actions or omissions of the corporation but there is no precise ascertainable test for piercing the corporate veil. This will be illustrated with examples from the jurisdictions of the U.S., England and Denmark.

[319] Lynda J. Oswald, *Bifurcation of Owner and Operator Analysis under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASHINGTON UNIVERSITY LAW REVIEW 223, 234 (1994).

Veil-piercing in the U.S. has no consistent pattern and has been described as "characterised by ambiguity, unpredictability, and even a seeming degree of randomness.[320] The corporate entity is a major barrier for filing a case because U.S. courts generally have a strong presumption against piercing the corporate veil. The corporate form is protected so that even if the mother company owns 100% of the shares and thereby the only shareholder in the subsidiary, it is still protected from liability for the violations of the subsidiary. As a principal rule, courts will only pierce the corporate veil when there is evidence that the subsidiary is a sham, created only to allow a parent company to fraudulently avoid responsibility for wrongful acts. This is in spite of the fact that the control or lack of the same of the parent company may be decisive for whether or not the subsidiary engages in risky and tortious activities. Also, the parent company may have profited from the tortious activity if the subsidiary declares dividends to the benefit of the parent. However, under certain circumstances, courts may pierce the corporate veil by finding that a subsidiary was "a mere instrumentality of the parent corporation". [321] It is part of the corporate constellation that the parent company has working control of the subsidiary company through the stock ownership, however, courts have often been willing to pierce the corporate veil in circumstances where the shareholder exercises excessive control over the relevant company. [322] This would mean for a parent – subsidiary constellation that the parent's managers or majority shareholder exert extreme control on the subsidiary. In such a case, the managers' control would be regarded as the parent company's domination as a whole over the subsidiary. Two transnational human rights cases illustrate subsidiaries acting as alter egos of the defendant parent companies. In *John Doe I v Unocal Corp*[323], plaintiffs alleged that Myanmar's military subjected villagers to forced labour, rape, torture and murder with the knowledge and support of Unocal, a U.S. oil and gas corporation. The Court indicated that Unocal's Myanmar

[320] Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 JOURNAL OF CORPORATE LAW 479, 507 (2001).
[321] Dept of Environmental Protection v Ventron 468 A.2d 150. 94, 473 (N.J. 1983) illustrates the potential benefit for a parent company externalising risk through its subsidiary causing mercury pollution seeping from a forty-acre tract of land into Berry's Creek in New Jersey Meadowlands. The suit was filed for the cost of the cleanup. The court ruled that the parent company had control over its subsidiary's activities and was therefore responsible.
[322] Minton v. Cavaney 56 2.d 576 (Cal. 1961) illustrates this argument, by which the Supreme Court of California pierced the veil between Seminole Hot Springs Corporation that operated a swimming pool at a leased facility and its sole shareholder Mr. Cavaney. The plaintiff's daughter drowned in the swimming pool and Seminole could not satisfy compensation claim. Cavaney was Seminole's director as well as the corporation's secretary and treasurer. Cavaney's office was used as the corporation's mailing address and to store its records. Therefore, Cavaney was held liable because he provided inadequate capitalization and actively participated in the conduct of corporate affairs.
[323] John Doe et al. v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002).

subsidiaries were the alter egos of the defendant parent companies,[324] however, the appropriate standard for veil-piercing was not finally determined at trial because the claim was settled. In *Wiwa v Royal Dutch Petroleum Co*[325] the court also found that Shell Nigeria was the alter ego of the defendant parent company which plaintiffs alleged had directed and aided the Nigerian government in committing torture, killing, arbitrary arrest and detention, and crimes against humanity to strike down opposition of plaintiffs against the Nigerian subsidiary of the oil companies. However, this case was also settled out-of-court so the decision was only preliminary.

Empirical findings show that U.S. courts are less likely to pierce the veil to expose corporate shareholders in a corporate group, as opposed to individual shareholders.[326] The use of this distinction to determine liability serves corporations well because, as artificial entities, they are recognised in the law as capable of holding shares and being shareholders but they are not capable of being an officer or director, which requires a natural person. When a corporate shareholder names a real person, perhaps one of its employees, as a director or officer of the subsidiary, it is only doing what shareholders normally do. If an individual shareholder names himself as a director or officer, it seems more nefarious and is a factor more likely to lead to piercing.[327] U.S. case law on when exactly the level of control by the shareholder reaches an excessive point is ambiguous and depends on judges' considerations of justice and public policy.[328] Furthermore, U.S. courts are less willing to pierce the corporate veil in tort cases than in non-tort cases.[329] E.g. the concept of piercing the corporate veil is generally associated with insolvency situations, where the plaintiff is the creditor, claiming the parent failed to provide adequate funding for the company's business activities leading to undercapitalisation of the company, business collapse and financial losses. Creditors enjoy a special protection under company law and insolvency law as a third-party stakeholder to the

[324] *Id*. at 953, n. 30.
[325] Wiwa v Royal Dutch Petroleum Co No 96 Civ 8386, 2002 WL 319887 (S.D.N.Y. Feb 28, 2002), at 14.
[326] Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL LAW REVIEW 1036, 1038 (1991).
[327] Robert Thompson, *Piercing the Veil within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 379, 387-88, 391 (1999).
[328] SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 130 (2004).
[329] Thompson, *Piercing the Corporate Veil*, *supra* note 326, at 1038. See also the case Berkey v. Third Avenue Railway, 244 N.Y. 602, 155 N.E. 914 (1927) in which the parent company Third Avenue Railway Co., was sued for accident on tramline operated by subsidiary. Plaintiff could not demonstrate complete domination of the parent company so no right to pierce the veil for a personal injury victim. Required that the subsidiary was no more than alter ego of parent or intentionally under-capitalized so as to defeat the company creditors.

company, which involuntary creditors, including human rights victims suing for personal injury compensation, do not have.[330]

In the U.K., courts' practise of piercing the corporate veil has been described as "a wilderness of isolated precedents."[331] The landmark U.K. company law case *Salomon v Salomon & Co Ltd* [332] laid down the doctrine that every company is a separate legal person that cannot be identified with its members. This was so even though the company was a one-man company and Mr. Salomon in substance a sole trader. The decision firmly upheld the principle of limited liability and has been applied in other spheres such as those of conveyancing, contracts, and of liability for tort.[333] The principle remains extremely strong almost without exception.[334] The U.K. Parliament has enacted exceptions to the Salomon decision, e.g. to protect creditors when the business of the company has been carried out to defraud them.[335] Most of the cases where the courts have lifted the veil concern instances where the shareholders are using the company, deliberately or otherwise as a device to achieve certain benefits or to avoid obligations.[336] Similar to the U.S., U.K. courts appear much more willing to permit shareholder domination when the shareholder is another corporation as opposed to individuals.[337]

When advising the Joint Committee on Human Rights on this issue, Richard Hermer QC and Rachel Chambers have argued that the "courts have shown themselves unwilling to lift the corporate veil in order to prevent parent companies taking advantage of limited liability in relation to tort liability."[338] E.g. in *Chandler v. Cape* plc[339] the claimant sued for asbestosis contracted as a result of exposure to dust during his employment by Cape Products, a subsidiary of Cape plc. The defendant contended that imposing liability would require a lifting of the corporate veil, however, the court rejected that it had been "in any way

[330] Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL LAW REVIEW 99, 130 (2014).
[331] Dan Prentice, *Veil Piercing and Successor Liability in the United Kingdom*, 10 FLORIDA JOURNAL OF INTERNATIONAL LAW 469, 474 (1996).
[332] Salomon v Salomon & Co Ltd, [1895] AC 22 (Eng.).
[333] Adams v Cape Industries Plc, [1990] Ch 433 (Eng.).
[334] ALAN J. DIGNAM & ANDREW HICKS, HICKS & GOO'S CASES AND MATERIALS ON COMPANY LAW 105 (2011).
[335] Section 213 of the 1986 Insolvency Act.
[336] See Gilford Motor Co Ltd v Horne [1933] Ch 935 (Eng.) and Jones v Lipman [1962] 1 WLR 832 (Eng.). In both cases the court lifted the veil where the corporation had been established to avoid pre-existing contractual obligations.
[337] Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 COMPANY FINANCIAL AND INSOLVENCY LAW REVIEW 15, 105 (1999).
[338] UK PARLIAMENT, MEMORANDUM SUBMITTED BY RICHARD HERMER QC AND RACHEL CHAMBERS TO THE HUMAN RIGHTS JOINT COMMITTEE 3 (2009).
[339] Chandler v Cape plc., [2012] EWCA Civ 525 (Eng.).

concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did, amounted to taking on a direct duty to the subsidiary's employees."[340] The Court held that the conventional three-part *Caparo*[341] test of foreseeability of harm, proximity and reasonableness applied to a parent company just as it did to an individual. The case was therefore not based on the principle of "piercing the corporate veil" but on negligence. In this way, the court expressed its position that it would uphold the corporate veil but at the same time that the case regarded direct parent company liability under the duty of care in the law of torts.

In the case *Adams v. Cape Industries*[342] claimants were employees of a subsidiary in Texas where they had become ill with asbestosis. A Texas court entered judgment against Cape and then tried to enforce in the U.K. courts. The Court of Appeal rejected that Cape should be part of a single economic unit, that the subsidiaries were a facade and that any agency relationship existed on the facts. Representation for plaintiffs, Mr. Morison, submitted that the court would pierce the corporate veil if the defendant attempts to evade 1) limitations imposed on his conduct by law 2) such rights of relief against him as third parties already possess; and 3) such rights of relief as third parties may in the future acquire. The court found that neither applied in the case and that it could not accept lifting the corporate veil against a defendant company, which is the member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company.[343] This decision is crucial to the understanding of lifting the corporate veil in English law because the Court of Appeal went through three possible justifications for piercing the veil: (i) if a company is a "mere façade" concealing the true facts[344] or ii) when a subsidiary company was acting as an authorized agent of its parent[345] or iii) where a group of companies were treated as a single

[340] *Id.* para. 69 -70.
[341] Caparo Industries plc v. Dickman [1990] 1 All ER 568 HL (Eng.) in which the House of Lords set out the leading judicial test for a duty of care: Harm must be a "reasonably foreseeable" result of the defendant's conduct; A relationship of "proximity" between the defendant and the claimant; It must be "fair, just and reasonable" to impose liability.
[342] Adams v Cape Industries Plc, [1990] Ch 433 (Eng.).
[343] *Id.*, at 42.
[344] *Id.*
[345] *Id.*, at 43.

economic unit.[346] Only in rare instances will the courts look to substance rather than the form to deny benefits of corporate status, which they think should not be enjoyed. It is difficult to predict when the courts will do so because it depends on the judges' subjective perception of fairness or policy, or of how a statute should be interpreted.[347]

In Danish law, it is disputed whether piercing the corporate veil can be acknowledged at all and if so how excessive the exception is or should be. In the legal literature, the prevailing opinion is that there are no Danish judgments that form basis for a non-statutory access for courts to override a company's limited liability.[348] It is only possible in isolated and exceptional cases to pierce the corporate veil when there has been a mix of the corporate assets.[349] Veil-piercing may be considered by Danish courts if in reality there is no formal separation between the company and the shareholders.[350] In *U 1981.473 H*, the Danish Supreme Court decided that the majority shareholder could not be released from the company's retained PAYE tax in regard to himself and therefore he was held personally liable. However, in *TfS 1987.806*, the National Tax Tribunal denied seizing the parent company's assets even though the subsidiary had inadequate capital in proportion to its activities.

Especially in the case of corporate groups, it has been argued in the legal literature that courts in specific cases can allow for parent company liability of the subsidiary's debt without direct statutory basis.[351] More specifically, it has been argued that the corporate veil can be pierced in corporate groups in certain cases where the subsidiary has inadequate capital, if the subsidiary has operated as a branch of the parent company and if there is a mix of assets.[352] However, there is disagreement in legal theory on whether holding a shareholder liable for the mix of assets is an exception from the principle of limited liability. Rather it is considered as a case of identification so that there never was a formal corporate constellation in the first

[346] *Id.*, at 31, cf. DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852 (Eng.) (where a group of companies make up a single economic entity it may sometimes be treated as one legal entity.
[347] DIGNAM, *supra* note 334, at 105.
[348] ØKONOMI- OG ERHVERVSMINISTERIET, BETÆNKNING OM MODERNISERING AF SELSKABSRETTEN 44 (2008) (MINISTRY OF BUSINESS AND GROWTH DENMARK, WHITE PAPER ON COMPANY LAW REFORM); JAN SCHANS CHRISTENSEN, KAPITALSELSKABER 185 (2009); Christian Schwarz-Hansen, *"Fordele og ulemper ved et hæftelsesgennembrudsinstitut i dansk koncernret"*, 4 Nordisk Tidsskrift for Selskabsret 433 (2001); Eva Aaen Skovbo, *"Bør advokater forstå sig på retsøkonomi?"* 1 Advokaten 6, n 8 (2004).
[349] ØKONOMI- OG ERHVERVSMINISTERIET, *id.*, at 44.
[350] PAUL KRÜGER ANDERSEN, AKTIE- OG ANPARTSSELSKABSRET – KAPITALSELSKABER 507 (2010).
[351] *Id.*, at 533.
[352] ERIK WERLAUFF , SELSKABSMASKEN – LOYALITETSPLIGT OG GENERALKLAUSUL I SELSKABSRETTEN (1991); PEER SCHAUMBURG-MÜLLER & ERIK WERLAUFF, SELSKABSLOVEN MED KOMMENTARER (2014); ERIK WERLAUFF, SELSKABSRET (2016).

place with actual operational separation and limited liability.[353] The theories about the branch and inadequate capital have not been established in case law and they have also been subject to disagreement in legal literature.[354] The case *U 1997.1642 H* (Midtfynsfestivalen) has been interpreted as Danish courts' acknowledgement of piercing the corporate veil. [355] In this case the two companies' finances were mixed together so that the profits were situated in one company while the risks were placed with the other company. On this basis the Court determined that the privileged company was liable for the defeated company's debts. However, some parts of the legal literature find that the judgment does not justify veil-piercing because it was merely a case of mixing of assets since it was not the shareholder held liable with the company but a sister company.[356] In the Supreme Court judgment *U 1997.364 H (Satair)* it was determined that a parent company that exercises complete control over its subsidiary can be held liable for culpable actions in the subsidiary, in this case asset stripping. However, the case was decided on Danish tort law's principle of fault rather than piercing the corporate veil.[357] In general, claims in Danish law on the basis of a parent company's complete domination of the subsidiary has been argued on the principle of fault instead of veil-piercing.[358]

In sum, circumstance that have lead to piercing the corporate veil includes undercapitalisation of that company, a failure to observe legal formalities, or that the level of control exercised by a shareholder may be so extreme as to render the corporation an alter ego or a sham. In the latter case a court is often more willing to pierce the corporate veil, not only because the shareholder exercise extreme control over the relevant company but also because considerations of justice and policy mandate that the shareholder should bear the burden of a wrong perpetrated by the company, rather than the victim who have suffered from the wrong. The question is when does the level of control reach an extreme point? There is no exact test for this and considerations of justice and public policy are value judgments, which will differ from person to person, and judge to judge, depending on the particular facts in each

[353] ANDERSEN, *supra* note 350, at 536.
[354] *Id.*, at 538. BERNHARD GOMARD, AKTIESELSKABER- OG ANPARTSSELSKABER 94, 97 (2006); SØREN FRIIS HANSEN & JENS V. KRENCHEL, DANSK SELSKABSRET 1, 135 (2005); Schwarz-Hansen, *supra* note 348, at 433.
[355] WERLAUFF, *supra* note 352, at 39. ERIK WERLAUFF, EU-SELSKABSRET 30 (2002) arguing that there is a doctrine in Danish law that courts can pierce the corporate veil and that Danish courts have confirmed this in Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1997 p. 1642 H (Midtfyns Festivalen) (Den.).
[356] CHRISTENSEN, *supra* note 348, at 185; ANDERSEN, *supra* note 350, at 506.
[357] The principle of fault in Danish company law is statutory in SELSKABSLOVEN [Companies Act], § 362 (Act. no 1089, 2015) (Den.).
[358] ANDERSEN, *supra* note 350, at 536.

situation.[359] Overall, the corporate veil poses a major obstacle to transnational human rights claimants seeking redress from corporate parents for the actions of their subsidiaries.[360]

Extraterritorial Application of National Law

It is generally recognised that States can exercise extraterritorial jurisdiction over wrongs committed abroad by their own nationals.[361] On this basis, it is relevant to look at the extent to which regulation comes from the home State of the corporation, which is the state of incorporation in regard to companies' overseas activities. Even more so because 90 % of MNCs originate in developed nations that are more likely to have technical expertise to set adequate safety standards and as well as an equipped legal system to attribute accountability in complex corporate groups than less developed states. Home states are not currently liable under international human rights law to regulate or punish human rights violations committed by their own corporations overseas. Extraterritorial application of laws can be very controversial because it invades the sovereignty of the territorial State and may be considered a sort of 'judicial imperialism' if developed countries regulated their corporations' activities in developing host countries. Another concern is that extraterritorial application of laws can be considered as imposed for protectionist purposes, which deprives other States of legitimate competitive advantages.[362]

Exceptionally, some States may apply criminal laws to their own citizens for acts committed in another jurisdiction. An example from U.S. federal law is the Foreign Corrupt Practises Act (FCPA) enacted in 1977.[363] The FCPA makes it a crime for an American company to bribe or have others bribe on its behalf, foreign officials in an effort to win or retain business. The FCPA applies abroad so that the American company will be held accountable if foreign business consultants and/or joint venture partners pay bribe. This is important e.g. in relation to private compliance mechanisms failing in factories as a result of suppliers' bribery of auditors in exchange for not reporting issues to the parent or buyer company on safety issues.[364] Moreover, under US federal criminal law, use of CSR mechanisms such as

[359] JOSEPH, *supra* note 328, at 130.
[360] *Id.* at 131.
[361] PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 124 (1995).
[362] Sarah Joseph, *An Overview of the Human Rights Accountability of Multinational Enterprises in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 78, (Menno T. Kamminga & Saman Zia-Zarifi ed. 2000).
[363] *See supra* text accompanying note 153.
[364] GRO NYSTUEN ET. AL., HUMAN RIGHTS, CORPORATE COMPLICITY AND DISINVESTMENT (2011), FABRIZIO CAFAGGI, COMPLIANCE AND REMEDIES OF REGULATORY PROVISIONS IN TRANSNATIONAL COMMERCIAL

compliance programmes and due diligence provides a more lenient treatment for companies convicted of various crimes.[365] Another more recent example is Singapore's Transboundary Haze and Pollution Bill.[366] It has extraterritorial reach, is binding on companies, and they can be held civilly or criminally liable for conduct that causes or contributes to haze pollution in Singapore. As long as Singapore is able to acquire jurisdiction over the persons (natural or corporate) involved, it does not matter where the act took place.[367]

An example of civil law relating to companies' extraterritorial activities is the California Transparency in Supply Chains Act of 2010.[368] It requires that any manufacturer or retailer with worldwide annual gross receipts of at least $100 million that is "doing business" in the State of California disclose on its website its policies on, and measures undertaken to, combat forced labor and trafficked persons in its global supply chain. Another disclosure requirement is the Wall Street Reform and Consumer Protection Act of 2010, known as Dodd Frank Act,[369] applying to companies that are listed with the Securities and Exchange Commission (SEC) and that use tin, tantalum, tungsten and gold in the products they manufacture. The companies must conduct an inquiry and provide certain information to the public regarding the source of the minerals sourced in the Democratic Republic of the Congo (DRC) and each of the nine countries that adjoin the DRC. Depending on the results of the inquiry, the companies may also be required to conduct supply chain due diligence to determine whether any of the minerals benefitted armed groups in the region, and to report if any of their products are not "conflict free".[370] Other examples of countries that have set up transparency requirements are Denmark,[371] the U.K.,[372] and Sweden.[373] In Denmark, the financial

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CONTRACTS, PAPER PRESENTED AT THE EUROPEAN UNIVERSITY INSTITUTE CONFERENCE: LEGITIMACY OF PRIVATE TRANSNATIONAL GOVERNANCE BY CONTRACT, (APR. 16-17, 2012).

[365] U.S. SENTENCING GUIDELINES MANUAL §8A1.2.(D) (2014).

[366] Transboundary Haze Pollution Act (Act. No. 18/2014 (Sing.).

[367] Bobbie Sta. Maria, *Singapore: Is the Haze Clearing for Extraterritorial Accountability?* BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE (2014), http://business-humanrights.org/en/singapore-is-the-haze-clearing-for-extra-territorial-accountability-0 (last visited Mar. 29, 2017).

[368] California Transparency in Supply Chains Act of 2010, S.B. 657, 2010 Reg. Sess., 2010 Cal. Legis. Serv. Ch 556 (West 2010) (codified at CAL. CIV. CODE § 1714.43).

[369] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o)

[370] JEWELERS VIGILANCE COMMITTEE, THE ESSENTIAL GUIDE TO CONFLICT MINERALS AND THE DODD FRANK ACT 2 (2013).

[371] ÅRSREGNSKABSLOVEN [Financial Statements Act], §99a, (revised with Act. no. 1580, 2015) (Den.), *available at* https://www.retsinformation.dk/forms/r0710.aspx?id=175792#id5db65fcc-7eef-4538-9c24-1c6ab48869a2 (last visited Mar. 29, 2017).

[372] Companies Act 2006, c.46, pt. 15, c.5, §417 (UK), *available at* http://www.legislation.gov.uk/ukpga/2006/46/section/417 (last visited Mar. 29, 2017).

statements reports of the largest companies must explicitly contain information of the companies' policies for respecting human rights and reducing climate impacts. If the companies have not developed CSR policies they are required to state this in the report. In the U.K., companies listed on the London Stock Exchange have to report on non-financial issues relevant to their business within annual reports. These reporting requirements implement EU's Accounting Directive 2014/95/EU.[374] Moreover, in order to address forced labour,[375] the UK Modern Slavery Act 2015[376] has been introduced with a legal requirement on companies with a global annual turnover of over £32 million to prepare a "slavery and trafficking statement." The act has been criticized for lacking accountability since it is estimated that 12.000 companies in the U.K.[377] have to produce a statement but so far only around 392 statements have been recorded.[378] This is in part due to there being no central list of companies that have to make the statement and there being no penalties for not doing so.[379] Sweden requires sustainability reporting from state-owned companies and all companies that are obliged to report and seek permit. In addition, Swedish state-owned companies must produce annual sustainability reports[380] in accordance with *The Sustainability Reporting Guidelines.*[381] An extraterritorial civil law initiative that goes beyond reporting and disclosure requirements is the Bill C-300 in October 2011 which, had it been enacted, would have imposed obligations on extractive companies to comply with certain human rights and environmental standards when operating in the Third World. It also featured a system of sanctions and a complaints mechanism. However, the bill was defeated through lobbying efforts led by major Canadian mining companies, including Barrick Gold,

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[373] MILJÖBALK [MB] [ENVIRONMENTAL CODE] 1998:808 (Swed.) *available at* http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/Miljobalk-1998808_sfs-1998-808/ (last visited Mar. 29, 2017).

[374] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[375] ILO Convention 29 Concerning Forced or Compulsory Labour, June 26, 1930, 39 U.N.T.S. 291; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, art. 4.

[376] UK Modern Slavery Act 2015, c.30 (Eng.).

[377] *Modern Slavery in Supply Chains*, CORE, http://corporate-responsibility.org/issues/modern-slavery-bill/ (last visited Mar. 29, 2017).

[378] *UK Modern Slavery Act & Registry*, BUSINESS & HUMAN RIGHTS RESSOURCE CENTRE, https://business-humanrights.org/en/uk-modern-slavery-act-registry (last visited Mar. 29, 2017).

[379] *Modern Slavery – Exploring the Role of Business and its Responsibilities Concerning Forced Labour*, HUMAN RIGHTS IN COLLABORATION, https://humanrightsincollaboration.wordpress.com/post-event-materials/labour-rights/(last visited Mar. 29, 2017)

[380] MINISTRY OF ENTERPRISE AND INNOVATION, GUIDELINES FOR EXTERNAL REPORTING BY STATE-OWNED COMPANIES, http://www.government.se/content/1/c6/09/41/25/56b7ebd4.pdf. (last visited Mar. 29, 2017).

[381] GLOBAL REPORTING INITIATIVE (GRI), SUSTAINABILITY REPORTING GUIDELINES, https://www.globalreporting.org/resourcelibrary/G3.1-Guidelines-Incl-Technical-Protocol.pdf (last visited Mar. 29, 2017).

IAM-gold, Vale Canada, the Mining Association of Canada and the Prospectors and Developers Association of Canada and mining-industry associations.[382]

Another venue for accountability is extraterritorial application of domestic tort law. It has been used frequently in civil suits and in some cases resulted in damage awards or out-of-court settlements to redress the aggrieved plaintiffs. An advantage of filing a civil suit is that it can be instigated by the victims themselves, whereas criminal laws must normally be activated by a State official, such as a District Attorney or an Attorney-General who may not have the political will to sue a home based corporation on behalf of offshore victims. The prospects of legal accountability through extraterritorial application of domestic tort law will be discussed in depth in the following chapter.

TWAIL Assessment

1) Reinforcement of human rights governance capacity over MNCs in host states.

As accounted for above, international human rights treaties and ILO Conventions, international criminal law, customary international law, international investment law, regional human rights law, and EU law are not well suited to strengthen human rights governance capacity over MNCs operating in host states. The accountability corporations might face under these binding legal frameworks is limited to actions taken by states or they lack the necessary jurisdictional reach to hold MNCs operating in host states accountable for violating the human rights of Third World peoples. Relying on the host state to ensure rights protection "cannot be higher than the economic structure of society and its cultural development conditioned thereby".[383] Sovereign economic decision-making authority has been relocated from states to international economic institutions – WTO, IMF and World Bank - which in turn has had serious consequences in terms of loss of autonomy for Third World states and peoples over corporate human rights governance.[384] Furthermore, trade- and investment agreements have extended the freedom of foreign investors in host states to operate with fewer impediments while regulation of economic activity has been restricted.[385] There is no addressing this loss of autonomy in the mentioned legal frameworks. Pursuing liability through piercing of the corporate veil and extraterritorial application of national law relies on application of Western legal doctrines and standards before a Western court.

[382] Bill Curry, *Lobbying Blitz Helps Kill Minings Ethics Bill*, GLOBE AND MAIL (Oct. 27, 2010), http://www.theglobeandmail.com/news/politics/lobbying-blitz-helps-kill-mining-ethics-bill/article1215704/
[383] FREDERICK ENGELS & KARL MARX, SELECTED WORKS VOL. 3 19 (1970).
[384] Chimni, *International Institutions*, *supra* note 103, at 2.
[385] WILLIAM TABB, ECONOMIC GOVERNANCE IN THE AGE OF GLOBALIZATION 272 (2004).

Turning to Western regimes for rights protection may be considered from a TWAIL perspective as confirming rather than rectifying the weakened human rights governance over MNCs in host states. E.g., Antony Anghie refers to Third World states' diminished economic governance capacity over concession agreements and arbitral decisions since their emergence as states into the international community.[386] The Abu Dhabi arbitration[387] concerned an agreement between Sheikh Shakhbut of Abu Dhabi and the company Petroleum Development Ltd. to transfer the exclusive rights to drill for oil within a certain area of Abu Dhabi. A dispute arose as to the rights of the company with respect to the seabed and subsoil over which the Sheikh may have had sovereignty, jurisdiction, control or mineral oil rights. The case illustrates how concession agreements were removed from the ambit of domestic law of the host state on the basis that no domestic law existed: "it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments." Instead, the arbitrators drew on the doctrine of sources to apply "general principles of law" to extend the laws, legal doctrines, and principles of the home state (including acquired rights and unjust enrichment) to the contract. [388] Anghie argues that arbitrators treated the concession agreements as having been internationalized on the basis of the asserted "unique nature" of such agreements and on the fact that they were governed not by domestic law but by an "international law of contracts" drawn from general principles of law. These developments facilitated the effortless transposition of Western concepts of law that provided for the comprehensive protection of private property.[389] Anghie hereby considers the application of Western concepts of law as colonial for diminishing Third World economic governance capacity.

2) Democratic inclusion that gives voice to host state local communities.

In terms of giving a voice to host state local communities, Bhupinder Chimni contends that "it would of course be churlish to deny that international human rights law and organizations have in many ways empowered progressive social forces in third world countries."[390] Even authoritarian governments have had to take human rights on board and take into account criticisms made in International Human Rights Organisations (IHROs), including UN bodies

[386] ANGHIE, *supra* note 106, at 235-36.
[387] Petroleum Development Ltd. v. Sheikh of Abu Dhabi, 1 Int'L and Comparative L. Q. 247 (Issue 2) (Aug. 28, 1951).
[388] *Id.*, at 251.
[389] ANGHIE, *supra* note 106, at 230.
[390] Chimni, *International Institutions*, *supra* note 103, at 11.

ECOSOC, UNDP, UNHRC, ILO, UNESCO, and UNHCR, from time to time.[391] However, Chimni is also wary of the domination of the human rights agenda by the transnational capital class (TCC), embodied in transnational corporations and private financial institutions.[392] The private corporate sector is playing an increasing role within the UN promoting the interest of transnational capital. In addition, the Northern/Western states emphasize civil and political rights thereby privileging private rights over collective social and economic rights.[393] Also, Rajagopal observes that while mass radical movements have increasingly emerged around the claims for human rights and democratic entitlement, IHROs deflect the movements through strategical programming. The power to program is used to select "legitimate"democratic voices in the Third World, "including for funding, just as the rural development and poverty alleviation programs targeted "authentic" Third World elites.[394] In this way, international law and its organisations have expanded their institutional reach by containing and deradicalizing mass resistance in the Third World leaving voices of billions of people underrepresented.[395] A democracy deficit at international organisations is maintained by powerful states to prevent the voice of developing countries and peoples from being heard.[396] Democratic influence on regional human rights law and EU law is limited to the "region" which excludes participation of Third World local communities. Using Western standards through piercing of the corporate veil and extraterritorial application of home state law also does not provide local communities with a voice and may be viewed from a TWAIL perspective as serving the home state's own policy goals.[397]

3) Access for Third World communities to enforce the measures.

The international, regional legal frameworks and piercing the corporate veil discussed above do not provide access to remedy and compensation after an abuse has been committed. Home state regulation of international corporate activities stand out as a possibility for Third World victims to access transnational judicial remedy directly against the corporation. Although the

[391] THOMAS RISSE ET AL., THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 277 (1999).
[392] Chimni, *International Institutions*, *supra* note 103, at 4.
[393] *Id.*, at 11.
[394] Balakrishnan Rajagopal, *From Modernization to Democratization: The Political Economy of the "New" International Law*, in REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS 150 (Richard Falk et al. eds., 2002).
[395] JOSEPH STIGLITZ & HA-JOON CHANG, JOSEPH STIGLITZ AND THE WORLD BANK – THE REBEL WITHIN 199 (2001).
[396] Chimni, *International Institutions*, *supra* note 103, at 3.
[397] JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 137 (2006).

concept of home states regulating MNCs' activities in developing countries may be considered on the outset as an imperialist infringement of host state sovereignty, it may be considered differently from an enforcement perspective. Rather than viewing it as a sort of judicial imperialism, it could be seen as the Global North mitigating the historical neo-colonialist tendencies already embedded within the structure of international law by remedying transnational human rights harm suffered by Global South local communities.

Subconclusion

The current legal frameworks for business and human rights accountability are spotted and some have apparent serious deficiencies. Generally, the system focuses on state human rights responsibility consequently excluding non-state actor accountability. Although there is an increasing recognition that corporations have a responsibility to respect human rights in their business operations, the legal basis of direct responsibility is not systematic but only sparsely in place for some sectors on the EU level and in a few national jurisdictions mostly amounting to reporting requirements. TWAIL is also sceptical to the functioning of legal systems in host states for human rights claims due to diminished governance capacity. This includes lack of independence of the judiciary and that certain protections such as that related to indigenous peoples' rights may not be recognized or regularly enforced in domestic law.[398]Extraterritorial application of domestic tort law stands out as an alternative avenue to enforce human rights. The following chapter will assess whether the venue of home state regulation with extraterritorial effect is viable in practise and from the perspective of TWAIL.

[398] S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 114 (2009).

Chapter 3 - Judicial Accountability

Introduction

Victims of human rights violations in developing countries have pursued redress from corporations for human rights violations in the American jurisdictions pursuant to extraterritorial application of the federal Alien Tort Statute (ATS).[399] In Europe, conventional tort law claims have been filed arguing for extraterritorial application of domestic norms. Firstly, this chapter introduces the key challenges for transnational human rights litigations and the two leading choice-of-law rules. Secondly, it explores the feasibility for filing a claim in the United States, England, and Denmark on a comparative basis. This section aims to demonstrate the viability of foreign direct liability claims following a shift in the private international law approach in U.S. federal law and Danish law and how it differentiates from the EU law approach adopted by England. Finally this chapter will be concluded by assessing whether transnational human rights litigation satisfies the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures.[400]

Key Challenges for Transnational Claims

Case Examples

"I drank the water and ate the fish. We all did.

The acid has damaged me permanently" [401]

Floribert Kappa, resident of Hippo Pool Village, Zambia

The social cost side-effects of economic globalization count complicity in human rights violations of multinational corporations (MNCs) particularly within the oil, mining, pharmaceuticals, and garment industry either in concert with the states where they do

[399] 28 U.S.C. § 1350 (2012). This was originally enacted as part of the Judiciary Act in 1789. The Alien Tort Statute (ATS) is also known as the Alien Tort Claims Act (ATCA).
[400] *See Chapter 1 supra* text accompanying notes 148-87.
[401] John Vidal, *Zambian villagers take mining giant Vedanta to court in UK over toxic leaks*, THE GUARDIAN (Aug 1, 2015) https://www.theguardian.com/global-development/2015/aug/01/vedanta-zambia-copper-mining-toxic-leaks.

business, or as a result of their own activities conducted by contractors or subsidiaries based in the host state. MNCs outsourcing their business to states with scarce regulatory capacities face a tremendous challenge and risk of complicity in human rights violations due to militant movements, lawlessness and lack of security in host states. One example is the 13 million barrels of oil spill in the Niger Delta, Nigeria, due to oil exploration since 1958 by oil MNCs. According to an Amnesty report, residents of the Niger Delta "have to drink, cook with and wash in polluted water; they eat fish contaminated with oil and other toxins."[402] If not contaminated, the fish die from the pollution making it impossible for villagers to keep up their livelihood on the sale of fish. There is hardly any birdsong as the pollution has sucked the life out of the area.[403] "After oil spills the air [the residents] breathe reeks of oil and gas and other pollutants; they complain of breathing problems, skin lesions and other health problems, but their concerns are not taken seriously.[404] The Nigerian government has not issued any statements asking for accountability nor has it decried the oil spills. Despite the fact that the government has part ownership in the subsidiaries of all the oil MNCs which operate in Nigeria, the oil companies operate with little or no oversight by the state. [405] Oil companies Shell and the Nigerian Agip Oil Company have responded that the oil spills are largely due to sabotage and oil pirates stealing oil cargo. Amnesty insists that the oil companies are to blame for the vast majority of spills. [406]

Another appalling example of the challenges with transnational accountability is the factory collapse in Bangladesh in April 2013 killing and mutilating thousands of garment workers producing clothes and garments for Western based multinational clothing companies.[407] The factory was not a subsidiary but a contractual outsourcing partner subject to failed compliance programmes of the MNCs. Victims have filed civil- and public-interest law suits to pursue remedy in Bangladesh against the Rana Plaza operators, however, with no success so far as they remain mired in protracted court bureaucracy.[408] Victims have taken their claims to Western courts as will be explained below.

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[402] AMNESTY INTERNATIONAL, NIGERIA: PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA 21 (2009).
[403] Will Ross, *Niger Delta Pollution: Fishermen at risk amidst the oil,* BBC NEWS (May 30, 2013) http://www.bbc.com/news/world-africa-22487099.
[404] AMNESTY, *supra* note 402.
[405] Ross, *supra* note 403.
[406] AMNESTY, *supra* note 402, at 17.
[407] Lucy Siegle, *Fashion still doesn't give a damn about the deaths of garment workers* THE GUARDIAN (May 5, 2013), http://www.guardian.co.uk/commentisfree/2013/may/05/dhaka-disaster-fashion-must-react.
[408] Chen, *supra* note 17.

As alternative to the lack of appropriate legal mechanisms and/or the political will to enforce relevant mechanisms in developing countries, domestic human rights laws have existed for many years in the EU and the U.S. applicable to corporations regarding anti-discrimination, sexual harassment, workplace relations, environmental standards, occupational health and safety, as well as federal law incorporating human rights norms derived from international customary law. These Western substantive measures pose hard law venues to form basis for a tort suit before a Western court against the MNC outsourcing its production. However, the remoteness of the large companies from the production chain makes the issue of tort liability more complex as the loss may be too remote for the companies involved. As demonstrated in the previous chapter[409], piercing the corporate veil between companies in the same group is in practice very difficult. In German scholarship, there has even been talk of piercing the contractual veil[410], however, with skepticism and rejecting it as unconvincing as illustrated in a judgment from the Karlsruhe Court of Appeal.[411] A Japanese car importer had built up a dealer distribution system in Germany, however one dealer became insolvent after a customer had taken a car in possession albeit without receiving the ownership papers by mistake of the direct dealer. The Court met the importer's demand for the return of his property, however, also allowed the customer a compensation claim against the importer. By piercing the contractual veil, the Court made the importer, the centre of the network, directly liable, although there was no contractual link between the customer and the centre whatsoever. The decision has been criticized for applying a form of organizational liability on a business network with dealers that were not even legal persons and thus organizational liability has no application to simple contractual relationships.[412]

Regardless of whether there is an organizational or a contractual relationship between the Western based MNC and the company where the violation has happened, filing a claim under the law of torts requires that the control which the Western MNC has exercised, or the advice it has provided through its directors suffices as negligent or intentional conduct as main basis for the claim. It is also possible to apply the language of intentional torts to human rights violations, e.g. assault, battery, false imprisonment, and trespassing. However, most cases against MNCs have been pursued on the basis of the tort of negligence. E.g. in a successful

[409] *See Chapter 2 supra* text accompanying notes 319-60.
[410] Gunther Teubner, *Hybrid Networks Beyond Contract and Organisation*, *in* NETWORKS: LEGAL ISSUES OF MULTILATERAL CO-OPERATION 5 (Marc Amstutz & Gunther Teubner eds. 2009). Gunther Teubner, *Piercing the Contractual Veil? The Social Responsibility of Contractual Networks*, *in* PERSPECTIVES OF CRITICAL CONTRACT LAW 211 (Thomas Wilhelmsson ed. 1993).
[411] OLG Karlsruhe (1989) 2 Neue Zeitschrift für Verkehrsrecht 434 (Ger.).
[412] Teubner, *Hybrid Networks*, *supra* note 410, at 6.

negligence suit in U.S. tort law, the plaintiff must show that each of the following five elements were present: 1) a duty of care owed by the defendant to the plaintiff, 2) a breach of that duty, 3) an actual causal connection between the defendant's conduct and the resulting harm, 4) proximate cause, which relates to whether the harm was foreseeable, and 5) damages resulting from the defendant's conduct. Negligence liability only applies if the defendant's conduct falls below the established standard of care. The standard of care sets out the measure of the duty owed. There are different theories of negligence and each theory has its own standard of care. E.g. "recklessness", "command", "aiding and abetting", "wilful disregard", and "vicarious liability" are all tort theories that can be applied to human rights violations. When a Western company is sued for liability for human rights violations carried out in a third world country by subsidiaries or contractor, the main issue is whether a corporation has a duty to prevent a third party from causing harm. Either risk-creating affirmative acts or risk-creating omissions generally give rise to a duty. To determine whether a duty applies to the conduct in question, the judge must turn to the deeply rooted distinction in American common law of 1) misfeasance, whether based on an active misconduct working positive injury to others or omission and 2) nonfeasance, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant. In the framework of claims against corporations for human rights violations, misfeasance shown by a negligent omission could be a situation where the corporation orders a large supply of t-shirts to be delivered within an impossible time-frame, demanding a price cut and warning the supplier that if the deadline is not met and the price is not accepted, the order will be taken elsewhere. The supplier has limited capacity not being able to meet the deadline without forcing his workers to overtime work, denying them rest and pay, preventing them from organizing themselves, relaxing safety standards of the working facilities and as a result ordering the workers to keep working in unsafe facilities. If it can be established that these risks were foreseeable for the corporate actors a case for misfeasance could be argued.

However, the reality of litigation practice is that the best case in the world becomes the worst case if it cannot be proved. The most fundamental problem for human rights claims against a corporation is fact-finding to establish a *prima facie* case that the corporate actor has created the risks that ultimately harm the plaintiff. This is because, in order to establish misfeasance under U.S. law, the plaintiffs have the burden of adducing evidence in support of the facts they allege, which would usually entail gaining access to material that is not publicly

available including access to the corporate defendant's documents and other types of data such as films, photos and digital files relevant for the legal evaluation of the tort-based legal relationship between the host country plaintiffs and the corporate defendant.

A case in point is the legal action taken by victims of the Rana Plaza disaster before courts the U.S. and Canada against fashion brands that had outsourced their production to the factory.[413] The class-action lawsuit in the U.S. was filed against retailers The Children's Place, Wal-Mart, J.C. Penney and the Bangladesh government for negligence and wrongful death.[414] American retailer Wal-Mart claimed that they did not permit production in Rana Plaza but their contractors sub-contracted the production of jeans to one of the Rana Plaza factories without their knowledge.[415] The case was dismissed on the basis that Bangladeshi law applies for the determination of the statute of limitations and the limitation period of one year for negligence and wrongful death had passed.[416] In addition the court pronounced on the duty of care dispute that the defendants were not the plaintiffs' direct employer. The plaintiffs had failed to demonstrate a "special relationship", "peculiar risk", sanctioned illegal conduct, or an exception to the general rule protecting independent contractors from liability to justify a *prima facie* case for negligence and wrongful death. The Canadian lawsuit is ongoing awaiting class certification in the Ontario Superior Court of Justice[417] charging the Canadian multinational retailer Loblaws and its auditing firm Bureau Veritas for breach of fiduciary duty and holding it partially responsible for wrongful death and injury arising from the negligence of safety conditions. [418]

Another case from the garment industry that has been dismissed for failure to state a claim is *Doe v. Wal-Mart Stores.*[419] The class action complaint for injunctive relief and damages was brought by employees of Wal-Mart suppliers' factories in China, Bangladesh, Indonesia, Swaziland, and Nicaragua and employees of Wal-Mart's competitors in Southern California against the retail chain.[420] It was disputed whether corporate codes of conduct are legally binding with regard to human rights violations at foreign supplier factories. The *Doe*

[413] *See supra* chapter 1.
[414] Rahaman v. J.C. Penney Corporation, INC., et al, No. 15-cv-619 (D.C. filed Apr. 23, 2015).
[415] *Update: Brands' responses to Tazreen and Rana Plaza Compensation demands*, CLEAN CLOTHES CAMPAIGN (May 24, 2013), http://www.cleanclothes.org/news/2013/05/24/background-rana-plaza-tazreen.
[416] Rahaman v. J.C. Penney Corporation, INC., et al, No. N15C-07-174 MMJ, 27 (Del. Feb. 3, 2016).
[417] Arati Rani Das et. al. v. Loblaws Companies Ltd. et al, no. CV-15-52662800CP (Ont. Super. Ct. filed Apr. 22, 2015).
[418] Chen, *supra* note 17.
[419] Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).
[420] Doe v. Wal-Mart Stores, Inc., No. CV 05-07307-NM(MANx) 2005 WL 4049637, at *29 (C.D. Cal. Dec. 23, 2005).

plaintiffs alleged breach of contract as third-party beneficiaries (or Wal-Mart as joint employer in the alternative), negligence, unjust enrichment, and violation of California's Unfair Competition Law as well as breach of contract as third-party beneficiaries. Plaintiffs alleged that the short deadlines and low prices in Wal-Mart's supply contracts force suppliers to violate Wal-Mart's code of conduct in order to satisfy the terms of the contracts. Wal-Mart's code of conduct required foreign suppliers to adhere to local laws and local industry standards regarding working conditions like pay, hours, forced labor, child labor, and discrimination.[421] The plaintiffs also relied on the federal ATS alleging the working conditions imposed by Wal-Mart to be in violation of several anti-slavery and forced labor treaties.[422]

In 2007, the district court granted with leave to amend Wal-Mart's motion to dismiss for failure to state a claim. The court feared the floodgates would open if it did not dismiss plaintiffs' third-party claim for negligent undertaking. Otherwise all businesses would 'be responsible for the employment conditions for their own workers and all the workers employed by their suppliers.'[423] Instead of amending, the plaintiffs appealed. The Court of Appeals dismissed the claims finding that the corporate codes of conduct were not contractual but self-imposed, self-regulated, and voluntary.[424] The case affirms the UN Guiding Principles on Business and Human Rights[425] in finding that the corporations' responsibility to respect human rights has as a starting point a non-legal basis amounting to a societal expectation for all corporations to respect human rights wherever they operate.[426] Specific regulation with respect to corporate behavior abroad is rare, mainly concerning corporate social responsibility (CSR) reporting, which incentivizes companies to adopt a CSR policy.[427]

CSR policies have also been used to form basis for litigation in the case Kasky v Nike[428] but the case was not decided on in substance. The consumer activist Marc Kasky filed a lawsuit

[421] *Wal-Mart Stores*, 572 F.3d at 681.
[422] Protocol Amending the Slavery Convention, the Supplementary Convention on the Abolition of Slavery, International Labour Organisation Convention No. 29 Concerning Forced or Compulsory Labour, International Labour Organisation Convention No. 105 Concerning the Abolition of Forced Labour Convention, and the Slavery Convention.
[423] Doe v. Wal-Mart Stores, Inc., No. CV 05-07307-AG(MANx) 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007).
[424] *Wal-Mart Stores*, 572 F.3d at 684.
[425] UNGPs, *supra* note 3.
[426] *Id.* at 4.
[427] *See Chapter 2 supra* text accompanying notes 368-81.
[428] Kasky v. Nike, Inc., 27 Cal 4th 939 (SCt Cal 2002).

against Nike claiming accountability for its CSR policies under Californian laws prohibiting unfair competition and false advertising referring to reports of poor working conditions at Nike's overseas supplier factories contrary to Nike's public statements claiming favourable labour standards.[429] Nike and Kasky agreed to settle the case for $1.5 million. The settlement involved investments by Nike to strengthen workplace monitoring and factory worker programmes.[430] The case illustrates an attempt to turn "soft law" CSR standards into "hard" legal regulation and enforcement. However, as the case was settled and not decided on in substance, it does not set a precedent on whether the voluntary pursuit of CSR activity can form basis for a claim.

Thus, a major obstacle for transnational human rights litigation against corporations is finding a legal basis for the claim. However, the thesis will not go further into depth with the requirements for a tort suit in each jurisdiction unless it can be established that extraterritorial application of Western jurisdiction's tort law is possible under private international law frameworks and a preferred venue from a TWAIL approach.

From this starting point, the paradigm case for assessing private international law frameworks in this chapter is one where the defendant is a multinational parent/buyer company incorporated in the U.S. or the EU and the plaintiffs are non-U.S. or non-EU citizens employed by or residing in the vicinity of the MNC's subsidiary or contractor based in a non-Western country. The MNC is sued for involvement in human rights violations such as torture, murder, genocide, and enslavement, or poor working conditions such as excessive hours or days of work, pay below minimum wage, lack of safety equipment, and discrimination carried out through operations of its subsidiary or contractors. The plaintiffs are claiming civil liability from the multinational company under domestic tort laws of EU Member States and the U.S. These cases are sometimes referred to as foreign direct liability cases because the claim arising from harm caused in the course of the Western MNCs' operations in host countries is brought directly against the company settled in the Western jurisdiction.[431] The comparison will also involve exceptional rules for suing non-EU corporations as co-defendants alongside an EU parent company since plaintiffs have done so in several cases.

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[429] *Id.*, at 948.
[430] Nike lawsuit (Kasky v Nike, re denial of labour abuses), BUSINESS AND HUMAN RIGHTS RESSOURCE CENTRE, (Feb. 18, 2004) https://business-humanrights.org/en/nike-lawsuit-kasky-v-nike-re-denial-of-labour-abuses-0#c9325.
[431] ZERK, *supra* note 397, at 32.

There are a number of reasons for targeting the parent/buyer company as the main party in charge of standards and policies in the supply chain. It exposes the involvement of the company in the human rights violation, which will bring about media coverage and affect the reputation of the corporation. Another reason is that a Western state is more likely to have a legal system able to cope with the proper attribution of responsibility within a complex network of corporate subsidiaries, branches, agents, and outsourcing partners than a developing state hosting an MNC. Also a Western court usually has better and more reliable legal infrastructure for example the possibility of class actions for several victims pursuing liability. It can take decades to take the case to a court in the host state and victims can fear repression if they file the case in their own countries, e.g. members of the indigenous Mapuche communities have claimed to be subjected to irregularities in their legal proceedings, including charges under anti-terror laws adopted by the military junta, and imprisonment by the Chilean state for seeking to reclaim traditional Mapuche territory from transnational business.[432] In addition, litigation in host states' courts may also lead to uncertainty, e.g. if the court is inclined to corruption. Also if the validity of a foreign judgment comes into question, it may defeat plaintiffs chances of reparation.

An example is the 25-year litigation, starting in 1993, by indigenous rainforest communities against Chevron (Texaco) for oil pollution damage in the Amazon jungle causing widespread contamination by toxic chemicals and human suffering amongst indigenous and farmer residents.[433] The plaintiffs claim that Chevron operating from 1964 until 1992 under the Texaco brand used Ecuador as a dumping ground for oil waste in order to keep costs to a bare minimum. In response, Chevron has claimed that it is the victim of opportunistic attorneys, a corrupt legal system, and Ecuador's former president, Rafael Correa, who spoke out against the American firm.[434] Following a ten-year legal battle in New York, the cases were dismissed for *forum non conveniens*.[435] *Forum non conveniens* is a common law doctrine which permits U.S. courts to dismiss cases on the basis that the balance of relevant interests weighs in favour of trial in a foreign forum. The case against Chevron was re-filed in Lago Agrio, Ecuador in 2001 and decided a decade later in 2011 resulting in a judgment of $19 billion scaled back to $9,5 billion by an Ecuadorean high court against Chevron (hereinafter

[432] *Indigenous Mapuche People Struggle Against the Chilean State and Private Companies,* THE REAL NEWS NETWORK, (Jan. 31, 2013), http://therealnews.com/t2/index.php?option=com_content&task=view&id=31&Itemid=74&jumival=9614.
[433] Aguinda v. Texaco Inc., 303 F.3d 470 (2nd Cir. 2002); Jota v. Texaco, Inc., 157 F.3d 153 (2nd Cir. 1998).
[434] See John Otis, *Chevron vs. Ecuadorean Activists,* GLOBALPOST (May 30, 2010), http://www.globalpost.com/dispatch/the-americas/090429/chevron-ecuador?page=0,2.
[435] *Aguinda,* 303 F.3d at 316.

the Lago Agrio judgment).[436] Shortly before the Lago Agrio judgment, Chevron cleared its assets from Ecuador and Chevron spokesman Donald Campbell promised the rainforest communities a lifetime of litigation.[437]

Chevron immediately sought injunction in New York to bar the plaintiffs from enforcing the Ecuadorian judgment in the U.S. The corporation filed a racketeering lawsuit[438] against the Amazon rainforest communities and their lawyers, primarily targeting lead U.S. lawyer Steven Donziger, alleging that the Ecuadorian judgment violated the American standards of due process. Claims included allegations of fraud by a court appointed expert and that Donziger was responsible for bribing the Ecuadorian judge, and ghostwriting the Ecuadorian judgment. Chevron initially held in 2001 that Ecuador's court was an adequate forum for the plaintiffs and rejected claims that the Ecuadorian judiciary was corrupt.[439] In 2014, the district court (Kaplan, J.) handed down an opinion found by "clear and convincing evidence"[440] that Donziger's conduct in the Lago Agrio case violated U.S. federal laws against extortion, wire fraud, witness tampering, obstruction of justice, and money laundering, and that he was also responsible for acts of bribery in violation of the Foreign Corrupt Practices Act. Judge Kaplan found that this pattern of criminality, had taken place over at least a five-year period from 2006 to 2011, also violating the Racketeer Influenced and Corrupt Organizations Act (RICO).[441] The judgment of the case granted Chevron an extraordinary injunction blocking worldwide collection on the Lago Agrio judgment.[442] Donziger denied wrongdoing and appealed.[443] Oral argument was held in the Second Circuit Court of Appeals in New York in April 2015. The presiding judge of the three-judge panel, Judge Richard Wesley, raised a startling question on whether his court might have the power to order the entire Ecuadorian-environmental battle between Chevron and residents of the Amazon back to New York; and if this was the case whether the parties would want the court

[436] Corte Provincial de Justicia de Sucumbios [Provincial Court of Justice of Sucumbios], Feb. 14, 2011, "Aguinda c. Chevron Corp.," Nicolas Zambrano Lozada, Juicio No. 2003 – 0002 (p. 179 -85) (Ecu.).
[437] Otis, *supra* note 433: "We're going to fight this until hell freezes over," Campbell said. "And then we'll fight it out on the ice."
[438] Chevron's claims were filed under the Racketeer Influenced and Corrupt Organizations Act (RICO), Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (Oct. 15, 1970), *codified at* 18 U.S.C. Ch. 96, §§1961-1968. Congress had intended the civil RICO law to be used to target organized crime groups like the Mafia.
[439] *Aguinda*, 303 F.3d 470, at 478, 480.
[440] Chevron Corp. vs. Donziger, et al., No. 11 Civ. 0691, 323 (S.D.N.Y. 2014) (opinion).
[441] *Id*. at 377, 379, 383, 387, 390, 391, 405.
[442] Chevron Corp. vs. Donziger, et al., No. 11 Civ. 0691, (S.D.N.Y. 2014) (judgment).
[443] Corrected Brief for Defendants-Appellants Steven Donziger, Chevron Corp. v. Donziger et al., Nos. 14-826, 14-0832 (2nd Cir. Jul. 16, 2014). http://guptabeck.com/wp-content/uploads/2014/10/Donziger-Brief.pdf.

to issue such an order.[444] If this hypothesis came true, the case would start again from scratch. In August 2016, the Second Circuit Court of Appeals affirmed the trial court's verdict that Donziger had engaged in wrongdoing to secure the $9,5 billion verdict in Ecuador.[445] In September 2016, the Court of Appeals rejected Donziger's petition for a rehearing en banc.[446] In June 2017, the U.S. Supreme Court denied to grant certiorari for a further appeal.[447] Regardless of the U.S. judgment, plaintiffs have sought to enforce the Ecuadorian judgment in third countries, where Chevron subsidiaries has enough assets to pay the damage award. Enforcement was rejected by courts in Argentina and Brazil, because of the separate legal personality of Chevron subsidiaries there. However, the Supreme Court of Canada established that Ontario courts have jurisdiction in the case[448] and proceedings commenced in September 2016 in Ontario Superior Court in Toronto.[449] In January 2017, the Superior Court ruled that Chevron's Canadian subsidiary is a separate entity and therefore is not a party to the Ecuadorian judgment. However, Ontario courts have jurisdiction to adjudicate a recognition and enforcement action against Chevron Corp. as a defendant.[450] In October 2017, in the Ontario Court of Appeals,[451] plaintiffs' successfully resisted motion for posting a $942,951 security for costs of the proceeding and appeals indicating that the case will proceed. Considering that the rainforest communities' claim for remediation of their polluted land and waters has been a 25-year battle, this multi-forum case illustrates the implications litigation in host states' courts may have for redress when attempting enforcement in the corporation's home state.

Simultaneously, Chevron has run international investment arbitration proceedings against the Republic of Ecuador in the Permanent Court of Arbitration in the Hague on the basis of the U.S.-Ecuador Bilateral Investment Treaty.[452] The case originally stems from a four-decade-old contract dispute that called for Texaco, later acquired by Chevron, to develop fields in exchange for selling oil to Ecuador at below-market rates. Chevron claimed that Ecuador had been violating its treaty obligations and deprived Chevron justice with undue delay and

[444] Circuit Judge Richard Wesley, Remark at the Federal Appellate Hearing of Chevron Corp. v. Donziger et al., (Apr. 20, 2015).
[445] Chevron Corporation v. Donziger, 833 F.3d 74 (2nd Cir. 2016).
[446] Chevron Corp. v. Donziger, No. 14-0826 (2d Cir. 2016).
[447] Donziger v. Chevron Corporation 137 U.S. 2268 (2017).
[448] Chevron Corp. v. Yaiguaje [2015] 3 S.C.R. 69 (Can.).
[449] Yaiguaje v. Chevron Corp., [2016] No. CV-12-9808-00CL (Ont. Super. Ct. filed Sep. 2, 2016).
[450] Yaiguaje v. Chevron Corp., [2017] ONSC 135 (Can.).
[451] Yaiguaje v Chevron Corporation, [2017] ONCA 827 (Can.).
[452] United States (US) -Ecuador BIT (1993) http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/Equador_BIT_AG.asp> accessed 6 April 2015.

biased Ecuadorian courts. Chevron subsequently requested from the arbitration tribunal to issue an international declaration, which confirms that the company is not liable for any environmental damage in Ecuador and to block the enforcement of the Lago Agrio judgment inside and outside of Ecuador.[453] The arbitration tribunal awarded Chevron $96 million in 2011 for Ecuador's alleged multiple denials of justice against Chevron within the Ecuadorian legal system.[454] Ecuador appealed but without success and the award was increased to $112 million because of interests accumulating. Ecuador paid the full amount in 2016, however, without agreeing with the ruling.[455] Also, in 2013, the Permanent Court of Arbitration ruled that former settlement agreements protected Chevron from paying to Ecuador a fine for polluting the Amazon basin region.[456] Chevron's claim to the arbitration tribunal for blocking enforcement of the long-running pollution judgment resulted in the tribunal ordering Ecuador to "take all measures necessary to suspend […] the enforcement […] within and without Ecuador of the judgments won by the rainforest communities."[457] The case illustrates the tension between international investment arbitration and national environmental concerns as well as a broad assertion of power by an arbitral tribunal. Although the award may appear detrimental to the rainforest communities' chance for enforcement of their claims, namely because the New York Convention prescribes enforcement of the award in any member-country, the tribunal's awards are only binding on the parties to the investor-state dispute.[458] Therefore the award has not prevented the Amazon plaintiffs, non-parties to the arbitration, from seeking enforcement in countries where Chevron has assets.

Jurisdiction and Choice of Law

In cases of transnational claims two problems must be cleared. First of all, it must be determined which national court should decide on the conflict in question. The rules regarding to this revolve around jurisdiction. Secondly, regardless of which national court is

[453] Chevron Corporation and Texaco Petroleum Corporation *v.* The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Notice of Arbitration of 23 September 2009, para. 76 and also the Claimants' Request for Interim Measures of 1 April 2010, paras. 142-148.
[454] UNCITRAL Chevron-Texaco v. Ecuador Final Award, (Aug. 31, 2011). http://www.italaw.com/documents/ChevronEcuadorFinalAward.pdf.
[455] Paul Barrett, *Chevron's Pollution Opens Door for Companies to Shirk Foreign Verdicts* BLOOMBERG BUSINESSWEEK (Aug. 9, 2016) https://bol.bna.com/chevrons-pollution-victory-opens-door-for-companies-to-shirk-foreign-verdicts/.
[456] Chevron Corporation and Texaco Petroleum Corporation *v.* The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, First Partial Award on Track I of 17 September 2013.
[457] Chevron Corporation and Texaco Petroleum Corporation *v.* The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23, Second Interim Award, February 16, 2012, para. 3.
[458] UNICITRAL Arbitration Rules, art. 32 (2); U.S.-Ecuador BIT, art. VI (6).

the competent court, it must be decided on which state's rules of law should apply to solve the conflict when the conflict is connected to several states. The transnational claim is typically non-contractual since the victim is employed by subsidiaries, business partners and/or (sub-) contractors executing the actions or inactions of the parent company. The applicable law is therefore determined by choice of law rules in tort. The rules deciding on jurisdiction and what state's rules of law should apply to foreign direct liability cases are referred to as private international law.

Plaintiffs' forum selection has vital consequences for the way in which a dispute is resolved. This is because choice of law rules applied by states are not harmonized on the international level which leaves room for the possibility of forum shopping so that the outcome of the case depends on the choice of law framework of the state where the court is seized. Therefore, the choice of law issue cannot be considered separately from the question of the international competence of the courts.[459] The option of forum shopping has become a matter of course attracting foreign litigants to file their lawsuit in the state where both the jurisdictional framework grants access to the national court and the conflict of laws rules of the chosen state lead them to a legal framework indicating the best prospects for a favourable result. This socio-legal trend has been adopted in several cases subjecting MNCs to forum shopping in human rights litigation to the law of their home state, or another state in which they do business, rather than the laws of the state in which the alleged violation took place.[460]

In order to secure jurisdiction in the company's home state, plaintiffs must deal with public international legal orders' concepts of territoriality and state sovereignty. The point of departure in today's legal order carries on the traditional Westphalian system of sovereign nation states including its concepts of territoriality, and national interests.[461] Accordingly, each state in principle has the supreme authority to prescribe and enforce rules and regulations with respect to actors and activities within its territory.[462] Consequently, each

[459] GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 27 (2007).
[460] In re Union Carbide Corp Gas Plant Disaster at Bhopal, 634 F Supp 842 (S. D. N. Y. 1986); Doe v. Unocal Corp., 963 F.Supp. 880 (C.D.Cal. 1997); Lubbe v Cape plc, [2000] UKHL 41 (Eng.); In re South African Apartheid Litigation, 346 F. Supp.2d 538 (S.D.N.Y. 2004); Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d 111 (2nd Cir. 2010); Yao Essaie Motto & Ors v Trafigura Ltd & Trafigura Beheer, [2009] EWHC 1246 (Eng.).
[461] Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUMBIA J TRANSNAT'L L 485 (2005).
[462] Phillip Bobbit, *'Public International Law'*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 103, 104 (Dennis Patterson ed., 2005). Horatia Muir-Watt, *Private International Law as Global Governance. Beyond the Schize, from Closet to Planet* 15 (ExpressO, Oct. 20, 2011) http://works.bepress.com/horatia_muir-watt/1.

state has its own laws and a legal system that diverges to varying degrees from other states' laws and legal systems both in terms of substantive laws and the legal principles applied. The difference is most significant between states from different legal families such as common law- and civil law-families but also within more specific legal families, e.g. the Nordic legal family, there can be significant differences between the laws and the legal systems. These legal differences are due to different societal structures that in turn are consequences of the differences within the political, cultural, moral, ethical, and religious development in each state. Every state has its own notion on what is the right or just legislation on a given area and as a main rule the legislator will only provide national effect to the laws so that they can only be applied within the specific state. Exceptionally, some national rules can be made overriding mandatory internationally so that they apply in cases regardless of the extent to which the facts of the case is connected to a foreign state. Whether or not a rule is overriding mandatory internationally is decided on the basis of ordinary interpretative principles of the legal system where the law originates.[463] Apart from the exceptional case of overriding mandatory rules, national law is formed in accordance with the requirements of the society in question and not at all intended for international cases where one or more parties are from a foreign state. This is because the applicable law in each state develops in keeping with the contemporary time, e.g. corporations have been regulated throughout decades to adjust to the specific needs of the society in question just as the society has adjusted according to the law in a mutual process.

Where public international law tends to be political in character centered on state interests, private international law is traditionally perceived as a technical legal field free of state intervention and separated from public interests. However, in light of the contemporary challenges of globalization, private international law can no longer apply domestic systems of private law apolitically and neutrally. In particular, the U.S. recognizes that the conflicting interests involved in this field go far beyond the interests of the parties directly involved in a transnational private law dispute and concern also societal, public and ultimately state interests.[464] As opposed to the U.S., the EU shows certain resistance towards introducing public values in the otherwise technical world of private international law. In comparison to the litigious nature of U.S. society and the plaintiff-friendly nature of the U.S. legal system,

[463] E.g. in Danish law, the tenor of the law may imply that it is overriding mandatory or it may be stated in the *travaux preparatoire* of the law. Overriding mandatory application of a law may also be derived from case law.
[464] The increasing reliance on civil litigation to address the human rights abuses by MNCs that amount to serious criminal behavior is one example of how the public and private divide is blurred. See *infra* text accompanying note 1406.

the legal culture of EU Members States does not have the same tradition of human rights litigation and damage claims against corporations. Public issues tend to be addressed in the EU through societal dialogue and government intervention rather than solving them through public interest-related litigation.[465] In particular EU civil law countries have a tradition of relying more on mediation and conciliation[466] and less than common law countries on litigation and the consequent generation of judicial precedent to develop the law.[467] The absence of a litigation culture in the EU also derives from the notion that excessive litigation in the public interest brings about deterrence of business activities and restraints on innovation.[468] Another concern is that abuse of civil procedures for unmeritorious claims may lead to high societal costs and 'blackmail settlements' that allegedly bring claims having little merit but extract settlements in excess of the total value of the claims.[469]

Considerations in regard to the application of the law constitute the main reasons for having private international law rules. First, there is a need for predictability in the application of the law. In want of choice of law rules, an international case would have to be decided according to the law of the State, where the case is, more or less, coincidentally filed *(lex fori)*. If so, the plaintiff could decide through the forum choice on what law should apply to the case, which would provide the plaintiff with an unreasonable advantage over the defendant. The business community adjusts according to the States' rules and development of business customs and ethics, which settles in the minds of corporate legal subjects such as employees. Accordingly, in a legal matter involving e.g. a Danish corporation and an employee of a subsidiary in Bangladesh, Danish law is not necessarily the legislation that matches best with the legal and societal preconditions of the case. It is quite conceivable that the laws of Bangladesh are

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[465] Liesbeth Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT'L L. REV. 903, 905 (2009).

[466] The OECD includes in its revision of the OECD Guidelines, clearer and reinforced procedural guidance to strengthen the role of the National Contact Points (NCPs) which institutionalizes human rights mediation and complaints bodies, cf. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES, *supra* note 3, Foreword at 3. The EU Commission responded by encouraging the alternative implementation and grievance mechanisms provided by the network of NCPs established by all adhering countries. European Commission, *A renewed EU Strategy 2011 – 14 for Corporate Social Responsibility,* COM (2011) 681 final (Oct. 25, 2011), at 13.

[467] HALINA WARD, SWEDISH PARTNERSHIP FOR GLOBAL RESPONSIBILITY, LEGAL ISSUES IN CORPORATE CITIZENSHIP 32 (2003). http://pubs.iied.org/pdfs/16000IIED.pdf.

[468] Cees Van Dam, *Who is afraid of diversity? - Cultural diversity, European cooperation, and European tort law*, 20 KING'S LAW JOURNAL 281, 287 (2009).

[469] Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN L.R. 497, 577 (1991).
This empirical study concludes that a significant number of settlements are involuntary in that trial is not a viable alternative, and inaccurate in that the strength of the merits has little or nothing to do with the settlement amount.

more appropriate for the legal matter in question. The consideration to predictability in the application of the law is thereby achieved by laying down choice of law rules that generally determines which State's law the legal matter should be subjected to. Second, the expectations of the parties constitute a substantial argument in favour of choice of law rules since the parties may have certain expectations of their legal position from the way in which they have arranged their matters, for instance in the example of a Danish company establishing a subsidiary or a branch in Bangladesh, the company may have adjusted its legal matters in view of the host State's laws. The circumstance that a suit is filed in Denmark should not in itself result in the case being decided according to Danish law because there is a need to take into account the merits of the case.

Lex Loci Delicti vs. the Contacts Approach

The two most widespread choice-of-law rules in tort law cases are *lex loci delicti*, the law of the place of the tort, and the contacts approach, a discretionary, flexible, and policy-oriented approach applying the law of the state where the case has the strongest connection to. The regime of *lex loci delicti* has grown in past American practice and is the most prevalent in EU continental practice and literature in its role as the *lex actus* (the law of the country of the act) and later as the *lex injuriae* (the law of the country in which the harm was suffered).[470] The conceptual basis of *lex loci delicti* dates back to the maxim of *locus regit actum* in the 17th and 18th century. According to this doctrine, the law of the place is decisive for actions. Subsequently, *lex loci delicti* was substantiated with the theory of territorial sovereignty. The core of this theory was that the application of the law in another state than where the damage occurred would imply an infringement on the sovereignty of the tort state, which should be avoided.[471] The doctrine of vested interests developed by Joseph Beale in the beginning of the 20th century has also been used to substantiate *lex loci delicti*. Beale argued that rights founded in one state, thereby vested, should enjoy protection in other states.[472] The theoretical grounds for *lex loci delicti* were rejected in Europe in the middle of the 20th century as untenable to justify the *lex loci delicti* rule and it was instead recommended by its supporters that the rule should be substantiated in its actual motives.[473] These motives

[470] Albert A. Ehrenzweig, *Enterprise Liability*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW VOLUME III - PRIVATE INTERNATIONAL LAW c. 32, 1, 7 (Kurt Lipstein ed., 2011).
[471] CHRISTOPHER G.J. MORSE, TORTS IN PRIVATE INTERNATIONAL LAW 411 (1978).
[472] JOSEPH H. BEALE, A TREATISE ON THE CONFLICTS OF LAWS 6 (1935).
[473] Jean-Paulin Niboyet, *Traité de droit international privé français, T. II, La condition des étrangers*, 3 REVUE INTERNATIONALE DE DROIT COMPARÉ 743 (1951); Åke Malmström, *Till frågan om skadestånd utanför kontraktsförhållande inom den internationella privaträtten*, *in* FESTSKRIFT TIL PROFESSOR DR. JURIS HENRY USSING 376 (1951).

include the expectations of the parties. Nowadays, the *lex loci delicti* rule is also supported by the claim that it ensures predictability and certainty in the application of the law because the rule is clear and simple to apply. In this way, it is claimed that the considerations of the tortfeasor and the victim is taken into account at the same time when they can predict in advance which state's legal regime will apply.[474] This was also reasoned by Beitzke: 'One must ascertain the law which has the closest connection with the relations between the interested parties'[475] and Kahn-Freund: "When in Rome, do as the Romans do."[476]

However, in the field of corporate liability, possible expectations of application of the *lex loci delicti* rule cannot be conclusive since the defendant cannot expect always to be able to adjust his conduct to the law of the country in which he acts (*lex actus)*. Applying *lex loci delicti* as the *lex actus* may provide a venue for foreign direct liability claims aimed at the Western based parent company where it can be said that it is the decision made or the policies set out by this parent company in its boardrooms, or the lack of supervision exercised from those boardrooms, that have ultimately resulted in the people-related harm caused in the host country and the damage suffered by the host country plaintiffs in connection therewith.

On the other hand, considering the far-reaching operations of MNCs, a plaintiff having been harmed outside the state of the defendant's conduct may expect to have his or her claim determined under the law of the country in which the harm was suffered *(lex injuriae).* Applying *lex loci delicti* as the *lex injuriae* means that the court dealing with the dispute must formulate its judgement, with respect to the alleged wrongfulness of the corporate conduct in question causing harm to people in host States, on the basis of foreign sources of law applicable in the host State where the subsidiary operates. Not only does the *lex injuriae* pose disadvantages for host country victims such as lenient standards of corporate behavior and lower levels of damage awards compared to developed States. It is also inexpedient to have foreign law applied because a verdict would not create binding or useful precedent. This is because the court would not develop foreign law as it could do with the forum's law.[477]A

[474] Ketilbjørn Hertz, *Lovvalg i Sager om Erstatning uden for Kontrakt*, 6 JURISTEN 231(2000); Richard Fentiman, *Choice of Law in Europe: Uniformity and Integration*, 82 TULANE LAW REVIEW 2021 (2008); Phaedon J. Kozyris, *Rome II: Tort Conflicts on the Right Track! A Postcript to Symeon Symeonides 'Missed Opportunity,'* 56 AMERICAN JOURNAL OF COMPARATIVE LAW 471(2008).

[475] Günther Beitzke, *Les délits en droit international privé (Torts in Private International Law)*, 115 HAGUE RECUEIL II, 67, 80 (1965).

[476] OTTO KAHN-FREUND, DELICTUAL LIABILITY AND THE CONFLICTS OF LAWS 44 (1968).

[477] Cees Van Dam, *Human Rights Obligations of Transnational Corporations in Domestic Tort Law*, *in* HUMAN RIGHTS AND BUSINESS: DIRECT CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS 475 (Jernej Letnar Cernic & Tara Van Ho eds., 2015).

general regime of *lex loci delicti* can therefore not be supported by a policy-directed analysis based on the parties' interests or expectations which are necessarily inconsistent with each other, irrespective of whether the *lex loci delicti* is identified as the *lex actus* or the *lex injuriae*. The application of the *lex actus* does not necessarily respond to the expectations of the victim of the enterprise but the application of *lex injuriae* may disappoint both the tortfeasor and the injured since it is fortuitous. If the purpose of the application of this law is to protect the victim, the place where the accident occurred is likely to be irrelevant from the premise that the host country has lower standards for corporate conduct than the home country of the MNC. If fairness to the corporate body is the principal concern, it must be noted that, when making the decisions for the enterprise, the management may not have been able to foresee in which country an accident may occur and to include such foresights in their calculations. In sum, an argument for the *lex loci delicti* rule on the basis of its actual motives in protecting either the defendant (*lex actus)* or the plaintiff (*lex injuriae)* fails on its premise.

The *lex loci delicti* rule has also often been defended on the ground that it deserves preservation because it is well established.[478] Contemporary legal literature counters that nowhere can the *lex loci delicti* claim a general or long-standing recognition.[479] It establishes that even courts of states in which legal theory has recognized a general regime of the *lex loci delicti* have in fact applied a foreign *lex loci delicti* almost exclusively for limited purposes such as the protection of the plaintiff against a time limitation of the law of the *forum* or the protection of the defendant against an *action directe* existing under that law.[480] In favour of *lex loci delicti* it has been highlighted as a predictable conflict of laws rule since it obviously renders legal counselling less complicated than if the rules are discretionary. However, procedural cost-saving considerations cannot and should not be conclusive when drawing up a conflict of laws rule. Moreover, *lex loci delicti* is only on the face of it simple to apply. In cases implying transnational actions or omissions the rule gives rise to complicated discussions on whether the place of the tort is in the state where the act was committed or in the state where the injury occurred, or in the state where the course of actions has its closest connection.[481]

[478] ERNST RABEL, THE CONFLICT OF LAWS: FOREIGN CORPORATIONS 302 (1960).
[479] Ehrenzweig, *supra* note 470.
[480] *Id.*
[481] Bier v. Mines de potasse d'Alsace case 21/76 (CJEU); Shevill v Presse Alliance C-68/93 (CJEU).

Discretionary conflict of laws rules such as the contacts approach may also be predictable if they bring about a *lex fori*[482]-tendency which is said to be rather significant in certain states.[483] The *lex fori*-tendency implies that a judge may feel tempted to apply a discretionary conflict of laws rule so the choice of law is made in favour of his own law. This may be due to convenience considerations of judges preferring to apply their own law of which they have in-depth knowledge of instead of familiarizing themselves with and applying foreign law. Or psychological circumstances such as a presumption that one's national law is better or more modern than the foreign law in questions.[484] These circumstances point to the contacts approach in facilitating adjudication of foreign direct liability claims on the basis of the Western home country substantive norms. However, the *lex fori*-tendency is one of the key points, which the contacts approach has been criticized on pertaining to its arbitrary application. In its defence it should be noted that the risk of a *lex fori*-tendency in principle has nothing to do with the contacts approach but rather, the tendency implies that the person providing the discretion is not capable of doing it correctly. In a historical context, the contacts approach can be seen as a further development of the theory on the domicile of the legal matter, whereby the centre of gravity of the particular legal matter or its strongest connection should be found.

The contacts approach made its début in Norwegian law in 1923 in the Irma-Mignon-case[485] concerning a collision between two Norwegian ships on the English river Tyne. The leading judge of the Norwegian Supreme Court pronounced that "it seems natural to start from the position that a matter preferably should be assessed according to the law of the country, where it has its strongest connection to or to where it closely belongs to' which is why he preferred applying Norwegian law instead of English law.

Also in English law similar views have been stated in the beginning of the 1950'ies on the basis of the case *McElroy v McAllister.*[486] A Scottish resident was killed in a car accident that occurred 40 miles from the Scottish-English border. Both the tortfeasor and the victim were Scottish and employees of the same Scottish firm, which owned the vehicle involved. Nevertheless, English law was found to be the applicable law, as the *lex loci delicti.* The judgment has been cited as unsatisfactory because the widow, in accordance with the then

[482] The law of the forum, or the law of the jurisdiction where the case is pending.
[483] Bernard Hanotiau, *The American Conflicts Revolution and European Tort Choice-of-Law Thinking*, 30 THE AMERICAN JOURNAL OF COMPARATIVE LAW 73 (1982).
[484] MICHAEL BOGDAN, SVENSK INTERNATIONELL PRIVAT- OCH PROCESSRÄTT 33-35, 47 (1999).
[485] Nordisk Domssamling [ND] [Supreme Court Reports] 1923 p. 289 (Irma-Mignon) (Nor.)
[486] McElroy v McAllister, [1949] SC 110 (Scot.).

current English law was only granted compensation for funeral expenses and no other forms of compensation which would have been granted according to Scottish law.[487]

Meanwhile, the contacts approach is best known from U.S. international tort law. The theories of territoriality and vested rights were dominant in the US applying the *lex loci delicti* rule until the beginning of the 1960ies, where the courts instead changed over to applying the contacts approach. This has been referred to as "The American Revolution" of private international law.[488] Contrary to the neutral and strictly territorially based *lex loci delicti* rule, the contacts approach allows courts to take into account material justice for victims in transnational human rights litigation against corporations by applying the law that imposes a higher standard of conduct for the tortfeasor than the law of the place of the injury.

"The American Revolution" was started by a number of academics that broke away from the traditional choice of law rules considering them too formalistic. They instead introduced a flexible conflict of laws approach '"weighing" contacts and relationships' in the sense that the court takes into account external influences when determining the applicable law.[489] Two of the leading "revolutionaries" were David Cavers and Brainerd Currie. Cavers mainly argued that the courts should take into account how the choice of legal framework would affect the dispute in question in substance instead of idly choosing the applicable law.[490] Currie criticised the choice of law system for disregarding state policies and as alternative he introduced his "Governmental Interest Analysis" allowing the courts to focus upon policies expressed in the domestic laws and to analyse the respective State interests in having their policies applied to a factual scenario not confined to that one State.[491] The U.S. judges read the new theories with great interest and the breakthrough for the new theories came with the judgment *Babcock v Jackson.*[492] The court examined partly which state had the closest connection to the case and partly which state had the greatest interest in having their rules applied to the case. In spite of the flexible conflicts of laws approach adopted in the U.S., the tendency towards bringing transnational tort-based civil claims against parent companies of MNCs for social and human rights impacts caused in host countries has not been confined to

[487] John H.C. Morris, *The Proper Law of a Tort*, 64 HARVARD LAW REVIEW 881, 890 (1951)."If we adopt the proper law of a tort, we can at least choose the law which, on policy grounds, seems to have the most significant connection with the chain of circumstances in the particular situation before us."
[488] SYMEON SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION : PAST, PRESENT AND FUTURE 365 (2006).
[489] Ehrenzweig, *supra* note 470.
[490] David Cavers, *A Critique of the Choice of Law Problem*, 47 HARVARD LAW REVIEW 173 (1933).
[491] BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 48 (1963).
[492] Babcock v Jackson, 12 N.Y.2d 473 (1963). See *infra* text accompanying note 614.

U.S. federal and state courts.[493] Similar claims have been brought before courts in other Western states such as Canada, the United Kingdom, Australia and the Netherlands against MNCs incorporated there.[494] While these states have more rigid and predictable rules regarding choice of law compared to the U.S., Denmark stands out as an exception where the contacts approach is gaining ground. The following comparison of the U.S., Danish, and English approach to foreign direct liability claims for corporate operations will endeavour to demonstrate a move in Danish private international law towards a U.S. contacts approach away from the starting point of the *lex loci delicti* rule in EU law adopted by England. Comparing American, English, and Danish law is also useful for an examination of the extent to which their systems for corporate liability differ considering their foundation in the distinct legal groups of common law and Nordic law.

Comparative Review of Transnational Litigation

United States

Jurisdiction

In terms of practical feasibility for litigation, it should be noted that each of the fifty states in the U.S. has its own court system. In addition, the federal government maintains a national court system with 94 federal district courts, including one or more in each state, with jurisdiction to hear nearly all categories of federal cases. The 94 judicial districts are organized into 12 regional circuits, each having a U.S. court of appeals. The U.S. Supreme Court is the highest court in the federal judiciary and the Court only agrees to decide cases where there is a split opinion among the courts of appeals or where there is an important issue of federal law that needs to be clarified.[495] The practical feasibility of running the case may depend on the choice of court since each state system as well as the federal system have their own procedural law. The most important procedural factor for a foreign direct liability claim is the possibility of class action lawsuits. Class action lawsuits are predominantly a U.S.

[493] Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 451 (2001).
[494] Association canadienne contre l'impunité v. Anvil Mining Limited [2012] S.C.C. 34733 (Can.); Lubbe v Cape plc, [2000] UKHL 41 (Eng.); Dagi v BHP [1997] 1 VR 428 (Austl.) ; Oguru et al. v. Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd. [District Court of the Hague], Jan. 30, 2013, Case No. 330891/HA ZA 09-0579 (Neth.); Oguru et al. v Shell Petroleum N.V. and The "Shell" Transport and Trading Company Limited [District Court of the Hague], Jan. 30, 2013, Case No. 365498/HA ZA 10-1677 (Neth.)
[495] THOMAS F. HOGAN, THE FEDERAL COURT SYSTEM IN THE UNITED STATES: AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATORS IN OTHER COUNTRIES (2010).

phenomenon which makes American courts a more attractive forum for class action plaintiffs than European courts.

Usually, the plaintiff is a group of employees or nearby residents to the subsidiary or contractor that have enough in common to constitute a class, allowing for the case to be filed as a class action lawsuit.[496] As opposed to mass litigation, through which a number of individual claims are brought and grouped together because of their similarity, class action litigation is constituted by one individual claim asserted to represent a class of others, whose owners are bound by the result of the single claim.[497] The possibility of class actions provides the plaintiffs with financial advantages, since costs of litigation are considerable, and also better opportunities for legal aid since claims that are too small to cover the cost of litigation are not pursued. Also, class action lawsuits provide procedural advantages when several victims pursue liability in one case, which increases the efficiency of the legal process.

An important change for foreign direct liability cases within class action regulation came in 1912 under Rule 38 providing the possibility of absence which is imperative for foreign direct liability cases where the violations occur in numerous countries around the world hosting the multinational company's business operations. In addition, foreign direct liability cases are often filed by hundreds, thousands or even millions of persons in the class.[498] Since 16 September 1938, all types of class actions have been governed by the same class action rules under the Federal Rules of Civil Procedure.[499] This is the case for U.S. Federal Class Actions and also for most state class action rules with a few exceptions. Some states like Virginia does not provide for any class actions, while New York limits the types of claims that may be brought as class actions. To constitute a class, Rule 23a of the Federal Rules of Civil Procedure provides that: 1) There must be a class so numerous that joinder of all

[496] In Wal-Mart Stores, Inc. v. Dukes et al., 564 U.S. 131 (2011) the Supreme Court ruled that 1.6 million women employed by Wal-Mart since 1998, in app. 3.400 stores across the U.S. alleging gender discrimination did not have enough in common to constitute a class.
[497] Ulrich Magnus, *Why is US tort law so different?* 1 JOURNAL OF EUROPEAN TORT LAW 102, 115-116 (2010).
[498] See e.g. First Amended Class Action Complaint for Injunctive Relief and Damages, Doe v. Wal-Mart Stores, No. CV 05-07307-NM(MANx), *supra* text accompanying note 419 filed individually under placeholder names Jane Doe and John Doe on behalf of workers in China, Bangladesh, Indonesia, Swaziland, Nicaragua and California.
[499] Cf. Federal Rules of Civil Procedure Rule 23. Class actions may be brought in federal court if the claim arises under federal law or if, pursuant to 28 United States Code (U.S.C.) § 1332(d) the amount in controversy exceeds $5,000,000 and 1) any member of a class of plaintiffs is a citizen of a State different from any defendant; or 2) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
3) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

members is impracticable, 2) There must be questions of law or fact common to the class, 3) One or more persons who are members of the class may sue or be sued as representatives of everyone in the class if their claims or defences are typical of the claims or defences of the class on the premise that 4) They will fairly and adequately protect the interests of the class. Often, the corporate defendant also has an interest in class action litigation since it will require substantial assets to pay all of the potential judgments individually and class treatment is also sought to facilitate settlement of all claims against the defendant. The Federal Rules of Civil Procedure do not cover all situations, in which case the district courts are permitted to formulate their own rules for practice and procedure.[500]

Throughout the 1960s, 1970s and 1980s, class action plaintiffs within the African-American civil rights movement, environmentalism and consumerism have paved the way for a favourable practise for class action certification. This was especially called for during the important development paving the way for class action certification taking place during the 1980s. Several class action claims were filed in the wake of at least 21 million American workers having been exposed to significant amounts of asbestos at the workplace.[501] One of them was *Jenkins v. Raymark Indus. Inc*.[502] in which the Circuit Judges affirmed the decision of District Judge Parker to certify a class of plaintiffs with asbestos-related claims. The judges agreed on the procedural advantages that "Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues with, as that experienced judge says, "days of the same witnesses, exhibits and issues from trial to trial."[503] Business and human rights litigators have also pointed out that compared to Europe and other jurisdictions such as Australia and Canada that have a "lose and pay" system, U.S. courts provide a more attractive forum because the "loser pays" principle does not apply to the U.S. legal system and therefore it is less financially risky to take the case before U.S. courts.[504]

A U.S. court generally has competence to adjudge a foreign direct liability claim when the court has both personal jurisdiction over the allegedly liable corporate defendant and subject-

[500] HOGAN, *supra* note 495, at 160.
[501] Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L.REV. 37, 37 n. 1 (1983).
[502] Jenkins v. Raymark Indus. Inc. 782 F.2d 468 (5th Cir. 1986).
[503] *Id.*, at 475.
[504] Jonathan Kaufman, Earthrights International, Corporate Accountability for Human Rights Abuses: Litigation and Other Avenues for Justice, Brown Bag Lunch Series at Leitnar Centre, Fordham Law School (Sep. 24, 2013).

matter jurisdiction over the claim itself.[505] Personal jurisdiction is granted if the defendant has 'minimum contacts' with the forum.[506] This liberal approach to personal jurisdiction implies that both a corporate defendant incorporated in the U.S. and a foreign corporation that has substantial ongoing business relations within the U.S. are subject to U.S. courts' jurisdiction even for their extraterritorial activities.[507] Consequently, U.S. courts may also assume personal jurisdiction over for instance EU parent companies of MNCs merely on the basis of the presence within the jurisdiction of local affiliates. Nearly all of the 500 largest MNCs have a presence in the U.S. sufficient to support territorial jurisdiction over them. This liberal approach to personal jurisdiction implies for a corporate defendant that the mere fact that a corporation has business activities within the forum - meaning that it has substantial, ongoing business relations there - may provide U.S. courts with personal jurisdiction over it.[508]

However, what constitutes sufficient "minimum contacts" has been defined in a more recent case, where the U.S. Supreme Court applied a strict interpretation to the "minimum contacts" requirement. In *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*[509] the issue was whether a U.S. state court could have personal jurisdiction to decide a case against a foreign subsidiary of a U.S. corporation that lacked any organised or continuous business relationship with the state. Goodyear USA and three of its subsidiaries in Turkey, Luxembourg and France were sued in North Carolina by the parents of two American boys that were killed in a bus accident in France. The parents alleged that the bus accident was the consequence of a defective tire manufactured at the Turkish subsidiary of Goodyear. The trial court found that the state of North Carolina had personal jurisdiction in the case, since Goodyear USA was based in North Carolina, and the three foreign subsidiaries' products were distributed in the state through the stream of commerce. This was affirmed by the North Carolina Court of Appeals, however the Supreme Court reversed the decision, holding that the foreign subsidiaries lacked a significant connection to North Carolina to provide for personal

[505] BORN & RUTLEDGE, *supra* note 459, at 8.
[506] *International Shoe Co v State of Washington*, 326 U.S. 310 (1945). In this landmark case, the Court pronounced on the level of connection that must exist between a non-resident corporation and a state in order for that corporation to be sued within that state:'[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such as the maintenance of the suit does not offend "traditional notions of fair play and substantial justice.' *Id*. at 316.
[507] See *Blackmer v. the United States* 284 U.S. 421 (1932). A U.S. citizen residing in Paris was found guilty for contempt for refusing to appear as witness for the US in a criminal trial on the Teapot Dome Scandal.
[508] However, Jesner v. Arab Bank, PLC, No. 16-499 (U.S. Apr. 24, 2018) has limited ATS jurisdiction to U.S. corporations, *infra* note 598.
[509] Goodyear Dunlop Tires Operations, S. A. v. Brown 131 U.S. 2846 (2011).

jurisdiction. Associate Justice Ginsberg, who delivered the opinion for a unanimous Court, pronounced that the defendant must be "essentially at home", which is the case when the defendant has continuous and systematic contacts with the forum state, and the claim that arises is related to those contacts.[510] The sales of petitioners' tires sporadically made in North Carolina through intermediaries did not suffice to support the exercise of jurisdiction over a claim that neither arose out of, nor related to, the petitioners' activities in North Carolina.

Subsequently, *Goodyear* was clarified by the Supreme Court in *Daimler AG v Bauman.*[511] Daimler AG, a German based public stock company was sued by Argentine plaintiffs who were former workers at the Gonzalez-Catan plant of Mercedes-Benz Argentina, a wholly owned subsidiary of Daimler's predecessor in interest. The twenty-two Argentines alleged that MB Argentina organized with the Argentine military and security forces to kidnap, detain, torture and kill plant workers, during the "Dirty War" from roughly 1974 to 1983. Plaintiffs and relatives alleged they were victims, because MB Argentina suspected them of being Union agiators. They filed suit under the federal Alien Tort Statute (ATS)[512] and Torture Victim Protection Act (TVPA)[513] seeking to hold Daimler liable under a theory of vicarious liability. Justice Ginsburg ruled that California could not exercise personal jurisdiction over Daimler because Daimler was not "at home" in California.[514] The "paradigm" places where a corporation can be "fairly regarded" as at home are its place of incorporation and its principal place of business which for Daimler was not in California.[515] However, Justice Ginsberg remarked that personal jurisdiction may apply in an "exceptional case" in which a corporation's operations in a forum other than its place of incorporation and principal place of business are "so substantial and of such a nature as to consider the corporation at home in that State".[516]

Significant limitations to the feasibility of pursuing foreign direct liability lawsuits may also arise from the procedural obstacle of *forum non conveniens*.[517] The most prominent example

[510] 'A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the ''continous and systematic" affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contracts with the state.' *Id.* at 3.
[511] Daimler AG v. Bauman 134 U.S. 746 (2014).
[512] See *infra* text accompanying note 525.
[513] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note § 2(a) (2012)). See *infra* text accompanying note 549.
[514] *Daimler* 134 U.S. at 751.
[515] *Id.* at 760.
[516] *Id.* at 761.
[517] See *supra* text accompanying notes 435-436.

is the *Bhopal* case[518] regarding the aftermath of the leak of 40 tons of poisonous gas from a pesticide plant in Bhopal operated by Union Carbide India killing 16.000 people and injuring 50.000. The damages amounted to such an extent that the company did not have the financial means to pay compensation. The victims sued the parent company Union Carbide Corporation claiming it managed the construction of the plant. Before the U.S. courts, the parent successfully argued that the victims' claims were not admissible on the basis that the Indian legal system was adequate for the gas victims to seek justice. The U.S. District Court dismissed for *forum non conveniens* which was affirmed by the U.S. Court of Appeals.[519] Since then *forum non conveniens* has been pleaded by defendant corporations in virtually all U.S. transnational human rights cases. Although the common law doctrine is a daunting obstacle for victims' resolution before U.S. courts,[520] it can be overcome.[521] Especially, if plaintiffs provide evidence, such as State Department Reports, that an alternative forum is too corrupt or totalitarian to provide justice to the case.[522] In the case *Mujica v. Occidental Petroleum Corp.* [523] the plaintiffs successfully rebutted the defendants' dismissal claim for *forum non conveniens* by arguing that the company OXY made all its decisions in Los Angeles and the subsidiary company and board members were no longer in Peru so the Peruvian court would not be able to bring them to trial. The probability of a dismissal on a

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[518] In re Union Carbide Corp Gas Plant Disaster at Bhopal, 634 F Supp 842 (S. D. N. Y. 1986).
[519] In re Union Carbide Corp Gas Plant Disaster at Bhopal, 809 F 2d 195 (2nd Cir. 1987).
[520] See Aguinda v. Texaco Inc., 303 F.3d 470 (2nd Cir. 2002). Complaints filed by indigenous Amazon rainforest communities against Texaco, about environmental and personal injuries, dismissed for *forum non conveniens*. Abdullahi v Pfizer, Inc., No. 01 Civ. 8118 (WHP), 2005 WL 187011, (S.D.N.Y., Aug. 09, 2005). Complaints filed by Nigerian children and their guardians against Pfizer, regarding deadly and mutilating medical experiments, dismissed for lack of subject matter jurisdiction and *forum non conveniens.* (reversed and remanded to the district court in Abdullahi v Pfizer, Inc., 562 F.3 d 163 (2nd Cir. 2009)). Flores v Southern Peru Copper, 343 F.3d 140 (2nd Cir. 2003). Complaints filed by Peruvians against Southern Peru Copper Corporation, regarding pollution and personal injury, dismissed for lack of subject matter jurisdiction and *forum non conveniens*.
[521] Wiwa v Royal Dutch Petroleum 226 F.3d 88, 2000 U.S. App. LEXIS 23274, at *7 and *14 (2nd Cir. 2000). The Court of Appeals reversed the district court's *forum non conveniens* dismissal finding that the district court did not accord proper significance to a choice of forum by U.S. resident plaintiffs or to the policy interest implicit in federal statutory law in providing a forum for adjudication of violations of the law of nations.
[522] See Sarei v Rio Tinto Plc, 221 F. Supp 2d 111 (C.D. Cal. 2002). In this case, the District Court found that the personal safety of plaintiffs would be in danger if the action was litigated in Papa New Guinea and: 'There is evidence in the record that PNG's courts are congested, and that it has taken them several years to resolve complex cases similar to this one.' *Id*. at 1174 - 1175. Presbyterian Church of Sudan v Talisman Energy, 244 F. Supp 2d 289 (S.D.N.Y. 2003): 'In light of the almost self-evident fact that, if plaintiffs' allegations are true, plaintiffs would be unable to obtain justice in Sudan and might well expose themselves to great danger in trying to do so, the Court finds that Sudan is not an appropriate forum under *forum non conveniens* analysis.' *Id*. at 336.
[523] Mujica v. Occidental Petroleum Corp. (Re Colombia), 381 F. Supp. 2d 1134 (C.D. Cal. 2005).

forum non conveniens basis is significantly higher in cases where the alternative foreign court is located in a liberal democracy than in cases where it is not.[524]

Apart from the procedural obstacles of personal jurisdiction and *forum non conveniens,* a U.S. court must also have subject-matter jurisdiction over the claim itself. Whether the court has subject-matter jurisdiction over a particular claim depends on the specific legal grounds upon which plaintiffs have based their case. A significant statute for federal subject-matter jurisdiction relevant for foreign direct liability claims is the Alien Tort Statute (ATS).[525] Adopted as part of the Judiciary Act in 1789, it was originally intended to assure foreign governments that the U.S. would act to prevent and provide remedies for breaches of customary international law[526] especially breaches relating to a wave of piracy in the Carribbean in the late 18th century.[527] The ATS is strictly directed at aliens prescribing that 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[528] Accordingly, the ATS is strictly jurisdictional and does not directly regulate conduct or afford relief.[529] It instead allows U.S. federal courts to recognise certain causes of action filed by a non-U.S. plaintiff based on customary international law and *jus cogens* norms[530] and treaties ratified by the U.S.

Commencing with the *Filartiga v. Peña-Irala*[531] case in 1980, several transnational human rights cases have been pursued in the past decades under the ATS making it the most important jurisdictional venue for these cases so far. In *Filartiga*, the Paraguayan married couple Dolly and Joel Filartiga successfully sued a Paraguayan police inspector-general for murder and torture of their 17- year-old son granting them $10 million in damages. This case broke new ground setting precedent for U.S. federal courts to hear a claim under the ATS brought by aliens concerning tortious acts committed outside the U.S. in violation of

[524] Christopher A. Whytock, *The Evolving Forum Shopping System* 96 CORNELL L. REV 481, 519 (2011).
[525] 28 U.S.C. § 1350. (2012). The ATS is also known as the Alien Tort Claims Act (ATCA).
[526] See Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish ... Offenses Against the Law of Nations,* 42 WM. & MARY L. REV., 447, 490-91, 520-24 (2000) (discussing history of ATCA).
[527] Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004): 'Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.'
[528] 28 U.S.C. 28 U.S.C. § 1350.
[529] See *Sosa* 542 U.S. at 713: 'As enacted in 1789, the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law.'
[530] See Alvarez – Machain v U.S. 331 F.3d 604, 635 (9th Cir. 2003): 'Nonetheless, we must also take into account the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations.'
[531] Filartiga v. Peña-Irala, 630 F 2d 876 (2nd Cir. 1980).

international law consequently rebutting the canon of statutory interpretation known as the presumption against extraterritorial application.[532] Since *Filartiga,* U.S. federal courts have upheld ATS jurisdiction in corporate civil liability cases[533] when plaintiffs have proven that the human rights violation at issue breached customary international law. E.g. *Doe v. Unocal*[534] regarded ATS claims for violations of customary international law committed by government security forces providing security on an overseas oil project of subsidiaries of a U.S. corporation. The claims were made against the parent corporation through attributional links including allegations that the subsidiaries aided and abetted the commission of a crime against humanity by the security forces and that the subsidiaries acted as agents of the parent company. Unocal's subsidiaries were participants in the Yadana gas pipeline project and plaintiffs argued that the subsidiaries were responsible for the forced labour allegedly imposed by the Burmese military who were providing security for the project. The Ninth Circuit held that the plaintiffs needed to demonstrate that Unocal knowingly assisted the military in perpetrating the abuses and concluded that plaintiffs had presented enough evidence to go to trial, however Unocal ended the lawsuit by settlement. Accordingly, plaintiffs must demonstrate that international law extends the scope of liability for a violation of a given norm to the perpetrator being sued. In *Sosa v. Alvarez-Machain*[535] the U.S. Supreme Court established a threshold question to the plaintiff as to whether it can be demonstrated that the alleged violation is "of a norm that is specific, universal and obligatory."[536] Federal courts must require any claim to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the original violations of the law of nations under the statute, i.e. violation of safety conducts, infringement of ambassadors' rights, and piracy.[537] Only a few courts have required plaintiffs to prove that the alleged violation was in breach of a *jus cogens* norm for applying

[532] Benz v. Compania Naviera Hidalgo S. A., 353 U.S. 138 (1957): In this case, the U.S. Supreme Court found that the Labor Management Relations Act of 1947 did not apply to a damage claim resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel was temporarily in an American Port. This was in spite of the fact that American unions participated in the picketing. An explicit content of congress was lacking: 'For us to run interference in such a delicate field of international relations, there must be present the affirmative intention of the Congress clearly expressed.' *Id*. at 147.
[533] Eastman Kodak Co. v.. Kavlin 978 F.Supp. 1078 (S.D.Fla. 1997), Wiwa v Royal Dutch Petroleum 226 F.3d 88, 2000 U.S. App. LEXIS 23274 (2nd Cir. 2000), John Doe et al. v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002), Licea v. Curacao Drydock Co. 584 F. Supp. 2nd 1355 (S.D.Fla. 2006), Ntsebeza v. Daimler, Khulumani v. Barclays International, 617 F. Supp.2d 228 (S.D.N.Y. 2009) (In Re South African Apartheid Litigation); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. 2011).
[534] *Unocal Corp,* 395 F.3d.
[535] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). See *infra* text accompanying note 576.
[536] *Id*. at 732.
[537] *Id*. at 725.

ATS jurisdiction.[538] Most cases have been settled before a final judgment could be handed down, or dismissed for *forum on conveniens,* or lack of subject matter jurisdiction.

Only in a few cases, U.S. federal courts have decided on the substantive tort claims, in which most of them fell out in favour of the defendants. These verdicts were the result of jury trials.[539] E.g. the case *Bowoto v. Chevron*[540] went to trial in the federal U.S. court in San Francisco under the ATS seeking to hold Chevron liable for egregious human rights abuses arising from its alleged complicity with the notorious Nigerian military and "kill and go" mobile police against members of the Ilaje community of the Niger Delta. The case was allowed to proceed by the U.S. federal court on the basis of California state claims of wrongful death, theft by coercion and assault and battery, negligence and intentional torts but ended in complete defense verdict for the corporation. In comparison, *Doe v. Wal-Mart Stores*[541] was also based on California State law as well as the ATS but the plaintiffs faced a distinct challenge from plaintiffs in Chevron since the negligence claim was based on the failure to monitor suppliers' factories only connected to the defendant by contract as opposed to a fully owned subsidiary. Another example of jury trials are the Drummond cases in which the families of three deceased Colombian labour leaders filed suit against Drummond Company, Inc. and its fully owned subsidiary Drummond Ltd. in U.S. District Court of Alabama. Plaintiffs alleged that Drummond hired Colombian paramilitaries to kill and torture three labour leaders in 2001. The jury acquitted Drummond finding that the company was not liable due to lack of sufficient evidence.[542] A favourable decision for plaintiffs is *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*[543] which is the first jury verdict against a corporation for torture, as well as a similar verdict against the corporation's representative. Evidence produced at trial demonstrated that in 2007, Mr. Chowdhury was detained for 5 months and subjected to torture by the Rapid Action Battalion (RAB), a united of the Bangladeshi Police known for committing torture. Mr. Khan, the representative at Worldtel, filed false criminal charges against Mr. Chowdhury and contacted the RAB for the express purpose of having the

[538] Xuncax v. Gramajo 886 F Supp 162, 179, 183 (D Mass 1995); Sarei v. Rio Tinto PLC, No. 02-56256, slip op. at 19361 (9th Cir. Oct. 25, 2011).
[539] Note that one case reaching a decision on the substantive tort claim in favour of the plaintiffs, *Filartiga* 630 2nd Cir. was litigated under the ATS and customary international law as applicable law and not ordinary tort jurisdiction and state tort law.
[540] Bowoto v Chevron, No. 99CV02506(SI), 2008 WL 5264690 (N.D. Cal. 2008).
[541] Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009). See *supra* text accompanying note 419.
[542] Locarno v. Drummond, Ltd.; Jimenez, JVR No. 478482, 2007 WL 4855173 (N.D.Ala. 2007) and Soler v. Drummond, Ltd.; Jimenez, JVR No. 478483, 2007 WL 4855174 (N.D.Ala. 2007).
[543] Chowdhury v. Worldtel Bangladesh Holding, Ltd., No. 08 Civ. 1659(BMC) 2009 WL 9053203 (E.D.N.Y. 2009).

RAB take action against him. He made it clear to Mr. Chowdhury's family that the torture would stop only if he turned over control of his company to the defendants and left Bangladesh. The case included claims under the ATS and the TVPA. The jury found that both defendants were liable for torture and awarded compensatory damages of $1.5 million and an additional $250.000 in punitive damages against Mr. Khan. However, defendants appealed and the verdict was affirmed for the TVPA part but reversed for the ATS part[544] in light of the subsequent decision *Kiobel v. Royal Dutch Petroleum Co.*[545] limiting the extraterritorial application in ATS claims.

ATS litigation was first limited in September 2010, when the Second Circuit Court of Appeals in *Kiobel v. Royal Dutch Petroleum*[546] rejected corporate liability under the ATS. The case was a class action claim filed by Esther Kiobel, individually and on behalf of her late husband, outspoken Ogoni leader, Dr. Barinem Kiobel who was sentenced to death and executed in 1995 along with 8 other male protestors collectively known as "the Ogoni 9".[547] Other Nigerian plaintiffs residing in the Ogoni Region of Nigeria took part in the claim covering rougly 2000 Ogoni deaths. Plaintiffs claimed that Dutch incorporated Royal Dutch Petroleum Company and the British incorporated Shell Transport and Trading Company PLC, through a subsidiary incorporated in Nigeria named Shell Petroleum Development Company of Nigeria, Ltd. aided and abetted the Nigerian government in committing human rights abuses in violation of the law of nations. The subsidiary was engaged in oil exploration and production in the Ogoni region of Nigeria since 1958 which caused residents of the Ogoni region to start the 'Movement for Survival of Ogoni People' to protest against the environmental effects. In 1993 the defendants allegedly responded by aiding and abetting the Nigerian government to suppress the demonstrators' resistance. The alleged actions were said to take place throughout 1993 and 1994 carried out by Nigerian military forces involving shooting and killing Ogoni residents, attacking Ogoni villages, beating, raping, torturing, and prolonged arbitrary arrest and detention of residents, as well as destroying or looting property with the assistance of defendants. The assistance of defendants amounted to 1) providing transportation to Nigerian forces 2) Allowing their property to be utilized as a staging ground for attacks 3) providing food for soldiers involved in the attacks, and 4) providing

[544] Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F. 3d 42 (2nd Cir. 2014).
[545] Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013).
[546] Kiobel v. Royal Dutch Petroleum Co., 621 F. 3d 111 (2nd Cir. 2010).
[547] *Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni 9 as Writ Served in Dutch Court*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/ (last visited Apr. 26, 2018).

compensation to those soldiers. The Second Circuit Court of Appeals looked to customary international law to determine both whether certain conduct leads to ATS liability and whether the scope of liability under the ATS extends to the defendant being sued. The majority of the court reasoned that corporate liability is not a rule of customary international law applicable under the ATS, because corporate liability is not recognized as a specific, universal, and obligatory norm. Inter alia the majority drew parallels to the TVPA as a similar rule to the ATS and the U.S. Supreme Court's standing on the TVPA. In brief, the TVPA states that an individual, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extrajudicial killing shall be held liable for damages in a civil action. In the case *Mohamad v Palestinian Authority*[548], regarding a Palestinian political organisation's alleged control of torture and killing of a Palestinian American, the U.S. Supreme Court held that the term 'individual' only encompasses natural persons and therefore does not impose liability on legal entities such as corporations.[549]

Consequently, according to the majority opinion, imposing civil claims on corporations directly based on customary international law has not reached a discernible, much less universal, acceptance among nations of the world in their relations. For that reason the court concluded that corporate liability falls outside the limited subject matter jurisdiction provided by the ATS. The Second Circuit was the first and only appellate court to reject corporate liability for torts in violation of international law under the ATS. Circuit Judge Leval derogated strongly from the majority opinion calling it 'strange' and 'illogical' on nine separate occasions[550] and criticized their analysis as 'internally inconsistent'.[551] He conceded that international law of its own force, imposes no liabilities on corporations or other private juridical entities but held that the law of nations takes no position on whether its norms may be enforced by civil actions for compensatory damages. According to Judge Leval, corporate liability must be accepted based on principles of domestic law unless the law of nations pronounces that 'acts of corporations are not covered by the law of nations'.[552] He concluded that no principles of domestic or international law support the majority's conclusion that the norms enforceable through the ATS apply only to natural persons and not to corporations and

[548] Mohamad v Palestinian Authority, 132 U.S. 1702 (2012).
[549] *Id*., at 1705.
[550] *Kiobel* 621 F. 3d at 151,152, 154, 164, 165, 166 n. 18, 168, 174, 185, 186.
[551] *Id*, at 152 - 153, 174.
[552] *Id*., at 175.

that corporate liability is a matter of 'remedy' which 'international law leaves to the independent determination of each State'.[553]

Upon review of the Second Circuit's *Kiobel* decision, the U.S. Supreme Court addressed very little the legal personality of corporations under the ATS[554] when making the long-awaited decision on April 17, 2013[555] for the future of foreign direct liability claims before U.S. federal courts. Instead the Court had ordered a supplemental briefing and a second oral argument from the plaintiffs on whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the U.S.[556] Restricting to some extent plaintiffs' odds for seeking redress through transnational civil litigation, the Court ruled that nothing in the ATS rebuts the canon of statutory interpretation known as the presumption against extraterritoriality which provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none.' [557] The presumption against extraterritorial application "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." [558] The key propositions of the court included that the First Congress had originally intended for the ATS to provide compensation for violation of safe conducts and infringement of the rights of ambassadors occurring within the U.S. as well as piracy occurring on the high seas beyond the territorial jurisdiction of the U.S. or another sovereign. From this outset, the Court reasoned that when a plaintiff injured by today's pirates, such as torturers, murderers, and the equivalent takes action under the ATS for conduct involving the territory of another sovereign, there is a need for judicial caution in considering which claims can be brought under the ATS in the light of possible direct foreign policy consequences.[559] The decision limits future corporate foreign direct liability claims under the statute to claims that touch and concern the territory of the U.S., in the sense that they must do so with sufficient force to displace the presumption against extraterritorial application. In assessing the 'touch and concern' requirement, the Court placed great emphasis on the fact that the

[553] *Id*, at 176.
[554] The U.S. Supreme Court subsequently resolved whether corporations can be held liable under the ATS for human rights violations and terriorism in Jesner v. Arab Bank, PLC, No. 16-499 (U.S. Apr. 24, 2018). *See infra* text accompanying note 598.
[555] *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013).
[556] *Kiobel v. Royal Dutch Petroleum Co.* 132 U.S. 1738 (2012).
[557] Morrison et al v. National Australia Bank Ltd. et al, 529 U.S. 698 (2010) concerning the extraterritorial application of U.S. securities legislation.
[558] EEOC v. Arabian American Oil Co. 499 U.S. 244, 248 (1991).
[559] *Kiobel* 133 U.S., at 1664.

plaintiffs were not U.S. nationals but nationals of other nations, all the relevant conduct in the case took place outside the U.S., and the plaintiffs did not allege that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so. The Court pronounced that these facts and the mere corporate presence of the defendants through an investor's office in the U.S. did not suffice to overcome the presumption against extraterritorial application.[560]

The majority opinion did not provide any guidance as to what claims might qualify for extraterritorial application of ATS jurisdiction. One of the court's liberals, Justice Breyer, disagreed with the opinion but concurred with the majority that the presumption is not overcome simply because, like in this case, the foreign corporation's shares are traded on the New York Stock exchange and the corporation's presence in the U.S. consists of an office in New York City helping to explain their business to potential investors. Justice Breyer interprets the statute, with guidance from principles and practises under foreign relations law, as providing jurisdiction only where distinct American interests are at issue. This is, according to Breyer, the case in three circumstances (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) in cases where the defendant's conduct 'substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind'.[561]

Court conservative Justice Anthony M. Kennedy joined the rest of the court conservatives' majority opinion albeit providing some clarity on qualification of future claims under the ATS noting that the decision was narrow enough to 'leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute' and that 'proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation'.[562] According to Justice Kennedy, qualified claims may amount to allegations of serious violations of international law principles protecting persons covered neither by the TVPA nor by the reasoning and holding of the *Kiobel* case.[563] Similarly, Justice Alito argued in a separate concurring opinion addressing the Court's requirement for rebutting the presumption against extraterritoriality that 'This formulation

[560] *Id.* at 1677.
[561] *Id.* at 1671.
[562] *Id.* at 1668.
[563] *Id.* at 1669.

obviously leaves much unanswered.'[564] A strong version of the presumption would imply that claims under the ATS can only be permitted if they are based on U.S. conduct allegedly violating a limited scope of international law norms.[565] However, the Kennedy and Alito concurrences strongly suggest that much less has been decided by the Court than what some commentators have already read into the decision as amounting to the death of the ATS.[566] Their concurrences strongly imply that their votes to the 9 – 0 decision had the necessary prerequisite that the 'touches and concerns the territory of the United States' requirement was left open. They also indicate that the presumption against extraterritoriality applied in this case is confined to the particular circumstances of the case, i.e. a foreign corporation aiding and abetting acts in a foreign country, and does not necessarily extend to other cases with other facts. The Court could not have applied the actual canon of the presumption against extraterritoriality since it regards substantive domestic statutes and not jurisdictional ones.[567] Unlike substantive domestic statutes in question in other cases applying the canon, the ATS does not regulate conduct or afford relief. If the Court was actually applying the canon presumption against extraterritoriality for jurisdictional statutes, then also the general enabling statute under the U.S. constitution for jurisdiction for federal courts § 1331 would have been excluded from extraterritorial cases but there is no indication that the Court did that. The Court must have applied only principles underlying the presumption leaving the question as to whether ATS covers actions taking place abroad for the federal courts to craft an answer in a common law concept formed by the presumption against extraterritoriality.

It seems that the Court's main concern is foreign policy considerations while it left on the table for future cases to interpret whether some acts taken in the U.S. that furthers the violations may be sufficient to meet the requirement that the tort must 'touch and concern' the U.S. Although Justices Alito and Kennedy do not explicitly adhere to Justice Breyer's three-tier test, they leave open the possibility that the test may fit into the majority opinion. In

[564] *Id.*
[565] Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/.
[566] *See Id.* Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries* ASIL INSIGHTS (Apr. 18, 2013), http://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign.
[567] See e.g. Morrison et al v. National Australia Bank Ltd. et al, 529 U.S. 698 (2010), in which Australian petitioners filed a suit under §§10(b) and 20(a) of the Securities and Exchange Act of 1934 and SEC Rule 10b–5 against an Australian bank owning a mortgage company in Florida; See also Sale v Haitian Centers Council Inc. 509 U.S. 155 (1993) in which organizations representing interdicted Haitians contended that an executive order violated § 243(h)(1) of the Immigration and Nationality Act of 1952. In both cases, the U.S. Supreme Court held that the domestic statutes did not apply envoking the presumption against extraterritoriality.

future cases, Justice Breyer's three tier test could be the applicable test for ATS jurisdiction, considering that the majority opinion does not reject it and other common law doctrines such as *forum non conveniens*, exhaustions of remedy[568], political question doctrine[569] can be reconciled with the Breyer test.

In addition, previous opinions of the Court may provide some clarification on the extent to which the presumption against extraterritoriality applies. It was established in *Sale* that the presumption against extraterritoriality applies regardless of whether there is a risk of conflict between the Act of Congress in question and a foreign law.[570] Conducts that 'touch and concern' the territory of the U.S. relevant to human rights litigation for injuries occurring abroad have been specified as design, manufacture or testing of products,[571] financing,[572] supervision or management,[573] conduct in territory under the control of the United States[574], or conduct in a 'failed State' that may not qualify as a foreign sovereign because it fails to meet basic conditions and responsibilities of a sovereign government.[575] The Supreme Court's first opinion on the ATS in *Sosa v. Alvarez-Machain*[576] provides some guidance on the kind of conduct that touches and concerns U.S. territory. The case was filed by Alvarez, a Mexican national of a Mexican drug cartel, for being captured in Mexico by Mexican nationals hired by the U.S. Drug Enforcement Administration (DEA) to hold Alvarez accountable for kidnapping and murdering a U.S. special agent of the DEA. The Court found that the DEA's plan to capture Alvarez was developed on U.S. soil and therefore covered by the ATS. The Supreme Court pronounced that supervision or management constitute conducts that touch and concern the territory of the U.S. So even though the restricted interpretation of the scope of the ATS to some extent limits plaintiffs' odds for seeking redress through transnational civil litigation before U.S. courts, there is a chance that the statute may be invoked in cases against U.S. parent corporations if the conduct causing the

[568] The doctrine of exhaustion of remedies prevents a litigant from seeking a remedy in a new court or jurisdiction until all claims or remedies have been exhausted (pursued as fully as possible) in the original one.
[569] Under the political question doctrine, the court can decide to refuse to hear a case if the question is fundamentally political on the grounds that legal questions are justiciable, while political questions are nonjusticiable and fall outside the authority of the court system.
[570] *Sale*, 506 U.S. at 173 – 174.
[571] Khulumani v. Barclays International, 617 F. Supp.2d 228, 545 (S.D.N.Y. 2009) (In Re South African Apartheid Litigation).
[572] *Id.* at 545.
[573] Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).
[574] Al Shimari v. CACI Int'l, Inc. 758 F.3d 516 (4th Cir. 2014) on liability for human rights violations in Iraq under the 2003 Iraq War. See *infra* text accompanying note 577.
[575] Yousuf v. Samantar 699 F.3d 763 (4th Cir. 2012) where Somalia did not meet the conditions under the Foreign Sovereign Immunities Act, Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611 of the United States Code, of a foreign sovereign nation in order to grant immunity to former prime minister of Somalia.
[576] Sosa 542 U. S. See *supra* text accompanying note 535.

tort occurred in the U.S., e.g. in cases where the U.S. based parent corporation has exercised significant control over human rights violations taking place abroad. The case also established, in line with Breyer's third criterion in *Kiobel* that cases including a distinct interest in preventing the U.S. from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind can be subject to ATS jurisdiction.[577]

Subsequent to *Kiobel*, the United States Court of Appeals decisions are split on the extent to which the presumption against extraterritoriality can be overcome. In 2014, the Fourth Circuit Court of Appeals held in *Al Shimari v. CACI*[578] that the presumption against extraterritoriality did not apply to claims brought by Iraqi plaintiffs against a U.S. government contractor that provided certain interrogation-related services to the U.S. military in Iraq. The plaintiffs had filed suit under ATS alleging that CACI employees had aided and abetted military intelligence personnel, as well as directly participated in subjecting plaintiffs to torture, and sexual and physical assaults while held at Abu Ghraib prison. All of the injuries were sustained outside the U.S. but the Court pronounced that the ATS claim had substantial ties to U.S. territory satisfying the "touch and concern test." As opposed to the defendants in *Kiobel*, the defendants in *Al Shimari*, the CACI corporation and CACI's employees, are U.S. citizens. Also, the alleged torture occurred at a military facility operated by U.S. government personnel. The employees were hired by CACI in the U.S. to fulfill the terms of a contract that CACI executed with the U.S. Department of Interior and payments were collected from government accounting offices in Colorado. In addition, the U.S. Department of Defense had provided security clearances for the CACI interrogators. Finally, plaintiffs not only alleged that CACI's employees directly and expressly ordered military personnel to "soften up," "rough up", and "humiliate"detainees but also CACI's managers located in the U.S. were aware of reports of misconduct abroad, attempted to "cover up" the misconduct, gave tacit approval and "implicitly if not expressly encouraged" it. [579] The case is ongoing and most recently the federal district court dismissed the plaintiff's direct liability claims because there were insufficient facts to establish direct contact between the CACI employees and the plaintiffs. However, the conspiracy and aiding and abetting claims could continue under the ATS.[580] The *Al Shimari* case is not the only case that has survived the

[577] *Id*., at 732.
[578] *Al Shimari* 758 4th Cir.
[579] *Id*., at 528-31.
[580] Al Shimari v. CACI Int'l, Inc. 2018 WL 1004859 (E.D. Virg. Feb. 21, 2018).

Kiobel requirements. A federal court in Massachusetts held in the case *Sexual Minorities Uganda v. Lively*[581] in 2013 that a Ugandan plaintiff's ATS claims were not barred by Kiobel's presumption against extraterritorial application. This was because the defendant, Scott Lively, was a U.S. citizen and resident, who aided and abetted persecution in Uganda against Ugandan members of sexual minority groups by assisting his "co-conspirators" in Uganda providing tactics and advice from Massachussetts. This case and *Al Shimari* exemplify that ATS litigation is likely to continue.

By contrast, the Eleventh Circuit's decision in *Cardona v. Chiquita Brands Int'l, Inc*.[582] held that jurisdiction could not be granted under the ATS. In March 2007, Chiquita admitted that it made payments from 1997 to 2004 to the United Self-Defense Forces of Colombia (known by its acronym in Spanish, AUC), a paramilitary organization that the U.S. Government had designated a terrorist group. Chiquita settled a criminal complaint by the U.S. Government at that time and agreed to pay a $25 million fine. The ATS case was brought by Colombian plaintiffs against Chiquita Brands International alleging that the company knew, or should have known, that its material support for the United Self-Defense Forces of Colombia ("AUC"), a paramilitary organization, would lead to the death or torture of their family members. The Eleventh Circuit noted that the defendants in *Kiobel* were not U.S. citizens and that Chiquita is U.S.-based, but "the distinction between the corporations does not lead us to any indication of a congressional intent to make the [ATS] apply to extraterritorial torts."[583] Judge Beverly Martin dissented the decision on two grounds noting that not only are *"plaintiffs seek[ing] relief in a United States court for violations of international law committed by (…) a corporation headquartered and incorporated within the territory of the United States"*.[584] *"Plaintiffs have (…) alleged that Chiquita's corporate officers approved payments and weapons transfers to Colombian terrorist organizations from their offices in the United States with the purpose (...) to commit extrajudicial killings and other war crimes."*[585] *"For these reasons, I believe that we have jurisdiction to consider the plaintiff's claims."*[586] Eleventh Circuit Judge Sentelle responded to Judge Martin's emphasis on the issue of where key decisions were made regarding extraterritorial conduct. Judge Sentelle

[581] Sexual Minorities Uganda v. Lively , Inc., No. 12-30051, 2013 WL 4130756 (D. Mass. Aug. 14, 2013).
[582] Cardona v. Chiquita Brands Int'l, Inc. 760 F.3d 1185 (11th Cir. 2014).
[583] *Id.*, at 1189.
[584] *Id.* at 1192.
[585] *Id.* at 1194.
[586] *Id.* at 1192.

referred in his opinion to *Sanchez-Espinoza v. Reagan*[587] in which the court held that actions taken by executive officials, in their private capacity, supporting forces bearing arms against the government of Nicaragua did not violate any treaty or "customary international law" so as to confer original jurisdiction of a suit under the ATS; and as the torture, to which Chiquita allegedly contributed to, occurred outside the territorial jurisdiction of the United States, the claim did not touch and concern the United States with sufficient force. It is obvious that Judge Sentelle joins the Supreme Court in protecting jurisdictional prerogatives of *lex loci delicti* in *Kiobel.*

Subsequently, the Eleventh Circuit made similar findings in *Baloco v. Drummond Co*[588] and *Doe v. Drummond Company Inc.*[589] finding that the legal heirs of Colombian union leaders, who were murdered by Autodefensas Unidas de Columbia (AUC), did not present claims that touch and concern U.S. territory with sufficient force to overcome the presumption against extraterritoriality. It further noted in *Baloco* that the majority in Kiobel did not "place significant weight on the defendants' nationality."[590] The plaintiffs claimed that the coal mining companies Drummond and its two subsidiaries, and two Drummond executives, Garry Drummond and James Michael Tracy, had aided and abetted AUC with funding and support from their corporate offices in Alabama. However, in the more recent related case *Melo et al. v. Drummond Inc. et al.,*[591]the Eleventh Circuit reversed in part and affirmed in part the District Court's dismissal of claims. The District Court had ordered the parties to show cause why *Melo* should not be dismissed on the authority of the Eleventh Circuit's recent decisions in *Baloco and Doe*. The plaintiffs briefed numerous issues including 1) the District Court should permit them to conduct discovery on the issue of U.S.-based conduct, (2) because *Baloco* and *Doe* were decided at summary judgment, the decisions did not impact the Plaintiffs' TVPA claims against Garry Drummond and Tracy, and (3) neither *Baloco* nor *Doe* affected the Plaintiffs' wrongful death claims, which, unlike those in *Baloco* and *Doe*, were premised on diversity jurisdiction. The District Court dismissed with prejudice all of the plaintiffs arguments referring to the Appeal decisions in *Baloco* and *Doe*. The Eleventh Circuit agreed with the plaintiffs that the trial court could not summarily dismiss the wrongful death claims under 28 U.S.C § 1332 (a) (2) because it had mandatory diversity jurisdiction. The claim for extrajudicial killing under the TVPA, 28 U.S.C. §1350 against

[587] Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir.1985).
[588] Baloco v. Drummond Company, Inc., et al. 767 F.3d 1229 (11th Cir. 2014).
[589] Doe, et al., v. Drummond Company, Inc, et al. 782 F.3d 576, 583 (11th. Cir. 2015)
[590] *Baloco* 767 F.3d at 1236.
[591] Melo et al. v. Drummond Company Inc. et al., No 16-10921 (11th Cir. 2016).

Garry Drummond and Tracy were remanded for consideration on the merits. Causes of action for both war crimes and extrajudicial killing against all the Drummond defendants under the ATS, 28 U.S.C. §1350 were dismissed with prejudice by the trial court based on the U.S. Supreme Court's decision in *Kiobel.* The Eleventh Circuit established, referring to *Baloco*, that claims must allege conduct "focused in the United States"[592] to invoke subject matter jurisdiction under the ATS. Referring to *Doe*, the Eleventh Circuit held that "claims will only displace the presumption against extraterritoriality if enough of the relevant conduct occurs domestically and if the allegations of domestic conduct are supported by a minimum factual predicate."[593] The Eleventh Circuit concluded that the operative complaint before the District Court in *Melo* was nearly identical to *Doe* and appropriately dismissed. However, the Eleventh Circuit found that the District Court lacked jurisdiction to dismiss the complaint with prejudice and reversed to dismissal without prejudice, leaving room for the plaintiffs to refile and seek to meet the new standard of the *Kiobel* decision.[594]

Human rights advocates have also called for the U.S. Supreme Court to clarify when ATS claims can be brought to U.S. courts in *Lungisile Ntsebeza et al v. Ford Motor Company Int'l.*[595] The petition requests review of the U.S. Court of Appeals for the Second Circuit's decision in *Balintulo v. Ford Motor Co.*[596] The plaintiffs sought to hold Ford Motor Co. and IBM Corp. liable for their affiliates' alleged technological aid to South Africa as it fought to keep racial segregation intact during the apartheid-era. The Second Circuit found that the lawsuit did not satisfy the requirements of the ATS because the companies' actions lacked a sufficient connection to the U.S. The plaintiffs filed the petition to challenge the Second Circuit's decision arguing that IBM and Ford repeatedly acted to aid and abet international law violations inside the U.S. by facilitating denationalization and violent suppression, including extrajudicial killings, of black South Africans living under the apartheid regime. Also, the petition aimed to persuade the Supreme Court to settle differing opinions regarding the standard for aiding and abetting liability and corporate liability under the ATS and the use of the "touch and concern" test. However the Supreme Court denied the petition for certiorari

[592] *Baloco* 767 F.3d at 1239.
[593] *Doe* 782 F.3d. at 598.
[594] *Melo* No 16-10921 at 11.
[595] Petition for Writ of Certiorari, Lungisile Ntsebeza et al v. Ford Motor Company Int'l, no. 15-1020, 2016 WL 612549 (U.S. Feb. 12, 2016), http://hrp.law.harvard.edu/wp-content/uploads/2016/02/Petition.pdf.
[596] Balintulo v. Ford Motor Co., 796 F.3d 160 (2nd Cir. 2015).

on June 20, 2016 without any reason.[597] It is the discretion of the Supreme Court not to accept certain cases for review without giving an official reason.

The U.S. Supreme Court in *Kiobel* did not dismiss corporate liability altogether stating only that the 'mere corporate presence' within the jurisdiction (in *Kiobel*, Dutch Shell traded its shares on the New York Stock exchange and had an investment consulting office in New York City) does not in itself grant jurisdiction under the ATS. However, in the long-awaited decision *Jesner v. Arab Bank, PLC*[598] the U.S. Supreme Court found that foreign corporations cannot be held liable under the ATS. Justice Kennedy expressed concerns that prolonging litigation by remanding to the Court of Appeals would exacerbate further the significant diplomatic tensions the case has caused between the U.S. and Jordan.[599] The decision may have limited consequences in practice since under *Kiobel*, aliens already cannot sue foreign corporations using the ATS unless the tort sufficiently "touches and concerns" U.S. territory. Considering the case law discussed above, lower courts after Kiobel have only granted jurisdiction under the ATS where the defendant is a U.S. corporation (*Al Shimari)* or -citizen (*Sexual Minorities Uganda*). However, even if plaintiffs manage to meet the "touch and concern" requirement, e.g. if the foreign corporation's actions leading to the tort have sufficient connection to the U.S., *Jesner* eliminates the option to sue the foreign corporation under the ATS. The requirements left under *Kiobel and Jesner* to obtain ATS jurisdiction include that: 1) the defendant must not be a foreign corporation, 2) the plaintiff must be foreign 3) the violations must constitute serious and universal violations of international law principles 4) the cause of action must "touch and concern" U.S. territory 5) the case must not cause foreign policy concerns.[600]

The controversy and limitation of the ATS has led to predictions[601] of a definitive closure to ATS litigation along with an increase of future ordinary tort-based claims under state law before state courts or federal courts.[602] ATS claims have over the past two decades regularly

[597] Lungisile Ntsebeza et al v. Ford Motor Company Int'l, no. 15-1020 (U.S. Jun. 20, 2016).
[598] Jesner v. Arab Bank, PLC, No. 16-499 (U.S. Apr. 24, 2018).
[599] *Id.*, at 11.
[600] Charity Ryerson, *Supreme Court Rejects Liability for Foreign Corporations in International Human Rights Cases*, CORPORATE ACCOUNTABILITY LAB (Apr. 24, 2018), http://legaldesign.org/calblog/2018/4/24/supreme-court-rejects-liability-for-foreign-corporations-in-international-human-rights-cases.
[601] Alford, *supra* note 565. Christopher A. Whytock et al., *After Kiobel: Human Rights Litigation in State Courts and Under State Law* 3 UC IRVINE L. REV. 1, at 7 (2013).
[602] The Erie doctrine provides that federal courts may hear claims arising from state courts under supplemental or diversity jurisdiction and must apply state substantive law. Erie Railroad Co. v. Tompkins 304 U.S. 64, 79 (1938): 'The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'

been accompanied by transnational tort-based claims against MNCs on the basis of alleged violation of U.S. state law. Ordinary transnational tort jurisdiction is, as opposed to the federal ATS and TVPA jurisdictions, not confined to severe cases of human rights violations such as extrajudicial killings, torture, and trafficking. Human rights abuses can be indirectly linked to the language of ordinary torts such as wrongful death, false imprisonment, assault, battery, negligent infliction of emotional distress, negligent hiring, and negligent supervision.[603] However, the plaintiffs suing a foreign corporation must overcome the strict interpretation to the "minimum contacts" for personal jurisdiction in *Goodyear* and *Daimler*.[604]

The question on the extent to which MNCs owe a duty of care to transnational human rights victims under tort theories still remains for further clarification by U.S. courts. Although ordinary tort jurisdiction holds promise for assuming claims that fail to rank as a breach of the law of nations and overcome the presumption against extraterritoriality of the ATS, it may face significant obstacles in providing a resort to victims of human rights abuse considering the increasing complexity in corporate supply chains.

Applicable Law

While the violation of international law provides a U.S. court with jurisdiction, it still remains disputed after 30 years of case law which law applies under the ATS. ATS cases have suggested a number of alternative approaches to the choice of law question. The tort system can be viewed as a legal enforcement mechanism that attaches legal consequences to non-compliance with substantive norms, i.e. rules of conduct, that derives from both external sources, for example legal norms from public law rules, and also from the tort system itself including tort precedents and codified tort standards such as vicarious liability for the acts of subordinates.[605] From this outset it has been suggested that a distinction should be made between on the one hand the rules of conduct applicable to the particular case, namely the norms of customary international law that are allegedly violated, and on the other hand the rules governing the other aspects of ATS litigation, such as the remedies that are made available to foreign victims of such violations under domestic U.S. tort law.[606] Some U.S. federal judges have concluded that the ATS prescribes international law as the law governing

[603] Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms, in* TORTURE AS TORT 46, 63 (Craig Scott ed., 2001).
[604] See *supra* text accompanying notes 509-16.
[605] LIESBETH ENNEKING, FOREIGN DIRECT LIABILITY AND BEYOND 181 (2012).
[606] Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases* 60 HASTINGS L. J, 61, 97 (2008).

the substance of the claim,[607] however only very few norms of customary international law are suitable for direct application to private actors including serious human rights abuses and international crimes and their application often require some kind of State action.[608] Other judges have pointed to U.S. federal tort law.[609] This is supported by the U.S. Supreme Court in *Sosa*.[610] Other courts have applied the law of the host country of the relevant injuries where that law is compatible with the purposes of the ATS and pertinent international norms.[611] At least it has been established that U.S. federal courts do not apply foreign laws against the purpose of the ATS, for instance application of foreign law that grants immunity to the crime suspect of a gross human rights abuse or imposing a punishment that clearly underrates the gravity of the offence.[612]As for applicable law on U.S. state level there is a distinct (often judicially created) choice of law system that is applied by U.S. state courts in order to determine the applicable law in civil cases with international or interstate aspects. Most U.S. states favour a flexible, policy-oriented approach to choice of law matters, meaning that the courts have a substantial amount of discretion in determining which law should be applied in any given case. Courts may apply the law of the jurisdiction that has the most significant relationship to the acts at issue, or the law of the site of the alleged wrong, or the law of the forum if it has an interest in the outcome of the case.[613] U.S. Courts therefore apply the contacts approach. The contacts approach was first adopted by a U.S. Court in 1963 in the case of *Babcock v Jackson*.[614] In this case the spouses Jacksons took their friend Miss Babcock on a weekend trip by car to Ontario, Canada. Both parties lived in the State of New York where the spouses' car was also insured. In Ontario, Mr Jackson lost control of the car and Miss Babcock was seriously injured. She filed for damages in the State of New York. According to the law of this state, she could be granted compensation whereas the law of the province of Ontario was a so-called 'Guest Statute' which did not grant compensation from the driver or the owner of a car for non-paying passengers. The New York Court of Appeal which had so far applied the *lex loci delicti* rule disavowed the rule on the grounds that it was

[607] Xuncax v. Gramajo 886 F Supp 162, 179 (D Mass 1995).
[608] 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* 2 J. EUR. TORT L. 221, 225 (2011).
[609] Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
[610] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[611] Tachiona et al v. Mugabe and ZANU-PF 234 F Supp 2d 401 (2nd Cir. 2002).
[612] JOSEPH, *supra* note 328, at 55; Filartiga v. Peña-Irala, 630 F 2d 876 (2nd Cir. 1980); *Tachiona* 234 F Supp.
[613] Donald Earl Childress III, *The Alien Tort Statute, Federalism and the Next Wave of International Law Litigation* 100 GEO. L.J. 709, 744 (2012).
[614] Babcock v Jackson, 12 N.Y.2d 473 (1963).

inconsiderate to the interests of the involved parties and the state and because they found the rule too formalistic. Instead, the court applied the contacts approach arguing that:

Justice, fairness and the best practical result may be best achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issues raised in the litigation. [It] thereby allows the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation.[615]

The court ruled the law of the state of New York applicable. Just a few years after the *Babcock v Jackson* judgment, the Second Restatement[616] was issued, which codified the contacts approach in general and not only pertaining to torts. Art. 6 of the Second Restatement includes a catalogue on a number of circumstances that should be taken into account when deciding on the applicable law while art. 145 concerns torts only and partly refers to art. 6 and partly to other criteria for exercising the discretion. These criteria include the place where the conduct causing the injury occurred, the place where the injury occurred, the domicile, residence, nationality, place of business of the parties, and the place where the relationship, if any, between the parties is centered. Focus tends to be on material justice rather than conflicts justice, meaning that it is generally considered to be more important to reach the 'right' substantive result than to choose the 'right' State in the sense of the State that has the right factual contacts with the case.[617] Apart from taking into account the interests of the private litigants involved in a transnational private law dispute, the American choice of law approach tend to be based on two premises in the broader public interest: 1) that the States have an 'interest' in the outcome of conflicts cases and 2) that these interests must be taken into account, albeit together with other factors, in resolving these conflicts. U.S. courts tend to apply the law of the place of conduct if that law imposes a higher standard of conduct for the tortfeasor than the law of the place of injury. More generally speaking, it has been found that in the majority of U.S. cross-border tort cases, when faced with a choice between the application of the *lex actus* (the law of the country where the injurious conduct

[615] *Id.* at. 481.
[616] *Restatement (Second) of Conflicts of Laws, American Law Institute*.
[617] Symeon C. Symeonides, *The American Revolution and the European Evolution in choice of law. Reciprocal Lessons* 82 TUL. L. REV. 1741, 1746 (2008).

has taken place) or the *lex injuriae* (the law of the country where the damage has arisen), U.S. courts choose to apply the law that is more favourable to the plaintiff.[618]

EU Private International Law Relevant to England and Denmark

Jurisdiction

EU-based Corporate Defendants

On the other side of the Atlantic, EU entered the Brussels Convention in 1968[619] which was largely replaced in 2002 with the Brussels I Regulation[620] and revised in 2012.[621] The regulation provides a statutory regime on jurisdictional issues in transnational civil and commercial matters for most EU Member States. For the EFTA Member States, Iceland, Norway, and Switzerland, except Liechtenstein, the Lugano Convention applies which was originally signed by the then six members of the EFTA, except Liechtenstein, and the EU in 1988[622] due to the great interest the EFTA Member States had shown for the Brussels Convention. The Lugano Convention is a "copy" of the Brussels I Convention and ensures partly that the EFTA Member States and the EU Member States have collective rules of jurisdiction and partly that there is free movement of judgments in civil cases. It applies when non-EU Member States are involved. The Brussels Convention was revised jointly with the Lugano Convention and in 2007 the EU entered into the new Lugano Convention[623] with Iceland, Norway, Switzerland, and Denmark which replaced the Lugano Convention from 1988. Denmark is separately mentioned as a contracting party because Denmark has opted out from the Brussels I Regulation. The new Lugano Convention entered into force on 1 January 2010. Under the Brussels I regime, unlike the U.S. common law system for jurisdiction, a link between the forum and the claim is not required for an EU forum to have jurisdiction. This means that even if the claim relates to events outside the jurisdiction, an EU Member State Court must accept jurisdiction if the claim is brought against a company domiciled in the EU Member State. By and large, plaintiffs in foreign direct liability cases

[618] JOSEPH, *supra* note 328, at 75.
[619] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[620] The regulation entered into force on 1 March 2002.
[621] Regulation (EU) No 1215/2012 of the European Parliament and of The Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (COM (2012) 1215 final (12 December 2012)). The revised regulation entered into force on 10 January 2015.
[622] The Lugano Convention (88/592/EEC Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters O.J. L 319/9 (16 September 1988).
[623] The Lugano Convention (2007/712/EC Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J.E.U. L 339) (21 December 2007).

filed in an EU Member State against an EU-based company can rely on the Brussels I Regulation art. 4 (1) which provides that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State" and art. 63 deciding that a company "is domiciled at the place where it has its a) statutory seat, or b) central administration, or c) principal place of business". Accordingly, the Brussels I regime grants jurisdiction to EU Member State courts over foreign direct liability claims that are brought before them against a multinational parent company or its branches or subsidiaries founded or running their central administration or principal place of business in the EU forum country.

Forum Non Conveniens and EU-based Corporate Defendants

As an exception to the Brussels I Regulation, common law jurisdictions in the EU have, like their U.S. counterparts, denied jurisdiction over foreign direct liability cases on the basis of the common law doctrine *forum non conveniens*. In *Lubbe v Cape plc*[624] the House of Lords (now replaced by the Supreme Court of the United Kingdom) superseded the lower courts and refused to deny jurisdiction on the basis of *forum non conveniens.* When the claim was brought before the High Court in London against a parent company domiciled in the U.K. by employees in its South African subsidiary for health damage caused by exposure to asbestos, the question of whether to apply *forum non conveniens* went all the way up to the House of Lords. The Law Lords held that although South Africa was a more appropriate forum for hearing the claim, the English court was allowed to retain jurisdiction on the basis that substantial justice and effective legal redress could not be done in the alternative forum because the plaintiffs would lack possibility of class action claims, legal aid, legal representation and expert evidence. The House of Lords also considered the merits of the claim at an early stage finding that there was a link between the forum and the human rights claim in that there was evidence to support the allegation that the parent company's own negligence was a course of the harm. This could be considered as equivalent to U.S. courts establishing subject-matter jurisdiction, because the House of Lords assessed the extent to which English tort law could constitute a legal foundation for the case based on the facts. However, such establishment of subject-matter jurisdiction is not necessary under the Brussels I regime. The impact of the Brussels I regime on foreign direct liability cases brought before domestic courts in EU Member States should rather be considered equivalent to the U.S. rules on personal jurisdiction since both systems require presence of the defendant within the forum. The Law Lords did not get around to assessing whether art. 2 of the

[624] Lubbe v Cape plc, [2000] UKHL 41 (Eng.).

Brussels Convention (now art. 4 of the Brussels I Regulation) precluded dismissal of a case on the basis of the common law doctrine *forum non conveniens.*

However, in the case *Owusu v Jackson*[625], the English Court of Appeal asked the CJEU whether – pursuant to the English rules on *forum non conveniens* – it could stay a matter brought to it under art. 2 of the Brussels Convention (now replaced by art. 4 (1) of the Brussels I Regulation) when the defendant was domiciled in England but every other contact pointed towards a non-contracting State. The CJEU ruled that courts in the EU cannot refuse to assume jurisdiction on the basis of the *forum non convenience* doctrine on cases falling under the Brussels I Regulation against companies seated in the EU, even if the harm occurred outside the EU and the victim is not an EU resident or national. As a last resort, the UK government proposed to include a *forum non convenience* provision[626] into the revision of the Brussels I regime which was concluded in December 2012.[627] The revised Brussels I Regulation may have come as a disappointment to the U.K. government since it carries on uniformity for suing EU-based companies from the former regulation's art. 2 (1) in conjunction with art. 60 to the present art. 4 (1) and art. 63 respectively. In line with the ruling in *Owusu v Jackson* that national law deviants such as *forum non conveniens* are precluded under the Brussels I Regulation, the CJEU also emphasized in the Lugano opinion,[628] while drawing a parallel to the Brussels I Regulation, that jurisdiction and the recognition and enforcement of judgments in civil and commercial matters fall within the Community's exclusive competence. [629] Considering the CJEU's interpretation of article 2 of the former Brussels I Regulation, now article 4 which grants jurisdiction on the courts of the defendants domicile as mandatory in nature and that its application could not be overruled by a doctrine of national legislation, the revised regulation can be considered to carry on the unification of fora against defendants domiciled in Member States in cases on civil and

[625] Owusu V Jackson Case C 281/02 (2005) Ecr I – 1383 (CJEU). The reference for a preliminary ruling was made in the course of proceedings brought by Mr Owusu against Mr Jackson, trading as 'Villa Holidays Bal-Inn Villas', and several companies governed by Jamaican law, following an accident suffered by Mr Owusu in Jamaica.

[626] Committee on Legal Affairs Rapporteur: Tadeusz Zwiefka, Report on the Implementation and Review of Council Regulation (Ec) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, (29 June 2010, PE 439.997v02-00 - A7-0219/2010).

[627] Regulation (Eu) No 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast).

[628] CJEU, 7 February 2006, Opinion 1/03, [2006] Ecr I-1145. The Lugano Opinion was requested in connection with the creation of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J.E.U. L 339 of 21 December 2007. The Convention was signed in Lugano on 30 October 2007 and entered into force on 1 January 2010 between the European Community, Denmark, Iceland, Norway, and Switzerland.

[629] *Lugano Opinion* 1/03 CJEU, para. 143.

commercial matters. No exception in the Regulation on the basis of the *forum non conveniens* doctrine is provided, apart from intending to prevent conflicting decisions with *lis pendens* provisions diverting from the principles of predictability and legal certainty advocated by the Court. Accordingly, articles 33 and 34 of the revised Brussels I Regulation provide that in case of parallel or related proceedings, the court of a Member State second seised is given the discretion to stay the proceedings in favour of the court of the Third State which has been seised first. For a Member State Court to stay the proceedings it must be expected that the court of the Third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State. In addition, it is required that the Court finds it necessary to stay the proceedings for the proper administration of justice. In light of the uniform rules of jurisdiction in both the former and the revised Brussels I Regulation and the CJEU's interpretation of them emphasizing their intention to eliminate "obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject,"[630] the *forum non conveniens* mechanism can be considered precluded in the EU against EU-based corporate defendants.

Forum Shopping and EU-based Corporate Defendants

Under some circumstances, a corporate defendant that has its statutory seat, its central administration or its principal place of business in one EU Member State may also be sued before the courts of another EU Member State which gives the plaintiffs the option of choosing from among the available EU fora the one that is likely to be most favourable for the trial of their case. This may be useful in case it enhances the feasibility of bringing such claims since different procedural laws and practical circumstances of each Member State apply determining the course of action. For instance the procedural rules of the alternative forum may allow the plaintiffs to bring a class action whereas the procedural rules of the original forum do not. A company domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.[631] In the *Bier*-case, revolving around cross-border pollution, the CJEU interpreted this procedural rule to encompass both the place where the damage occurred and the place of the event giving rise to it and therefore, the plaintiff can choose the place to file his or her claim.[632] This may be the case if the harmful

[630] *Owusu* C 281/02 CJEU, para. 34.
[631] Article 7 (2) Brussels I Regulation.
[632] Handelskwekerij G.J. Bier BV v. Mines de Potasse d'Alsace SA Case 21-76 (CJEU).

event causing the claim can be said to have occurred there for example if the impugned actions were planned, and in some way partially executed, in the boardrooms of a branch, agency or other establishment based in the alternative forum. This jurisdictional venue overlaps with a complementary ground for jurisdiction in the Regulation providing that if the dispute involving an EU-based corporate defendant arises out of the operations of a branch, agency or other establishment based in another Member State, the claim can be brought before the courts in the alternative EU forum.[633] Similarly, an EU-based corporate defendant may be sued in the courts of another Member State if the civil claim is based on an act giving rise to criminal proceedings in the alternative forum and is brought in the courts seized of those proceedings provided that the alternative court has jurisdiction under its own law to entertain civil proceedings.[634] Where liability actions are taken against multiple defendants domiciled in different EU Member States, the plaintiffs can bundle their claims and choose their preferred forum for litigation on the premise that the claims in question are adequately linked against the various defendants.[635] In addition, foreign direct liability claims may also be brought before courts in one of the EU Member States on the basis of a forum choice agreement between the parties of the dispute regardless of whether the parties are domiciled in an EU Member State or in a third state.[636] Finally, a court of an EU Member State before which a defendant enters an appearance shall have jurisdiction over a foreign direct liability claim. Appearance implies that the defendant consents to the host country plaintiff's choice of forum unless this is done only to contest the jurisdiction.[637]

Non-EU-Based Corporate Defendants

On the face of it, the EU may seem to adopt a more favourable policy for jurisdictional venue than the U.S., which still endorses the *forum non conveniens* doctrine. However, depending on the EU Member State, this is only true for claims against EU-based corporate defendants. In some cases foreign direct liability claims may be principally aimed at the parent company of the MNC domiciled in an EU Member State with the Third State subsidiaries/or sub-contractors sued as co-defendants alongside the EU parent company. It is also likely that claims may be filed before EU Member State courts against parent companies that are not domiciled in the EU/Lugano territory but in another Western country such as the U.S., e.g. if

[633] Article 7 (5) Brussels I Regulation.
[634] Article 7 (3) Brussels I Regulation.
[635] Article 8 (1) Brussels I Regulation.
[636] Article 25 (1) Brussels I Regulation.
[637] Article 26 (1) Brussels I Regulation.

jurisdiction is not possible to obtain in the U.S. because of the restrictions to the ATS.[638] In these cases where the co-defendant is not domiciled in a Member State, the Brussels I Regulation provides that jurisdiction of the courts of each Member State is determined by their domestic rules on international civil jurisdiction.[639]

A possibility exists in most EU Member States[640] to bring a suit before local courts against a defendant from a non-EU Member State as a co-defendant in proceedings brought against a locally based defendant where there is some kind of connection between the claims.[641] However, the Brussels I Regulation's reference to the legislation of each Member State results in lack of uniformity and does not take into account the needs of the Community as a whole in its external relations in the sense that they do not ensure uniform treatment in each Member States of plaintiffs as far as their right of access to justice is concerned.[642] Consequently domestic rules may bring about different results in courts in the EU.[643] In its Proposal for a Recast of the Brussels I Regulation, the EU Commission pointed out that the lack of harmonised rules at the EU level and the diversity in the national laws of the Member States to determine jurisdiction over Third State defendants leads to unequal access to justice. However, the concern was not directed at Third State plaintiffs but rather EU citizens and companies in transactions with persons from Third States. In spite of the Commission's concern, the revised Regulation maintains non-application of EU rules on jurisdiction when the defendant is a Third State domiciliary instead of eliminating referral to national law.

Forum non conveniens and non-EU based corporate defendants

A notable exception to EU law's referral to national jurisdictional rules in regard to Third State defendants is the barring of the *forum non conveniens* doctrine, discussed above for EU-based corporate defendants, which is also precluded in the EU against Third State corporate defendants. The same interpretation that applies to article 4 of the Brussels I Regulation (former article 2), under the *Owusu v Jackson* judgment, can be extended to article 6 (1) of the present Brussels I Regulation (former article 4 (1)). In *Owusu v Jackson*, the Court made

[638] *See supra* text accompanying notes 545-599.
[639] Article 26 (1) Brussels I Regulation.
[640] Except Denmark, Germany, Greece, Finland, Malta, Sweden, and Poland. The cases can be heard together in the forum State only if the courts of that Member State have jurisdiction, individually, over each of the co-defendants,under the ordinary (or exorbitant) national rules.
[641] Arnaud Nuyts, *Study on residual jurisdiction - (Review of the Member States' rules concerning the "residual jurisdiction" of their courts in civil and commercial matters pursuant to the Brussels I and II Regulations),* EC Report, (3 September 2007).
[642] Riccardo Luzzatto, *On the Proposed Application of Jurisdictional Criteria of Brussels I Regulation to Non-Domiciled Defendants in* RECASTING BRUSSELS I 111 (Fausto Pocar et al. ed. 2012).
[643] *See infra* text accompanying notes 723 – 41 for England and 784-803 for Denmark.

it clear in its statement that the jurisdictional rules of the Brussels Convention (now applying *a fortiori* to the rules of the Brussels I Regulation) are not limited to intra-Community situations, but also apply "to circumstances involving relationships between the courts of a single-contracting State and those of a non-contracting State rather than relationships between the courts of a number of contracting states".[644] Even if *Owusu* does not address the situation where the defendant is domiciled outside the Community, it clearly demonstrates the Court's will to give to the jurisdictional rules of the Brussels Regime the broadest possible effect. This is also true in light of the *Lugano opinion* which emphasises that the objective of the Brussels I Regime is to unify the rules on jurisdiction in civil and commercial matters and conciliate national legislative discrepancies, not only for disputes involving Member State defendants but also for disputes with international aspects.[645] Furthermore, the Court observed that "even where they refer to national law, the rules on jurisdiction are nevertheless Community rules" and "situations where the Community courts do not have jurisdiction are not lacunae or gaps which a Member State can fill but definitive choices on the part of the Community legislature".[646] Also, the *Lugano opinion* makes clear that, in spite of the referral to national law in article 6 (1), jurisdiction matters regarding defendants not domiciled in a Member State form part of the system implemented by the Brussels I Regulation given its uniform and coherent nature.[647] The fact that the Court bothers to underline that article 6 (1) is itself a rule of Community law must imply that the reference to national law should be understood as leading to an incorporation of the national rules on jurisdiction into the Regulation by which the legal nature of these rules is changed. This is suggested in the extensive interpretation of the reference in article 6 (1) to national rules undertaken by the Commission and the Parliament in their observations before the Court, implying a genuine "communitarisation", i.e. a general transformation of national law into Community law. The Commission argued that the Regulation "incorporates" the rules of national law and thus provides the basis for the exclusive competence of the Community to conclude an international agreement affecting these rules. If the Member States were free, within the limits of article 6, to regulate issues of jurisdiction such as incorporation of the doctrine of *forum non conveniens,* why should they be barred to enter into international

[644] *Owusu, C 281/02 CJEU,* paragraph 35.
[645] CJEU, 7 February 2006, Opinion 1/03, [2006] Ecr I-1145, para. 143. *See supra* text accompanying notes 628-29.
[646] *Id.* para. 63.
[647] *Id.* para. 148.

agreements with non-Member States? [648] In line with the Commission, the Parliament submitted that the effect of article 6 (1) is that the Member States can at most amend their national rules with the consent of the Community. [649] The fact that the Parliament's interpretation pre-empts the Member States' competence to change their rules on jurisdiction pertaining to non-EU based defendants underlines the wide scope of the Regulation and its objective to unify fora against defendants domiciled both in Member States and in Third States. For these reasons, in spite of the Brussels I Regulation's referral to domestic law in cases against non-EU based corporate defendants, [650] EU Member State Courts cannot introduce the *forum non conveniens* doctrine in foreign direct liability cases against Third-State defendants.

Forum Necessitatis and non-EU based Corporate Defendants

Only a few EU Member States[651] offer exorbitant common law jurisdiction in the shape of *forum necessitatis* which provides for civil jurisdiction over non-EU-based corporate defendants on the basis that the alternative forum poses legal obstacles, such as no guarantee of a fair trial, or factual obstacles, including that the plaintiff would be deprived of effective access to courts in the alternative forum. If unified, *forum necessitatis* could be a type of European ATS providing an exceptional guarantee of right of access to courts for foreign plaintiffs against foreign defendants but going even further than the ATS in light of the U.S. Supreme Court's recent interpretation restricting the possibility of applying the statute to non-U.S.-based defendants. It was suggested by the Commission to include a *forum necessitatis* provision in the recast of the Brussels I Regulation but the Council did not support it because the EU Member States wanted to apply their own rules on exorbitant grant of jurisdiction.[652] However, the Commission's favourable position towards granting exercise

[648] *Id.* para. 52.
[649] *Id.* para. 72.
[650] Article 6 (1) Brussels I Regulation.
[651] Austria, Belgium, Estonia, Netherlands, Portugal, Romania, France, Germany, Luxembourg, Poland, cf. DANIEL AUGENSTEIN & ALAN BOYLE, STUDY OF THE LEGAL FRAMEWORK ON HUMAN RIGHTS AND THE ENVIRONMENT APPLICABLE TO EUROPEAN ENTERPRISES OPERATING OUTSIDE THE EUROPEAN UNION 69 (2010).
[652] The common law doctrine is however recognized in EU law in Council Regulation 4/09, Jurisdiction, Applicable law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, art. 7, 2008, O.J. (L 7). Its preamble in pt. 16 explains reasons and limits of this measure: 'In order to remedy, in particular, situations of denial of justice this Regulation should provide a forum necessitatis allowing a court of a Member State, on an exceptional basis, to hear a case which is closely connected with a third State. Such an exceptional basis may be deemed to exist in the case of civil war or when proceedings prove impossible in the third State in question, for example when an applicant cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on the forum necessitatis should, however, be exercised only if the dispute has a sufficient connection with the Member State of the court seized, for instance the nationality of one of the parties.'

of exorbitant jurisdiction does not seem to extend beyond EU Member State Courts. In contemplation of the *Kiobel* judgment the EU Commission essentially urged the U.S. Supreme Court in an *amicus curiae* brief to interpret the ATS in such a way as to limit both its substantive reach and its international reach towards foreign direct liability cases so that universal civil jurisdiction is only exercised in cases where universal criminal jurisdiction would apply. To fulfill this requirement the nature of the tort must rise to the level of the most serious crimes recognized under international law and the plaintiffs must prove that local remedies have been exhausted or that the local forum is unwilling or unable to provide relief.[653] The brief conveys a discrepancy between the Commission's position on the desirability of foreign direct liability cases and the stance of the European Parliament encouraging the Commission in 2013 to promote mechanisms that ensure that victims, including third-country nationals and communities affected by European companies are entitled to a fair and accessible process of justice.[654] However, just because the EU Commission as an executive branch does not support transnational human rights litigation, it does not mean that EU Member States are barred from extraterritorial application of home country law. The CJEU might be more willing to allow exercise of extraterritorial jurisdiction than the U.S. Supreme Court if the EU Member States filed for a judicial opinion. In order to properly reflect the EU's cherishing of universal values of human dignity, freedom, equality and solidarity[655] a unification of exorbitant rules on jurisdiction on the European level would be appropriate to provide an EU human rights answer to the limitations in the ATS.

Applicable Law

In 2007 the EU adopted a harmonized set of rules to govern choice of law in civil and commercial matters (subject to certain exclusions) concerning non-contractual obligations. This was adopted in the Rome II Regulation[656] which has applied to most EU Member State

[653] Brief for European Commission as Amicus Curiae Supporting Neither Party, at 26, Kiobel v. Royal Dutch Petroleum Co., 133 U.S.. 1659 (2013). The Commission took the same position in Brief for European Commission as Amicus Curiae Supporting Neither Party, at 12 – 26, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[654] Resolution on Corporate Social Responsibility: Promoting Society's Interests and a Route to Sustainable and Inclusive Recovery, Eur. Parl. Doc. 2097 (INI) (2012).
[655] The Charter of Fundamental Rights of the European Union, Dec. 14, 2007, O.J. C 303/01.
[656] Regulation 2007/864 of the European Parliament and of The Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations 2007 O.J. (199/40) (EC) [hereinafter *Rome II Regulation*]. The Rome II Regulation is based on TEU art. 67 (former TEC art. 61(c)) allowing measures in the field of judicial cooperation in civil matters as provided for in TEU art. 81 (former TEC art. 65); TEU art. 81 vests power in the Community to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction).

courts since January 1, 2009 and pertains to events giving rise to damages that have occurred since that date.[657] Such regulations apply to the U.K., Ireland, and Denmark only in case these Member States specifically opt in.[658] The U.K. and Ireland opted in on Rome II by taking part in the adoption of the Regulation, while Denmark did not opt in.[659] Rome II applies the *lex loci damni*, a specification of the traditional *lex loci delicti* rule, as the principal conflict of laws rule in order to realize uniformity in the choice of law decisions by the courts of EU Member States. Accordingly, it is the law of the country in which the damage occured that in principle applies under the Regulation regardless of the country in which the event giving rise to the damage occurred, or where the indirect consequences of that event occurred. The *lex loci damni* has been chosen as preferable in terms of due process, predictability of the outcome of litigation, and the proper functioning of the internal market, for instance for the free movement of judgments.[660] In drafting the Regulation it was also reasoned that the law of civil liability is nowadays dominated by the compensation function rather than an objective of punishing fault-based conduct.[661] This means for foreign direct liability cases that it is the law of the host country that will in principle be applicable in cases brought before EU Member State courts bound by the Regulation. The Regulation has been critizised for providing a "system of tightly written black-letter rules with relatively few escapes and little room for judicial discretion" focusing on jurisdiction-selection (conflicts justice) rather than content-oriented law selection (material justice).[662] However, there are a few limited exceptions to the principal rule but it is uncertain whether they will help the victim much in applying the home country law of the parent company rather than that of the subsidiary's or contractual supplier's host country law. These include a general escape clause providing for the application of the law of a State that has a manifestly close connection[663], common rules providing for the application of overriding mandatory rules of the forum

[657] See Deo Antoine Homawoo v GMF Assurances SA, 2011 E.C.R. I-11603 (CJEU). In this ruling, the CJEU responsed to preliminary questions concerning confusion on the Regulation's application in time. The CJEU held that the Rome II Regulation only applies to events giving rise to damage, which occurred on, or after, 11 January 2009.
[658] See Protocol no. 4 (1997) (United Kingdom and Ireland annexed to the Treaty on the European Union (TEU) and to the Treaty establishing the European Community (TEC) art. 1–4); Protocol no. 5 (1997) (Denmark, annexed to the TEU and to the TEC art. 1–5).
[659] Rome II Regulation, Article 1(4) and recitals 39 & 40.
[660] Rome II Regulation. recital 6.
[661] Explanatory Memorandum to the Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome Ii), (COM (2003) 427) (Jul. 22, 2003) at 12.
[662] Symeon Symeonides, *Rome II and Tort Conflicts. A Missed Opportunity*, 56 AM. J. COMP. L. 173, 181 (2008).
[663] Rome II Regulation, art. 4 (3).

State[664], the taking into account of rules of safety and conduct which were in force at the place and time of the event giving rise to the liability[665], and the possibility to refuse application of the applicable foreign law where such application is manifestly incompatible with the public order of the forum State.[666] With reference to Currie's 'Governmental Interest Analysis'[667], it could be argued under the general escape clause that policies of the parent company's home country governing MNCs' behaviour in regard to human rights violations could form a basis for a closer connection of home country law to the case than host country law. Accordingly, the court is encouraged to take into account which of the states involved in the case has the predominant interest in having their own law applied. In order to comply with its international human rights obligations, the state must enforce its domestic applicable human rights law against its nationals. By becoming parties to international treaties, states assume obligations and duties under international law to respect, to protect, and to fulfil human rights. The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfil means that states must take positive action to facilitate the enjoyment of basic human rights.[668] These obligations entail that the State's domestic judicial authority must undertake to make decisions compatible with their international human rights treaty obligations and duties.[669] Therefore it could be argued that the home State of the parent company would have an interest in applying its laws, if it is the decisions made or the policies set out by the parent company's management, or the lack of supervision exercised by the management that have ultimately resulted in the human rights violation.

The second exception that mandatory rules of the forum State override the Rome II Regulation implies that in some countries there are so-called 'domestic tyrants' that unconditionally demand to be applied by the judge.[670] They are mandatory rules so crucial, that the national legislator has decided that they must be applied even though the legal matter according to the choice of law framework is subject to foreign law. Such mandatory

[664] *Id.*, art. 16.
[665] *Id.*, art. 17.
[666] *Id.*, art. 26.
[667] CURRIE, *supra* note 491.
[668] *International Human Rights Law,* UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx (last visited May. 28, 2018).
[669] UNGPs, *supra* note 3, at 23.
[670] OLE LANDO KONTRAKTSTATUTTET 74 (1981).

provisions will typically involve domestic public regulations interfering with private actors in the public interest such as anti-trust regulations, monetary regulations, labour regulations, environmental regulations and rules of criminal law.[671] Whether a national rule is mandatory or not is decided on the basis of general principles of interpretation in the legal system where the rule has its origin or the *travaux preparatoires.*

The third reservation revolves around national rules of safety and conduct, which must be taken into account by the forum court if the rules were in place at the time of the conduct triggering the liability to pay damages. This special provision does not allow for alternative applicable conduct-regulating rules of tort law to replace the *lex loci damni* and is not applicable when a person is accused of having caused damage intentionally. Rules of safety and conduct apply only when negligent behavior is to be judged. The rules do not apply in a strict sense but must be taken into account on a purely factual basis as so-called local data. As applied to claims, this means that the law applicable according to the Rome II Regulation will decide on the extent to which the acknowledgement of a claim depends on negligence, whereas the rules of safety and conduct at the place of action will be taken into account in determining whether the tortfeasor acted negligently. In its assessment of negligence, the court must keep in mind that a reasonable person would have obeyed the rules of safety and conduct in force at the place where he acted. The rules become a component of the concrete situation facing the tortfeasor and in this way significant as facts of the case rather than as applicable law.[672]

The fourth reservation, *ordre public*, implies that foreign law should not be applied if it leads to a result that is manifestly incompatible with the public policy of a State, including fundamental ethical and moral principles. The *ordre public* reservation is general in the sense that it in the nature of things also applies in areas where it does not have explicit legal authority.[673] Article 7 of the Regulation also has special exceptions to the *lex loci damni* motivated by substantial policy on specific matters such as environmental liability in which case the applicable law is the law of the country in which the damage occurs unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.[674] Apart from damage to the

[671] ANDREW DICKINSON, THE ROME II REGULATION. THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 117 (2008).
[672] PETER HUBER ET AL., ROME II REGULATION 351(2011).
[673] PETER ARNT NIELSEN, INTERNATIONAL PRIVAT- OG PROCESRET 95 (1997).
[674] Rome II Regulation, art. 7.

environment itself and to property the provision covers damage to persons, however only if the damages are the result of the damage to ecology and consequence of human activity.[675] The exception may have significance to foreign direct liability cases where the EU-based parent company of the MNC can be said to have indirectly caused the harm occurring in the host State for instance through decisions made by the management of the parent company or omissions detrimental to employees in the host State subsidiary. The exception was however not used in the European counterparts to the *Kiobel* case, The *Shell Nigeria cases*, filed in the Netherlands before the Hague District Court by Friends of the Earth and a group of four farmers from villages in the Niger Delta that claimed compensation from Shell for damages caused when a major pipeline bust causing farmers and fishers to lose their livelihood. The Hague District court applied *lex loci damni***,** according to the principal rule in the Rome II Regulation and decided that Nigerian tort law should be applied to the case rather than Dutch tort law. In January 2013 the Dutch court issued a decision ordering Shell to pay compensation to one of the farmers, but it dismissed the balance of the claims based on Nigerian tort law, because the negligence did not fall under the standard of care under Nigerian law.[676] The rejection of the demands of the three remaining farmers was however appealed and in 2015, the Court of Appeals in The Hague issued a ruling[677] allowing the farmers to try the case before the court and demanded that Shell must give access to internal company documents. The ruling can pave the way for victims to turn to the Netherlands for legal redress when a Dutch company has been involved in environmental pollution or human rights violations abroad. It remains to be seen whether the Court of Appeals will apply the principal *lex loxi damni* rule of the Rome II Regulation and apply Nigerian tort law or whether it will use the article 7[678] exception on environmental liability and allow the plaintiffs to choose Dutch law. The case against the Swedish mining company Boliden for disposal of toxic waste in Chile also appears to have significant precedential value to EU Member States bound by the Rome II Regulation since it also applies in Sweden. The Boliden case started in September 2013 when a group of 707 Chileans sued the Swedish mining company demanding 91 million kronor ($13.9 million) in compensation for health problems allegedly caused by toxic waste the company dumped in northern Chile. The

[675] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) (22 July, COM (2003) 427 final), at 19.
[676] Friday Alfred Akpan et al. v. Royal Dutch Shell Plc. en Shell Petroleum Development of Nigeria Ltd. [District Court of the Hague] Jan. 30, 2013, HA ZA 09-0579 (Neth.).
[677] Oguru et al. v. Shell Petroleum N.V. [District Court of the Hague] Dec. 18, 2015, Case No. 3588/HA ZA 10-1677 (Neth.).
[678] Rome II Regulation, article 7.

plaintiffs filed with the Swedish district court in Stockholm, the first transnational corporate accountability case to be brought in Scandinavia, claiming Boliden exported 20,000 tons of mining waste to the Chilean town of Arica in the mid-1980s, despite knowing it was highly toxic and could not be handled safely at the site. People residing there eventually became sick, especially children that ran about on the town's toxic playground for years. Especially children are victims because both the arsenic and lead disposed off pose special problems for women during pregnancies. Contaminated women have passed on these toxics on to their fetuses, which has resulted in birth of poisoned children years after the toxics were brought to Arica. Boliden filed its defence on 20 January 2014 and denied the claim in its entirety. The court decided in favour of Boliden on 8 March 2018, however plaintiffs have appealed.[679]

In terms of applying the home State law, the Rome II Regulation by and large bars EU Member State Courts from deciding on foreign direct liability claims using its own law since the *lex loci damni* points to the host country forum's law when the violation is caused by a subsidiary or contractor of the parent MNC. Only a few special provisions allow for taking into account certain rules of conduct belonging to the home State but the legal consequences of that conduct is to be decided using host country rules of tort law.[680] Unlike the U.S., predictability and uniformity in choice of law rules still have a high priority in the EU and the European judges do not undertake a weighing out if interests similar to that which is undertaken by American judges.

England

Jurisdiction

EU-based corporate defendants

Although the U.K. voted to leave the EU on June 23, 2016, it is not yet clear what the country's path to "Brexit" implicates. At this writing, the U.K. is still in the EU so the comparative analysis will account for the private international framework on this basis. As explained above the judicial co-operation in civil matters under the Treaty of the European Union has been complicated by Ireland, the U.K., and Denmark choosing to stay outside the

[679] Arica Victims KB v. Boliden Mineral AB, Skellefteå Tingsrätt, T. 1021–13(Swed.); *Toxic Swedish Mining Waste Is Shipped to Chile,* Environmental Defender Law Center, http://www.edlc.org/cases/corporate-accountability/mining-waste-from-sweden-poisons-chilean-children/ (last visited May 28, 2018).
[680] Liesbeth Enneking, *The common denominator of the Trafigura case, foreign direct liability cases and the Rome II Regulation,* 16 EUR. REV. PRIVATE L. 283 (2008).

co-operation.[681] However Ireland and the U.K.'s opt-outs are constructed flexibly so that they can decide to participate in the co-operation in regard to a specific legislative act so-called "opt-in" clause.[682] Thereby, these states' opt-outs provide them with the possibility to participate in the co-operation on so-called "à la carte"-basis.[683] Both Ireland and the U.K. have however not made use of the opt-outs but instead consistently used their "opt-in" possibility for each and every legislative act adopted in the EU within the area of judicial co-operation in civil matters since the commencement of the Amsterdam Treaty in 1999. This means for foreign direct liability cases that English courts have jurisdiction over a multinational parent company or its branches or subsidiaries founded or running their principal place of business in England according to the rules set out in the Brussels I Regulation[684] presented above.[685]

The principle place of business means the place where a company carries out functions and not where others carry out functions that affect it. In the case *Vava and others v Anglo American South Africa Limited (AASA)*[686] it was disputed whether South African silicosis victims could file suit in the English High Court against AASA, a wholly owned subsidiary of London-based mining giant, Anglo American plc. AASA is not a U.K.-registered company but the claimants contended that the "central administration" or "principal place of business" of the defendant was in London and that accordingly under Art. 60 (now replaced with Art. 63) of the Brussels I Regulation, AASA was domiciled in the U.K. Anglo challenged the U.K. jurisdiction and the High Court decided in the company's favor but granted permission to appeal. In *Young v. Anglo American South Africa Limited and others*[687] the Court of Appeal upheld the decision finding that the South African subsidiary was not domiciled in England under the Brussels I Regulation. Therefore, a South African subsidiary which executed its entire business in South Africa could not be shown to have its central

[681] Cf. the Amsterdam- and Nice Treaties' attached protocols, Protocol no. 4 (1997) (United Kingdom and Ireland annexed to the Treaty on European Union (TEU) and to the Treaty establishing the European Community (TEC) art. 1–4); Protocol no. 5 (1997) (Denmark, annexed to the TEU and to the TEC art. 1–5).
[682] This can be done in two ways. Firstly, these states can, before three months after a proposal for the legislative act has been made, declare that they want to participate in the adoption and application of the legislative act. In this case these states' votes are counted in at the adoption of the legislative act. Secondly, Ireland and the United Kingdom can at any point in time after the adoption of a legislative act declare that they will use the legislative act so that it also applies to these states.
[683] PETER ARNT NIELSEN, INTERNATIONAL HANDELSRET 90 (2015).
[684] Regulation (EU) No 1215/2012 of the European Parliament and of The Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) COM (2012) 1215 final (12 December 2012). Art. 4 (1) and art. 63.
[685] *See supra* text accompanying notes 619-37.
[686] Vava and others v Anglo American South Africa Limited [2013] EWHC 2131(Eng.)
[687] Young v. Anglo American South Africa Limited and others [2014] EWCA Civ 1130 (Eng.)

administration in England on the grounds that its English parent company took the major decisions affecting the corporate group. For the Court to grant jurisdiction under the Brussels I Regulation, it may have been more expedient for the claimants to file suit directly against the English parent company on the basis that the parent company's own negligence was a cause of the harm.

In *Lungowe and others v. Vedanta and KCM*[688] London's Court of Appeal upheld a ruling by the High Court[689] that a case brought by Zambian villagers against Indian founded mining company Vedanta Resources and its Zambian subsidiary Konkola Copper Mines (KCM) over environmental pollution could be heard in England. The *Lungowe* court established that there was mandatory jurisdiction under the Brussels Regulation for *Vedanta* headquartered in London. For Zambian KCM, jurisdiction was granted pursuant to Civil Procedure Rules (CPR) 6.36 and 6.37[690] and paragraph 3.1 of CPR Practice Direction 6B since it was served out of Brussels I jurisdiction. Plaintiffs argued English courts were the only route to achieve justice, in particular because of the possibility of a conditional fee agreement for legal aid which is unlawful in Zambia.[691] The Court emphasizes in its ruling that access to justice was unrealistic in Zambia in terms of finding Zambian lawyers able and willing to fund such a complex and expensive litigation.[692] Also, referring to the discretionary rule CPR 6.37 (3)[693], the Court was satisfied that England was the proper place for the claim because the alternative – two trials on opposite sides of the world on precisely the same facts and events – was "unthinkable".

Vedanta challenged jurisdiction over KCM by arguing that the claim did not raise a real issue to be tried. Claimants must prove under CPR Practice Direction 6B, paragraph 3.1 (3) (a) that there is a real issue, which it is reasonable for the court to try, between the claimants and the anchor defendant (Vedanta) in order to establish jurisdiction over a defendant (KCM) serviced out of jurisdiction. Upon claimants submission of duty of care as the real issue, the *Lungowe* court provided seven key propositions[694] that a court must consider as to the existence of a duty of care between the parent company and its subsidiary: 1) Application of

[688] Lungowe and others v. Vedanta and KCM [2017] EWCA Civ 1528 (Eng.).
[689] Lungowe and others v. Vedanta Resources Plc and another [2016] EWHC TCC 975 (Eng.)
[690] The Civil Procedure Rules (CPR) United Kingdom Statutory Instrument 1998/3132 (L.17) amended by The Civil Procedure (Amendment) Rules 2018/239 (L.3) [hereinafter CPR]. *See infra* text accompanying notes 723 – 41 on jurisdiction in England over non-EU defendants.
[691] *Lungowe* EWHC Civ. 1528, para. 125.
[692] *Id.*, para. 127.
[693] *Lungowe* EWHC TCC 975, para. 168.
[694] *Lungowe* EWHC Civ. 1528, para. 83.

the Caparo[695] three-part test of foreseeability, proximity and reasonableness 2) Circumstances under which a duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the actions of that subsidiary 3) Such circumstances may exist where the parent company a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or b) controls the operations which give rise to the claim[696] 4) *Chandler v. Cape*[697] and *Thompson v. The Renwick Group Plc*[698] describe circumstances where the *Caparo* three-part test may, or may not, be satisfied so as to place responsibility on a parent company for the health and safety of a subsidiary's employee 5) The first of the four indicia in *Chandler v. Cape*[699], requires not simply identification between the businesses of the parent and the subsidiary in the relevant respect but that the parent is in a position to protect the subsidiary's employees because of its knowledge and expertise. If both companies have similar knowledge and expertise and they jointly take decisions about mine safety, which the subsidiary company implements, both companies may owe a duty of care to those affected by those decisions 6) Such a duty may be owed in analogous situations, not only to employees of the subsidiary but also to those affected by the subsidary's actions 7) The evidence sufficient to establish the duty may not be available at the early stages of the case. Much will depend on whether the pleading represents the actuality, cf. *Connelly v. RTZ Corporation Plc.*[700]

The *Lungowe* court's propositions not only affirmed the precedence of *Chandler* that a parent company's duty of care can extend to third-parties directly affected by the actions of the subsidiary. *Lungowe* also expands the scope of parent company liability if the claimants can prove that the parent controls the operations of the subsidiary and takes direct responsibility for devising a policy for human rights risks relevant to the claim throughout the corporate group. The possibility of a duty of care was satisfied in *Lungowe* with evidence that

[695] *See supra* chapter 2 text accompanying note 341.
[696] *See supra* chapter 2 text accompanying notes 319-20 on control and the distinction between piercing the corporate veil and direct parent company liability under the law of torts.
[697] Chandler v Cape plc., [2012] EWCA Civ 525 (Eng.).
[698] Thompson v The Renwick Group Plc, [2014] EWCA Civ 635 (Eng.). The claim had been based on the fact that the parent company had assumed a duty of care towards employees of the subsidiary for health and safety matters by virtue of that parent company having appointed an individual as director of the subsidiary with responsibility for health and safety matters. This one act did not establish the necessary duty.
[699] Arden LJ identifies four indicia for a duty of care: 1) Are the businesses of the parent and subsidiary in a relevant respect the same? 2) does the parent have, or ought it to have, superior knowledge on some relevant aspect of health and safety in the particular industry? 3) does the parent know (or ought it to know) that the subsidiary's system of work is unsafe in some way? 4) does the parent know (or ought it to have foreseen) that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection? cf. *Chandler*, EWCA 525 (Eng.), para. 80.
[700] Connelly v. RTZ Corporation plc [1998] A.C. 854 (Eng.), at 538.

Vedanta's global sustainability report stressed that "the oversight of all Vedanta's subsidiaries rests with the Board of Vedanta itself" and made an express reference to the problem at the mine in Zambia with contaminating discharges into the ground water.[701] Also Vedanta said it would seek the right to appeal to the Supreme Court.[702]

The scope of parent company liability in regard to a human rights policy was further clarified and limited in *HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell plc and another.*[703] The claimants wanted to bring proceedings in England against Shell and its Nigerian subsidiary on the basis that Shell owed the claimants a duty of care. The High Court pronounced that it had jurisdiction to try the claims against Shell but that there was no duty of care on Shell for the acts and/or omissions of its subsidiary. Since there was no reasonable ground for bringing the claim against Shell, there was no connection between England and Shell's Nigerian subsidiary to establish jurisdiction over the claims against the subsidiary and the case was dismissed.[704] Plaintiffs appealed but the Court of Appeal affirmed the High Court ruling that the claims about the parent company's control over the subsidiary's operations were bound to fail.[705] The Court of Appeal applied the seven propositions of *Lungowe* and held that the issuing of mandatory policies cannot mean that a parent has taken control of the operations of a subsidiary such as to create a duty of care to a person or class of persons affected by the policies.[706] The ruling thereby establishes that implementing a group human rights policy, e.g. following the OECD Guidelines or the UNGPs, does not in itself create a duty of care for the parent company under English law. Following the dismissal, King Okpabi of Ogoniland stated that English courts were the only hope for his community and justice could not be attained before Nigerian courts. Plaintiffs intend to bring the case to the U.K. Supreme Court.[707]

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[701] Lungowe and others v. Vedanta and KCM [2017] EWCA Civ 1528 (Eng.), para. 84 (1).
[702] Barbara Lewis, Zambian Villagers Win Right to Sue Vedanta in English Courts, THOMSON REUTERS (Oct. 13, 2017) https://www.reuters.com/article/us-vedanta-zambia-court/zambian-villagers-win-right-to-sue-vedanta-in-english-courts-idUSKBN1CI1SC
[703] HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell plc and another [2017] EWHC TCC 89 (Eng.)
[704] *Id.*, para. 119; Adam Vaughan, *Nigerian Oil Pollution Claims against Shell Cannot be Heard in UK, Court Rules*, THE GUARDIAN (Jan. 26, 2017) https://www.theguardian.com/business/2017/jan/26/nigerian-oil-pollution-shell-uk-corporations.
[705] HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell Plc and another [2018] EWCA Civ 191 (Eng.).
[706] *Id.*, para. 89.
[707] Libby George & Tife Owolabi, *Appeal Court Rules Nigerians Cannot Pursue Shell Spill Claim in England*, THOMSON REUTERS (Feb. 14, 2018) https://www.reuters.com/article/us-shell-nigeria-court/appeal-court-rules-nigerians-cannot-pursue-shell-spill-claim-in-england-idUSKCN1FY1V0.

Another case was brought against Shell's Nigerian subsidiary in *The Bodo Community v. Shell Petroleum Development Company (SPDC)* [708] regarding substantial land-based oil pollution in Nigeria. However, in this case the claims could be brought in the English Court by agreement between the parties although subject to some jurisdictional reservations[709] to be solved when the individual claims had been analysed.[710] However, the jurisdictional issues were never solved because Shell ended the case with settlement. The case is discussed in more detail further below regarding applicable law.[711]

As presented above[712], the House of Lords refused to deny jurisdiction under the *forum non conveniens* doctrine in *Lubbe v Cape.*[713] In *Connelly v. RTZ Corporation plc*[714] where plaintiff claimed damages for negligence on the grounds that he had contracted throat cancer working in the company's Namibian uranium mine, the company Rio Tinto also invoked *forum non conveniens* unsuccessfully. This was also the case in *Ngcobo v. Thor Chemicals Holdings Ltd and Desmond Cowley*[715] and *Sithole v. Thor Chemicals Holdings and Desmond Cowley*[716] regarding mercury poisoning of South African Workers. Pursuant to the CJEU case *Owusu v. Jackson*[717] and the *Lugano Opinion,*[718] English courts have lost judicial discretion on *forum non convenience* grounds in disputes falling within the scope of the Brussels I Regulation. Consequently, English Courts can no longer apply the common law doctrine to refer the case to an allegedly more appropriate forum available for the parties in order to avoid assuming jurisdiction against companies seated in the EU. However, following a change under the Recast Brussels I Regulation[719] Member State courts have discretion to stay proceedings in favour of non-Member State courts if: two sets of proceedings involve the same cause of action[720]; and where the proceedings are related.[721] Member State courts may only exercise the discretion if three criteria are met: proceedings in

[708] The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Limited [2014] EWHC 1973 (TCC) (Eng.).
[709] *Id.*, para. 8.
[710] *Id.*, para. 166.
[711] *See infra* text accompanying notes 761-66.
[712] *See supra* text accompanying note 624.
[713] Lubbe v Cape plc, [2000] UKHL 41 (Eng.).
[714] Connelly v. RTZ Corporation plc [1998] A.C. 854 (Eng.)
[715] Ngcobo v. Thor Chemicals Holdings Ltd and Desmond Cowley [1995] WL 1082070 (Eng.)
[716] Sithole v. Thor Chemicals Holdings and Desmond Cowley [2000] WL 1421183 (Eng.)
[717] Owusu V Jackson Case C 281/02 (2005) Ecr I – 1383 (CJEU)
[718] CJEU, 7 February 2006, Opinion 1/03, [2006] Ecr I-1145.
[719] Regulation (EU) No 1215/2012 of the European Parliament and of The Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (COM (2012) 1215 final (12 December 2012)).
[720] Article 33 (1) Brussels I Regulation.
[721] Article 34 (1) Brussels I Regulation.

the non-Member State court must have been started first; the non-Member State judgment is capable of recognition and enforcement in the Member State; and the Member State court considers that a stay is necessary for the proper administration of justice. It is possible for the Member State court to lift a stay any time if: there is no longer a risk of irreconcilable judgments (for related proceedings only); the non-Member State court stays or terminates proceedings; if there is reason to believe that proceedings will not be concluded in a reasonable time; or if continuation of Member State court proceedings are necessary for the proper administration of justice.[722]

Non-EU-based corporate defendants

Where a claim does not fall within the Brussels I Regulation because the defendant is not domiciled in a EU Member State and there is no jurisdiction agreement in favour of an EU Member State Court, English Courts are referred to the legislation of the Member State for solving jurisdictional issues involving non-EU based corporate defendants.[723]

English common law rules permit English courts to exercise jurisdiction over corporate defendants domiciled outside the EU/Lugano territory, if the foreign company carries business "to a definite and, to some reasonable extent, permanent place" within jurisdiction.[724] For instance, a U.S. based company could be sued in England if it carries business within English jurisdiction. However, if the presence in English jurisdiction is a subsidiary/parent connection, e.g. U.S. based parent with English based subsidiary, it does not suffice to attract jurisdiction because the court cannot ignore the separate legal personalities.[725] The foreign corporation must have "premises in England from which or at which its business is carried on."[726] The existence of a branch office or another place of business, suffices to attract jurisdiction. In such cases, the litigation must in some way involve the business of the branch, though not necessarily to a significant extent. A foreign corporation may also be subject to English jurisdiction if its agent is present within

[722] Article 33 (2) & 34 (2) Brussels I Regulation.
[723] Article 6 (1) Brussels I Regulation.
[724] Littauer Glove Corp v F W Millington (1920) Ltd., [1928] 44 TLR 746,747 (Eng.).
[725] Adams v Cape Industries Plc, [1990] B.C.C. 786 (Eng.), at 787 applying Salomon v Salomon & Co Ltd, [1895] AC 22 (Eng.).
[726] *Adams*, B.C.C. 786 (Eng.), at 812.

jurisdiction. However, there is a prerequisite that the agent has legal capacity to enter into contracts on behalf of the corporation.[727]

If the non-EU domiciled defendant has no presence in England, the starting point under the common law is whether the defendant can properly be served with proceedings. Where serving within jurisdiction is not possible, the claimant will need permission to serve proceedings on the defendant out of the jurisdiction. To obtain permission, a good arguable case must be established that each claim comes within at least one of the gateways in paragraph 3.1 of CPR Practice Direction 6B.

Paragraph 3.1 (3) (b) allows for consolidation of related claims before an English court against a defendant already served within the jurisdiction and an outside co-defendant who is "a necessary and proper party to the action." This is also referred to as the "necessary or proper party" gateway. The point of departure "is to ask whether, if [the co-defendant] were subject to the jurisdiction of the court, it would be appropriate for the claimant to join him to the claim against [the primary defendant] as co-defendant. If the answer is affirmative, he will be a proper party to the claim, but if there is no pleaded or sustainable claim against [the co-defendant], or the claim against [the co-defendant] is not well founded in fact and law, the present state of the law is that he will not be proper party no matter how closely bound up with the claim against [the primary defendant] he may be."[728]

A further condition is that the jurisdiction is not envoked abusively. There is a requirement that there exists a "*real issue which it is reasonable for the court to try"* between the claimant and the original defendant.[729] This requirement is an obstacle to a fictive or fraudulent suit, because the claimant will have to establish a good arguable case against the primary defendant. For instance in *Lungowe,*[730] a Zambian subsidiary could be brought to trial with its English parent company because it was established that there was a real issue between the claimants and the parent company and the subsidiary was a necessary and proper party to the claim against the parent. Moreover, even if the claimant can bring itself within this gateway,

[727] Saccharin Corporation Ltd v. Chemische Fabrik AG [1911] 2 K.B. 516 CA (Eng.). *Adams,* B.C.C. 786 (Eng.), at 811-29.
[728] ADRIAN BRIGGS AND PETER REES, CIVIL JURISDICTION AND JUDGMENTS, PARA 4.32. (2002).
[729] CPR Practice Direction 6B, Paragraph 3.1 (3) (a).
[730] Lungowe and others v. Vedanta and KCM [2017] EWCA Civ 1528 (Eng.). *See supra* text accompanying note 688 - 89.

the court still retains an overall discretion pursuant to CPR 6.37 (3) prescribing that the court will not give permission unless satisfied that England is the proper place for the claim.[731]

Also, a new general gateway was introduced in 2015 in CPR Practice Direction 6B, paragraph 3.1 (4) (a) making it possible to include further claims that otherwise would not by themselves fall within any of the jurisdictional gateways to serve English proceedings on non-EU domiciled defendants. It depends on which gateway has been relied on to establish jurisdiction over the main claim. The gateway relied on must be one or more of paragraphs (2), (6) to (16), (19) or (21) and the further claim made against the same defendant must arise out of the same or closely connected facts that apply to the main claim. This means that there are some circumstances in which the new gateway will not apply, for instance against a defendant who has been brought in as a "necessary or proper party" to a claim against another defendant pursuant to paragraph 3.1 (3) (b).

Additionally, specialized gateways allowing service out of English jurisdiction to a non-EU-domiciled defendant were introduced in 2015 including paragraph 3.1 (21) on claims for breach of confidence or misuse of private information where the relevant acts are committed and/or detriment is suffered within the jurisdiction.[732] For a claim in tort, the paragraph 3.1 (9) gateway was expanded from only allowing the claim against a non-EU-domiciled defendant if damage was sustained within jurisdiction or the damage sustained resulted from an act committed within jurisdiction to a case where damage *will be sustained within the jurisdiction* and where damage *which has been or will be* sustained results from an act committed, or *likely to be committed*, within the jurisdiction.[733]

A human rights victim residing in England, who suffers continuing damage such as psychological or physical impairment within England resulting from acts which took place wholly abroad by a company should be able to serve the overseas company under paragraph

[731] See how the High Court exercised the discretion in Lungowe and others v. Vedanta Resources Plc and another [2016] EWHC TCC 975 (Eng.), para. 96 - 97.
[732] Before introduction of the new gateway, the misuse of private information fell under the general gateway for tort claims, cf. Vidal-Hall v. Google Inc. [2015] EWCA Civ 311 (Eng.) which provided service out of jurisdiction to California-based Google for suit under the Data Protection Act 1998 claiming Google had used private browser-generated information to offer commercial service to advertisers. However, it was necessary to clarify misuse of private information as gateway in the CPR. The U.K. Supreme Court granted Google appeal for part of the claims but the case ended in settlement. See a U.S. example of transnational human rights litigation on misuse of private information, Xiaoning, Tao v. Yahoo!, Inc., No. C07-02151 (N.D. Cal. Nov. 13, 2007), discussed below.
[733] CPR 6.36 and CPR Practice Direction 6B, paragraph 3.1 (9) (a) and (b).

3.1(9).[734] Even a non-resident victim present in England for medical treatment related to human rights violations committed abroad might be able to make use of the provision according to *Al-Adsani v Government of Kuwait*.[735] In this case though, the English Court of Appeal eventually dismissed leave to serve out of the jurisdiction because the defendant was the government of Kuwait and was covered by state immunity against U.K. jurisdiction.[736] The case also confirms that England has subject matter jurisdiction, similar to the American ATS and TVPA, through customary international law, which is considered part of English common law.[737] Accordingly, it appears possible to make claims of breaches of custom in an English court so long as English law is the "applicable law". This was affirmed in the appeal case of *Al-Adsani v Government of Kuwait*[738] for breach of customary international law, entailed in alleged acts of torture. However, in most cases, customary human rights claim against a corporation would have to allege complicity between the corporation and a State actor.[739]

Another expansion of gateway relevant to transnational human rights litigation is paragraph 3.1 (16) opening up to service out, not only if the claim for restitution is made where the defendant's alleged liability arises out of acts committed within English jurisdiction but also if *enrichment is obtained within jurisdiction or the claim is governed by the law of England and Wales*. Finally, EU Member State Courts can no longer introduce the *forum non conveniens* doctrine in foreign direct liability cases against Third-State defendants as a result of the CJEU's ruling in the case *Owusu v Jackson*[740] and the *Lugano Opinion*[741] as presented above.

Applicable Law

English tort choice of law rules have gone through a remarkable and radical development from revolutionary alteration to a shift towards harmonisation with its Continental partners. The development dates back to 1870 in the leading case *Philips vs. Eyre*[742] predicating the

[734] International Law Association Human Rights Committee, *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad,* 2 EUR. HUM. RTS. L. REV 129, 161 (2001).
[735] Al-Adsani v. Government of Kuwait and others, [1994] 100 I.L.R. 465, 469 (Eng.) The predecessor to CPR 6.36, para. 3.1 (9) was applied.
[736] Al-Adsani v. Government of Kuwait and others, [1996] 107 I.L.R. 536 (Eng.).
[737] Trendtex Trading Corp v Central Bank of Nigeria [1977] 2 WLR 356 (Eng). confirms that customary international law is automatically incorporated into UK law.
[738] *Al-Adsani*, 100 I.L.R. (Eng.)
[739] JOSEPH, *supra*, note 328, at 115.
[740] Owusu V Jackson Case C 281/02 (2005) Ecr I – 1383 (CJEU).
[741] CJEU, 7 February 2006, Opinion 1/03, [2006] Ecr I-1145.
[742] Phillips v. Eyre LR [1870] 6 Q.B. 1 (Eng.).

rigid rule of "Double Actionability" which has formed the basis of the traditional English common law principles relating to tort choice of law. In *Philips* Jamaica's governor was sued for alleged assault and false imprisonment of a person during a riot on Jamaica which at that time was part of the English Commonwealth. After the revolt was put down, the island's legislator adopted a retrospective act, which legalised all the actions which were undertaken for the purpose of putting down the revolt. Consequently, according to *lex loci delicti* the imprisonment was not tortious. The court found for the defendant setting up two premises for liability constituting the "Double Actionability" rule: Firstly, the wrong must have been of such a character that it would have been actionable under English law, if committed in England and secondly, the act must not have been justifiable by the law of the place where it was done, meaning that the tortfeasor must be able to rely on any defence under foreign law.[743] The "Double Actionability" rule was interpreted as a fixed unconditional choice of law rule in the shape of the contacts approach until the case *Boys v. Chaplin.*[744] Boys and Chaplin were both English soldiers temporarily stationed in Malta but domiciled in England. During a leave in Malta, Boys, who was a pillion passenger on a motor scooter, suffered serious injuries as a consequence of Chaplin's negligent driving of a car rear-impacting the scooter. According to Maltese law, Boys could be granted compensation for loss of earnings and certain other expenses amounting to 53 British pounds. According to English law, Boys could also be granted compensation for pain and suffering which would amount to a compensation of 2303 pounds. English law was used by the English court of first instance and the Court of Appeal. In the Court of Appeal, *Lord Denning* decided that English law should be applied in accordance with the contacts approach while *Lord Upjohn* found that the question of measure of damages should be decided according to *lex fori*. *Lord Diplock* dissented and wanted to use Maltese law as *lex loci delicti*. The House of Lords upheld the decision with different *ratio decidendi* among the judges. *Lord Guest* and *Lord Donovan* considered the question of measure of damages as a procedural question which should be decided by the *lex fori* and rejected the contacts approach as too unpredictable.[745] *Lord Pearson* rejected both the *lex loci delicti* and the contacts approach but wanted to apply a flexible approach in order to avoid forum shopping.[746] According to his interpretation, the second part of the "Double Actionability" rule implies a strongly modified *lex loci delicti* principle in the sense that *lex loci delicti* must be used if it implies rules of defence. This

[743] *Id*. at. 28-29.
[744] Boys v. Chaplin [1971] AC 356 (Eng.)
[745] *Id*. at 381 - 383.
[746] *Id*. at 405 - 406.

interpretation has with some reluctance been viewed upon as the decisive opinion. A fourth judge, *Lord Hodson* wanted to introduce an exception to the "Double Actionability" rule and apply English law inspired by the American Second Restatement, arts. 6 and 145 following the *Babcock v Jackson*[747] decision from the U.S. explained above, reasoning that the ends of justice are more likely to be achieved if controlling effect is given to the *lex fori* which has a closer connection and a greater concern with the parties and the specific issues raised in the litigation.[748] *Lord Wilberforce* also wanted to introduce a flexible exception to *Phillips v. Eyre* drawing on the Second Restatement and the principles of Currie's "Governmental Interest Analysis" according to which consideration must be made as to whether the foreign rule ought to, as a matter of policy, be applied. The opinion of *Lord Wilberforce* has subsequently been adopted by appellate courts as the decisive opinion. Accordingly, the principles of the American Second Restatement emerged in English law laying down the general rule that English law should be applied if the defendant's conduct was actionable as a tort under English law and on the premise that civil liability in respect of the claim in question exists between the actual parties under *lex loci delicti*. However, the system of law having the most significant relationship with the ocurrences and the parties should be applied if clear and satisfactory grounds can be demonstrated to justify this. Even though *Boys* introduced a flexible exception, it did not determine what this exception should be predicated upon. The nature and extent of the exception to the general rule was uncertain. Eventually this traditional basis for English tort choice of law rules was subject to critique for being unjust and lacking in clarity.[749] Firstly, it was criticised for keeping tort law as the only area in English law where application of foreign law was not allowed, cf. the first part of the "Double Actionability Rule". Secondly, the rule was to a wide extent for the benefit of the tortfeasor because he or she could plead defence under both English law and *lex loci delicti*. Thirdly, the scope of application of the exception in *Boys* was considered almost fully undefined and a matter for speculation. On this background a new act Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act") [750] was introduced based on the *lex loci delicti* choice of law rule, however with room for some flexibility in the so-called "hard cases" – the cases that defy the underlying assumption about the state being a robust guardian of economic, social, and cultural rights which is clearly at odds with the prevailing

[747] Babcock v Jackson, 12 N.Y.2d 473 (1963).
[748] *Boys,* AC 356, 377-80 (Eng.).
[749] THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, PRIVATE INTERNATIONAL LAW: CHOICE OF LAW IN TORT AND DELICT (1990).
[750] The Private International Law Act 1995 (Law Commission 1995). Art. 11, section 1 and 2.

political realities of a majority of states.[751] Such as in *Boys* where Maltese law would compensate up to 53 pounds compared to British law which measured the damages to 2303 pounds. In these "hard cases" the new act introduced an exception according to which the law of another state than the law of place of the damage should be applied if it is substantially more appropriate. This assessment was to be carried out on the basis of the contacts approach comparing connections to *lex loci delicti* and to the other law in question.[752] Albeit in exceptional cases, the British Parliament had thereby completely abolished the old common law position.

As explained above, since January 11, 2009 EU Member States have had to apply the Rome II Regulation[753] to determine the law governing non-contractual obligations. Since the U.K. has used its opt-in clause[754] to take part in the Rome II regulation, English courts must now apply the *lex loci damni* to foreign direct liability cases under the Rome II Regulation as presented above. However, in cases where the damage occurred before January 11, 2009 the 1995 Act applies as presented above.[755] As discussed earlier[756], the *Chandler* case set a precedent for English courts to attribute a duty of care to the parent company for its subsidiary's workers under English tort law. However, in cases where the subsidiary or contractor is abroad, English law may not apply as English courts in most cases must apply host state law pursuant to the Rome II Regulation. In *Lungowe,*[757] the Court of Appeal affirmed that Zambian law should apply.[758]

In *Guerrero et.al. v. Monterrico Metals Plc, Rio Blanco Copper SA*[759], Peruvian communities filed claims in 2009 against U.K.-based Monterrico and its Peruvian subsidiary Rio Blanco copper mine on the grounds that they had been held for over 72 hours on the business's property, where they claimed that they were beaten, bound, forced to eat rotten food, and threatened with violence, rape and death. Two women on the group were sexually assaulted.

[751] Sub-commission on Prevention of Discrimination and Protection of Minorities Commission on Human Rights, *The Realization of Economic, Social and Cultural Rights: Final Report Submitted by Mr. Danilo Türk, Special Rapporteur, E/CN.4/Sub.2/1992/16* (July 3, 1992).
[752] The Private International Law Act 1995, Art. 12.
[753] 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 (Rome II), 2007 O.J. L 199/40 (31 July 2007)
[754] Protocol no. 4 on the position of the United Kingdom and Ireland (1997) (annexed to the Treaty on European Union (TEU) and to the Treaty establishing the European Community (TEC) art. 1–4).
[755] Matthew Chapman, *Private International Law and PI: Final Gasps of the 1995 Act*, 1 CHANCERY LANE, (May 13, 2014) https://www.lexology.com/library/detail.aspx?g=1ed34902-d079-4422-b5ea-6bed87c61dfc.
[756] *See supra* text accompanying note 697.
[757] Lungowe and others v. Vedanta and KCM [2017] EWCA Civ 1528 (Eng.).
[758] *Id.*, para. 19.
[759] Guerrero et.al. v. Monterrico Metals Plc, Rio Blanco Copper SA, [2009] EWHC 2475 (Q.B.) (Eng.).

Monterrico denied involvement, claiming that the abuses took place during a police operation over which it had no control. The claimants contended that officers of Rio Blanco or of Monterrico ought to have intervened so as to have prevented the abuse of the claimants human rights and/or were otherwise responsible for the injuries they had suffered. Thus, liability was claimed for negligent management and control. The claimants contended that the 1995 Act should decide the applicable law, since the damage occurred in 2005. Accordingly, English law would apply to Monterrico's liability in so far as their responsibility for risk management but either English or Peruvian law in respect to the remaining basis of its liability. In relation to Rio Blanco's liability, the 1995 Act pointed to Peruvian law according to claimants.[760] However, the choice of law was never decided because the case was settled without the company admitting liability, shortly before a ten-week trial that was scheduled to begin in October 2011.

In *The Bodo Community v. Shell Petroleum Development Company (SPDC)*[761] members of the Bodo community took legal action in 2012 before the High Court in London against SPDC (the Nigerian subsidiary of Shell) alleging the company was responsible for devastating oil spills leaving the Bodo community unable to earn money by fishing and farming like they used to. Unlike in the *Okpabi* case discussed above[762] which SPDC blamed on criminal sabotage and oil theft (known as "bunkering"), SPDC acknowledged responsibility to pay appropriate compensation in *Bodo* as required by the Nigerian Oil Pipelines Act 1990 (OPA) for spills caused by operational failure of the pipelines. The claims were filed under Nigerian law and the High Court affirmed in a preliminary ruling in June 2014 that there was no dispute about the applicable law being the law of Nigeria on all liability aspects.[763] The Court also affirmed that claimants were only entitled to claim compensation under the OPA in the sense that common law was excluded.[764] The Court also pronounced that Shell could be held responsible for pollution not only caused by operational failure but also for oil seepage from pipelines if the company failed to take reasonable measures to protect them from malfunction or bunkering. Such reasonable steps do not include a duty to appoint policing or military defence but an obligation to protect the pipeline using appropriate technology, surveillance and reporting to the police and the provision of

[760] *Id.*, para. 9.
[761] The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Limited [2014] EWHC 1973 (TCC) (Eng.).
[762] *See supra* text accompanying notes 703.
[763] Bodo, EWHC 1973 (TCC) (Eng.), para. 18.
[764] *Id.*, paras. 21 – 69.

anti-tamper equipment providing warnings.[765] The case was expected to go to trial under Nigerian law[766] in 2015, however, SPDC ended the case with settlement.

Where the local law of the host state in question is based on, or strongly infused with, English law principles, decisions of the higher courts of England and Wales will be influential. E.g. in *Lee v. Minister of Correctional Services*[767] the South African Constitutional Court cited with approval a series of English authorities that have replaced the conventional "but for" test of causation in certain cases where, essentially due to limitations in scientific and medical understanding, this standard is impossible to meet with "material contribution" or "material increase in risk" principles.[768] Referring to the obligations of the Bill of Rights, the Court noted that there was a "powerful case" for developing South African common law of causation along similar lines.[769] The gold mining silicosis cases *Vava and Young* discussed above[770] were switched to South Africa following the jurisdictional defeat in the U.K. and might have indicated whether a South African court would follow the *Chandler* decision. The case was due to go forward when South Gauteng High Court handed down judgment in April 2014 finding the company's objections to the claims as "ill-founded". The case was supposed to proceed to arbitration in April 2016, however in March 2016 a settlement was reached with AASA and AngloGold (previously within the Anglo American group) to compensate the victims. Two of the initial claimants had died in the intervening period and South African attorney Zanele Mbuyisa pronounced that continuing with the litigation, rather than settling, would have meant further substantial delay in receipt of compensation which the claimants and their families could not afford.[771]

Denmark

Jurisdiction

EU-based corporate defendants

[765] *Id.*, para. 92 (g).
[766] See The Bodo Community and Others v. Shell Petroleum Development Company of Nigeria Limited [2014] EWHC 2170 (TCC) (Eng.) in which the judge decided that claimants were only entitled to claim compensation under the Nigerian Oil Pipelines Act 1990.
[767] Lee v. Minister of Correctional Services [2012] ZACC 30 (S. Afr.).
[768] Fairchild v. Glenhaven Funeral Services Ltd [2002] 3 All ER 305 (Eng.); Mcghee v. National Coal Board [1973] 1 WLR 1 (Eng.); Barker v. Corus UK Ltd [2006] 2 WLR 1027 (Eng.).
[769] *Lee v. Minister*, ZACC 30 (S. Afr.). para. 101.
[770] *See supra text* accompanying notes 686-87.
[771] Gold Mining Silicosis, LEIGH DAY, https://www.leighday.co.uk/International-and-group-claims/Gold-mining-silicosis-(1) (last visited Mar. 23, 2017).

Denmark acceded to the Brussels Convention[772] in 1968 along with the then 14 EU Member States and was ready to implement the rules of the Convention in national law, however, when the Convention was largely replaced in 2002 with the Brussels I Regulation[773], recasted in 2012[774], Denmark was not a part of it because of an opt-out relating to judicial co-operation. The Danish opt-out was due to Denmark not being willing to accept that the basis for the international judicial co-operation in civil matters changed from an intergovernmental co-operation to a supranational co-operation. Originally, Denmark participated fully in the judicial co-operation in civil matters under the Rome Treaty but in connection with Denmark's accession to the Maastricht Treaty, the Danish Parliament entered into the so-called "national compromise" following the Danish "No" to the Maastricht Treaty in the context of a referendum 2 June 1992 following the conclusion of the Danish Ministry of Justice that entering the Maastricht Treaty necessitated application of the procedure in the Danish Basic Law § 20 on surrender of sovereignty.[775] The "national compromise" implies that the Danish Parliament came to the agreement that Denmark could enter into the Maastricht Treaty on the condition that Denmark could opt-out on EU's decisions in the four areas of union citizenship, the Monetary Union, the area of defence, and justice and home affairs. Subsequently, the Edinburgh Agreement was concluded between the EU and Denmark which solved Denmark's specific problems in ratifying the Maastricht Treaty by accepting the four opt-outs. Denmark's opt-out entails that none of the legislative acts established under the authority of article 81 of the Lisbon Treaty on judicial co-operation in civil matters apply to Denmark. The Brussels I Convention co-operation is still in force since the 14 "old" Member States chose not to denounce the Convention. The consequences of the Danish opt-out is alarming considering that Denmark is at a deadlock in the original Convention co-operation being the only EU country which the EU's new rules on transboundary civil and commercial matters do not apply to. Meanwhile, EU and Denmark have come up with a solution for the Brussels I regime by entering a parallel agreement under

[772] Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
[773] Council Regulation (Ec) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (16 January 2001).
[774] Regulation (EU) No 1215/2012 of the European Parliament and of The Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) COM (2012) 1215 final (12 December 2012).
[775] Notat om Visse Statsretlige Spørgsmål ved Danmarks Tiltrædelse af Traktaten om Den Europæiske Union, J.nr. 1991 – 513 -113, 3. marts 1992, Justitsministeriet Lovafdelingen (Memorandum on Certain Constitutional Questions in regard to Denmark's Accession to the Treaty on the European Union TEU).

international law which renders the Brussels I Regulation applicable to Denmark.[776] This is because Denmark acknowledges that not being subject to the Regulation would have serious consequences for Danish business and industry, environment, citizens, consumer protection etc. since the free movement of goods, people, services, and capital gives rise to several cases. Therefore it is necessary to have agreements with the other Member States that partly respects the judgments delivered in the EU and partly permits execution of the judgments delivered as well as clarifying and agreeing which court has jurisdiction.[777] Accordingly, the rules of jurisdiction in Denmark for cases with an international connection, e.g. where the parties are from different countries, are to be found in the Brussels I Regulation. Proceedings against a Danish parent company can therefore be initiated in the jurisdiction of the defendant's domicile, i.e. its statutory seat, or central administration or the centre of its main business activities.[778] Danish courts will therefore have jurisdiction over foreign direct liability claims brought before them against corporate defendants that are domiciled in Denmark, in the sense that they have their statutory seat, their central administration, or their principal place of business there. It appears that Denmark has not taken part in the adoption of the recast Regulation.[779] However, Denmark has made use of the possibility to implement the amendments to the former Brussels I Regulation[780] under the terms of the parallel agreement[781] between Denmark and the EU extending the Regulation to Denmark. Accordingly, on December 2012 Denmark notified the Commission of its decision to implement the new Brussels I Regulation.[782] Finally, it should be noted that the Danish courts have never had the possibility to decide their competence on the basis of an assessment of the suitability of the forum. If Danish courts have jurisdiction according to Danish law, the courts cannot refuse the case in favour of another court more convenient to take on the

[776] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. L 299/62. 16.11.2005).The agreement came into force on the 1. July 2007.
[777] Hearing no. 3 from negotiations during meeting no. 12, 7 November 2006 in the context of the first reading of L 46, draft bill to the law of the Brussels I Regulation (Forslag til Lov om Bruxelles I Forordningen m.v.).
[778] Article 4 (1) in conjunction with article 63 of the Brussels I Regulation.
[779] Regulation (EU) No 1215/2012 of the European Parliament and of The Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) COM (2012) 1215 final (12 December 2012). Recital 41.
[780] Council Regulation (Ec) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (16 January 2001).
[781] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. O.J. L 299/62. 16.11.2005.Article 4 (2).
[782] Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L 79, 21.3.2013).

proceedings.[783] Accordingly, EU's barring of the common law doctrine *forum non conveniens* does not have an impact on Danish rules on international jurisdiction.

Non-EU-based corporate defendants

The circumstances under which Danish courts may exercise jurisdiction over corporate defendants domiciled outside the EU/Lugano territory, in example a U.S. based parent company or a Third State corporate co-defendant brought to trial with an EU based parent company, are stipulated in the Danish domestic regime on international civil jurisdiction by referral from the Brussels I Regulation.[784] The rules of jurisdiction in Denmark for cases with Third State defendants are to be found in the Danish Administration of Justice Act.[785] The starting point is that a Third State defendant must be sued at the home court (*actor sequitur forum rei*), i.e. in the defendant's own country. Under Danish law, a legal person is domiciled at the place where it has its statutory seat or if that is unidentified, the place where a member of the board or the management is domiciled.[786] However, some exceptions apply for international civil jurisdiction of Danish courts over non-EU-based defendants some having parallels in EU law and some unequalled. Under Danish procedural law cases on damages in tort can be filed with the court in the place where the harmful event has occurred.[787] This rule corresponds to article 7 (2) of the Brussels I Regulation presented further above and must therefore be interpreted in the same way as the European rule. This implies that if the place where the act giving rise to the damage and the place where the harmful event occurred are sited in different countries, a Danish court has international jurisdiction when the place of the act was in Denmark.[788] This is interesting for foreign direct liability cases if the impugned actions were carried out in the boardroom of a Danish parent company, a branch, agency, or other Danish affiliate. Another counterpart to the Brussels I Regime under Danish civil procedural law extending beyond EU-based defendants is the possibility of jurisdiction over foreign defendants where the matters in dispute pertain to the activities of Danish offices or branches of those foreign defendants.[789] This may be relevant for suing for instance a U.S. parent company or for bringing a Third State subsidiary before Danish courts if it can be

[783] Comparative Study of "Residual Jurisdiction" in Civil and Commercial Disputes in the EU. National Report for Denmark. (2007).
[784] Article 6 (1) of the Brussels I Regulation.
[785] Consolidated act no. 1008, 27. October 2012 of the Danish Ministry of Justice.
[786] The Danish Administration of Justice Act (Retsplejeloven).Section 238, subsection 1.
[787] *Id.* Section 246, subsection 1, cf. section 243.
[788] NIELSEN, *International Handelsret, supra* note 683, at 342.
[789] The Danish Administration of Justice Act (Retsplejeloven).Sections 237 and 238, subsection 2. The counterpart in the Brussels I Regulation for EU-based corporate defendants is article 7 (5).

proven that the Danish affiliate was complicit in the alleged violation. If the court of the branch forum is envoked, it should be noted that a branch has no independent legal capacity. The moment a foreign company is dissolved, the branch ceases to exist, and so does the court of the branch.[790] The Danish Administration of Justice Act also has jurisdictional grounds relevant in this context unprecedented in the EU framework. If the corporate defendant is a foreigner and not covered by the Brussels I Regulation, it may be sued in Denmark if one of the Danish Business Administration Act's exorbitant jurisdictions can be applied.[791] One possibility is if the defendant was staying in Denmark at the time when the suit was filed, Danish courts will have competence[792], however this rule does not apply to foreign companies, only to foreign natural persons which is of interest in a foreign direct liability case when the claim is filed against a manager or one of the board members of the company during their stay in Denmark.[793] Another possibility is the rule on *quasi-in-rem* jurisdiction[794] which grants competence to Danish courts to decide on claims with economic value against non-EU-based defendants on the premise that the non-EU-based defendant has goods in Denmark. The juncture is when the writ is filed with the court.[795] If the goods are moved to another country after this time, the Danish courts will still have international competence. The concept of "goods" is, by case law, taken to mean any asset with economic value whether it is real estate, movables, securities, mortgage right, or other interests in land, intellectual property rights, and lawful claims.[796] It is however required that a claim is sufficiently definite and clear.[797] The *quasi-in-rem* jurisdiction does not require that the plaintiff is domiciled in Denmark. Nor does it require a connection between, on the one hand, the foreign defendant's goods or property and, on the other hand the economic claim which

[790] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1989 p. 969 Ø (Dissolution of Chevron) (Den.) on the dissolution of Chevron in Delaware, United States; a pending employment case had to be dismissed immediately.

[791] The exorbitant jurisdictions are secondary to the ordinary rules on international civil jurisdiction meaning that they only apply if a Danish court does not have competence according to the rules in the Danish Administration of Justice Act sections 237, 238, subsection 2, 241, 242, 243, and 245.

[792] The Danish Administration of Justice Act (Retsplejeloven).Section 246, subsection 2.

[793] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1955 p. 1079 SH.

[794] In Danish "godsværneting", cf. The Danish Administration of Justice Act, section 246, subsection 3.

[795] The Danish Administration of Justice Act, Section 348, subsection 1.

[796] For example Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1960 p. 428 (Den.) about a foreign shipping company's ship chartered out to a Danish charterer, UfR 1968 p. 384 (Den.) about rights pursuant to an agreement on a partnership's winding-up, UfR 1973 p. 206 (Den.) and UfR 1999 p. 88 H (Den.) about claims in insolvent estates entitling dividends, and UfR 2005 p. 1922 V (Den.) about how back pay also constitutes "goods".

[797] NIELSEN, *International Handelsret, supra* note 683, at 509. Although, in the case Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1996 p. 950 SH (Den.) it was decided that a Tunesian company which filed a suit in Tunis against a Danish shipping company had goods in Denmark even though the Danish shipping company contested the claim raised in Tunis.

the case is based on. Such basis for jurisdiction is called exorbitant jurisdiction which is characterized by the presence of a weak but not completely irrelevant or insignificant connection between the lawsuit and the forum-state and it is often based on policy reasons.[798] In relation to EU-law, it is essential to note the Brussels I Convention's barring of *quasi-in-rem* jurisdiction which it deems to be exorbitant and it is on the black list of "prohibited" grounds for jurisdiction.[799] Accordingly, such jurisdictional grounds that only have authority under national procedural law can only be applied against foreign nationals not domiciled on the EU or Lugano territory.[800] This is due to the concern that the regulation and its uniform application would be made illusory through various national provisions, typically aimed at extending the competence of the national courts and restricting the competence of courts in other signatory states.[801] Exorbitant jurisdictions are also generally looked upon in EU context as precarious in terms of substantive due process.[802] As noted above[803] the erosion of *forum non conveniens* does not affect Denmark since Danish courts have never made use of the common law doctrine, neither in cases involving non-EU based defendants.

Applicable Law

As noted above, since January 2009 the choice of law rules that apply to transnational tort claims brought before EU Member State courts have been unified by the EU's Rome II Regulation.[804] The Regulation was adopted under the authority of Title IV, article 65 (now Title V, article 81), and is as a result of Denmark's opt-out in justice and home affairs not applicable to Denmark. Since the Regulation merely revolves around an approximation of laws there is nothing to prevent Denmark from unilaterally enacting choice of law rules identical with the regulation. Denmark had a referendum on the Danish opt-outs in 2015 but the result was that Denmark is keeping the opt-out on EU justice and home affairs.[805] In Danish law, choice of law in tort cases is not governed by statute but determined by case law and the interpretation in legal literature. Contrary to the U.S. contacts approach of applicable law, Denmark is a country where the *lex loci delicti* rule has traditionally been the decisive

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[798] NIELSEN, *International Handelsret*, *supra* note 683, at 507. Exorbitant jurisdiction is known in American law as "long-arm" jurisdiction.
[799] Brussels I Regulation article 5 (2).
[800] Unless the exceptions, irrelevant in this context of foreign direct liability cases, pursuant to point (a) of article 1 (2) of the Brussels I Regulation apply.
[801] ERIK WERLAUFF, CIVIL PROCEDURE IN DENMARK (2010).
[802] NIELSEN, *International Handelsret*, *supra* note 683, at 507.
[803] *See supra* text accompanying note 783.
[804] 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 (Rome II), 2007 O.J. L 199/40 (31 July 2007).
[805] *Resultat af Folkeafstemning: Nej*, FOLKETINGETS EU-OPLYSNING (EU INFORMATION CENTRE), (Dec. 4, 2015) http://retsforbehold.eu.dk/da/nyheder/2015/resultat

conflict of laws rule. However, in recent decades it has been greatly disputed in Danish legal literature whether an international tort case should be decided according to *lex loci delicti* or the contacts approach. Contemporary Danish legal literature argues that the Danish courts consistently use the contacts approach and that the *lex loci delicti* rule is a thing of the past.[806] In Danish case law the courts have indeed derogated from the *lex loci delicti* rule in favour of the contacts approach because there were one or more factors in the cases pointing to the use of Danish law instead of foreign law of the country where the damage happened. This tendency commenced in three decisions regarding traffic accidents before the Danish High Courts in the 1960'ies and in the 1980'ies.[807] The common denominator of these cases was the acknowledgement of a need for higher flexibility. In the judgment *U 1967.405 Ø* The Danish High Court found that the case had a stronger connection to Denmark, even though the traffic accident took place in Poland. The case regarded a Danish carrier company owner's liability towards the widow of a victim who was killed in a traffic accident in Poland in a vehicle owned by the company and driven by an employee of the company. The victim wanted to go for holiday in Poland and was allowed by the company owner to join the company driver on a drive from Copenhagen to Poznan to transport laundry machines for another Danish company on the premise that he assisted the company driver in driving the vehicle. During the drive in Poland there was a collision between the Danish vehicle, while driven by the company driver, and a Polish vehicle. At the collision, the victim was injured and died shortly thereafter. The victim had not at the point where the accident happened assisted the company driver. The victim's widow claimed compensation for loss of dependency from the Danish company owner claiming Danish tort law as applicable law from a contractual point of view. The court pronounced that regardless of whether there existed privity the case did not regard contractual liability because the accident was not connected to performance of a possible contract. The court reasoned that "the question - apart from the place of the accident and its applicable regulation of traffic relevant as to whether the driver in the given situation has acted with due care – has connection to the Danish legal system with regard to decisive factors which is therefore applied for the decision as to whether and to what extend the liability to pay damages rest on the owner of the vehicle."

[806] Peter Arnt Nielsen, *Deliktsstatuttet - duplik*, 1 JURISTEN 40, 42 (2002).
[807] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1967 p. 405 Ø (Den.); Assurandør-Societetets Domssamling (ASD) [Supreme- and High Court Reports] 1968 B p. 26 Ø (Den.); UfR 1982 p. 886 V (Den.).

The decisive factors in question pointing to Danish law amounted to the defendant residing in Denmark, the vehicle being registered in Denmark with a Danish compulsory third party liability insurance, the plaintiff being Danish, and the agreement on ride share being entered in Denmark about driving from Denmark and back again. Similarly the High Court judgment *ASD 1968 B 26 Ø* also concerned a Danish owned car used for business purposes involved in a traffic accident abroad and is also undoubtedly decided using the contacts approach resulting in application of Danish law. The third judgment *U 1982.886 V* differs from the two other cases in that the driving was not international but took place within the borders of Scotland. Two Danish citizens, Karsten Krægpøth and Gerhard Rasmussen, residing in Denmark, were connected with one another through a hunting magazine with a view to arranging a hunting trip to Scotland. The trip was arranged by a Danish travelling agency making the reservations for a car rental in Scotland in both their names. During the stay in Scotland, the car was driven alternately by the two Danes. While driving on the 29. September 1973, Krægpøth at the wheel and Rasmussen as passenger, an accident happened, at which Rasmussen was killed. After this, Rasmussen's widow and son prosecuted Krægpøth claiming compensation for loss of dependency. Scottish law was applied by the Danish High Court referring to connecting factors such as the site of damage being Scotland during use of a vehicle registered in Scotland covered by a compulsory third party liability insurance taken out in Scotland. The claim was hereafter statute-barred because of a Scottish provision with a limitation period of 3 years which could not be disregarded even though the provision after Scottish law is of procedural character. This judgment is controversial. It has been perceived in Danish literature as not constituting a definitive rupture with *lex loci delicti* placing emphasis on the result. It has also been argued that Scottish law was deliberately chosen in order to reach a reasonable substantive result considering the belated claim.[808] More radically, the judgment has been cited in support of the High Court deliberately establishing a breach with *lex loci delicti* for the benefit of the contacts approach.[809] This interpretation is supported by the fact that the court took unnecessary trouble in reaching the law of the place of the tort when considering a number of connecting factors. The deliberate choice of Scottish law by the High Court would have been made much easier if the court briefly and to the point had stated that Scottish law was applicable because the accident took place in Scotland. However, The High Court did not choose the convenient solution but instead the contacts approach reaching a decision on Scottish law as applicable, not on the

[808] TORBEN SVENNÉ SCHMIDT, INTERNATIONAL FORMUERET 220 (2000); Hertz, *supra* note 474, at 231.
[809] Peter Arnt Nielsen, *Deliktsstatuttet i Dansk Ret*, 4 JURISTEN 134 (2001).

basis of the *lex loci delicti* rule but because the court aimed to reach a reasonable substantive result. Judgments of the Danish High Courts are in Denmark attributed great precedential value, especially as regards areas not governed by statute which is the case in Denmark for choice of law in foreign direct liability in tort. Subsequent case law establishes that the contacts approach is not only used in cases of traffic accidents complicated by the driving in different countries. The judgment of the Danish Supreme Court, *U 1999.255 H*[810] regarding choice of law in product liability is cited as a prejudicial decision dealing a deathblow to the *lex loci delicti* rule.[811] In this case, a German company had produced and sold district heating pipes to a Danish company which re-sold the pipes to a Danish municipality. The municipality found out that the pipes were defective and prosecuted the Danish seller which issued third-party notice against the German producer. Both the Danish High Court and the Supreme Court found that the product liability to the Danish municipality should be decided according to Danish law after evaluating several connecting factors of the case. The court pronounced that "since the damage occurred in Denmark where the claimant is domiciled and to where the pipes were delivered, the question of the possible product liability of the third party defendant is to be decided according to Danish law. It is true that, in terms of result, the courts decide in favour of the *lex loci delicti*, but the interesting question in terms of precedential value is *how* the result is substantiated. Both the High Court and the Supreme Court clearly use the contacts approach. The place where the damage has occurred is neither the decisive nor the only criteria, on the contrary, it forms part of a discretion exercise as one of several elements. Similar to the High Court in case *U 1982.886 V*, the Supreme Court deliberately refuses *lex loci delicti* as an absolute rule. Again, if *lex loci delicti* were the absolute rule, there was no point in the Supreme Court going through unnecessary trouble evaluating connecting factors to reach the law of the place of the tort. The grounds of the four cases mentioned do not list any reservations whatsoever as to applying the contacts approach in other types of cases than traffic accidents and product liability. This is finally confirmed in a more recent Danish High Court decision *U 2010.2717 V.*[812]A Danish worker was injured in an industrial accident in connection with his work as an on-site fitter at a shipyard in China. The accident happened during work on a new building in an engine room of Wuhang Shipping Wuhang where the worker stepped on a floor plate that was loose whereby he fell down and injured his leg. After this, The Danish Metalworkers' Union acting

[810] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1999 p. 255 H (Den.)
[811] Nielsen, *Deliktsstatuttet - duplik, supra* note 806, at 42.
[812] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 2010 p. 2717 V (Den.)

as agent of the worker filed a tort claim against “MAN B&W Diesel A/S Alpha Diesel”, a Danish branch of the German multinational company “Man Diesel SE”. The on-site fitter was employed by MAN Diesel A/S, however it was stated in the company folder for on-site fitters that when the worker was aboard a shipyard he was himself responsible for his work abroad. The Danish Metalworkers' Union claimed the case to be decided according to Danish law and Danish legal principles so that in passing judgment on MAN Diesel A/S’s liability the point of departure should be the principles that can be deduced by Danish regulation on work environment including standards of acting reasonably. In addition, the plaintiff claimed that the case should be decided according to tort law since claims in consequence of an industrial injury are tort claims outside the contract of employment. It was therefore submitted that the case should be decided according to the contacts approach.

The defendant counter-argued that Chinese law should be applied on the basis of *lex loci delicti* and that the norms of the Danish regulation on work environment were only applicable in Denmark to a Danish work place. In support of this it was argued that MAN Diesel A/S did not have the possibility to supervise the work or influence the organization of the work place. The High Court found that it was apparent that the Danish Health and Safety at Work Act was not directly applicable in China even though the case revolved around work carried out for a Danish employer by a Danish employee. The court reasoned that the question was rather whether the norms of acting and the duty of care for employers which apply to industrial injuries according to Danish tort law and which build on the principles mentioned in the Danish regulation on work environment on the organization of the work place, the arrangement of the work and the employer’s duty to instruct and supervise, could be applied. The court found that the industrial accident had to be considered as a claim in tort and that the claim did not directly concern the conditions of employment between the parties. It was therefore a matter of course that the choice of law was decided according to the conflict of laws rules in tort. Accordingly the High Court used the contacts approach again departing from the *lex loci delicti* rule on the grounds that the case in overall terms had the strongest connection to Denmark. Therefore the norms of acting reasonably and the duty of care which under Danish tort law applies to industrial injuries were applicable to the case. In Danish tort law it must be proven that the defendant is liable under the principle of fault, in Danish “culpa”. According to the governing principle of fault, a person is liable in damages for any foreseeable damage caused by a wrongful act to which culpability attaches - whether deliberate or negligent - where such damage is caused to a vested interest and where no

defences are available. The High Court found that MAN Diesel was not liable for the accident because it only had limited influence on the arrangement of the workplace, and no possibility to supervise the work. As for the substantive outcome of the case, it may not be useful for determining the prospects of holding a parent company liable for its subsidiary or contractor because, although the plaintiff was working as an on-site fitter at a shipyard in China, he was employed directly by MAN Diesel A/S in Denmark. However, it may be deduced that to be liable under the principle of fault the defendant must have had a degree of control such as taking part in the management or supervision of the company where the injury occurred.

In the interest of accommodating concerns of unpredictability, it is recommended in legal literature that the contacts approach is combined with a strong rule of presumption in favour of the law of the state where the injurious conduct has taken place. This is to say that the application of the *lex actus* (the law of the place of the act) instead of the *lex injuriae* (the law of the place of the country in which the harm was suffered) should be an important, if not the only criteria in the case.[813] This is interesting in the case of a parent company exercising control over the subsidiary's activities, e.g. if it has a considerable influence on the working standards.[814] It has also been suggested in Danish legal literature[815] that the contacts approach should be the starting point in Denmark so that the discretion is confined by using the principles of the Rome Convention art. 4,[816] regarding choice of law for contractual obligations in cases where the parties have not agreed on the choice of law when entering the contract. According to this outset, the assumption is that the case has the closest connection to the law in the state where the injurious conduct has taken place. In sum, compared to other EU member states sticking to the general rule of *lex loci delicti*, Denmark stands out as an exception moving towards the contacts approach. Therefore it is not possible to predetermine which country's law would be applied in transnational human rights litigation before a Danish court. If the violation happened exclusively overseas in the host state e.g. as a result of a company's environmental harms or breach of working standards, this would be a factor

[813] JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, INTERNATIONAL PRIVATRET PÅ FORMUERETTENS OMRÅDE 110 (2008).
[814] As the Court noted in the Judgment of the Court of the Chief Judicial Magistrate of Bhopal, Cr. Case No. 8460 / 1996 dated June 7, 2010, par. 1 and 2 at http://www.countercurrents.org/UCIL.pdf, an American corporation cynically used a Third World country to escape from the increasingly strict safety standards imposed at home continuing. Specifically, the communication of safety standards and procedures to the subsidiary from the headquarters were ineffective, and the enforcement of safety standards, codes, and punishment were, at best, inconsistent.
[815] NIELSEN, *Privat- Og Procesret*, *supra* note 673, at 73.
[816] Convention 80/934/ECC on the law applicable to contractual obligations.

pointing to applying the law of the host state rather than Danish law. An MNC's overseas act could on this basis perhaps be subjected to applicable laws at home if the impugned actions were planned, and in some way partially executed, in the boardrooms at headquarters.[817]

In the Danish legal system, it can also be considered whether Danish tort law could be applied on the basis that some rules are mandatory so they must be applied even though the legal matter according to the choice-of-law framework is subject to foreign law.[818] Application of the host state tort law can be overruled if those rules are manifestly incompatible with *ordre public*.[819] It is not clear to what extent these exceptions could apply in transnational human rights cases. E.g. it could be considered that application of foreign tort law could be dismissed from an *ordre public* point of view if application of that law would undermine human rights. However, if host state law subjects a tort claim to statutes of limitation and thereby cuts off the human rights victim from compensation, it is not necessarily contrary to *ordre public.* It can be assumed though that e.g. a tort rule in host state law that excludes compensation for children that have suffered damage during work on the grounds that child labour is legal in the host state would be contrary to Danish *ordre public*.[820]

It is difficult to determine the substantive outcome of a transnational human rights case before a Danish court, because there is no case parallel to the English or American case law reviewed above. As mentioned above on *U 2010.2717 V* the defendant must be proven liable under the principle of fault, in Danish "culpa". The damage must have been foreseeable damage and caused by a wrongful act to which culpability attaches whether deliberate or negligent. As explained in Chapter 2 the starting point is that liability for the parent company is only a possibility if there is a basis for imposing liability on the parent company for the subsidiary's acts because of mix of assets between the companies or because there is a basis for fault-based liability. The cases in Danish law on liability for the parent company have revolved around property damage or liability for debts rather than personal injury.[821] It is not

[817] Craig Forcese, *Deterring "Militarized Commerce": The Prospect of Liability for "Privatized" Human Rights Abuses*, 171 OTTAWA LAW REVIEW 173(2000).
[818] *See supra* text accompanying notes 673 on *ordre public* in EU law.
[819] NIELSEN, *Privat- Og Procesret*, *supra* note 673, at 73.
[820] Vibe Ulfbeck, *Virksomhedens Privatretlige Erstatningsansvar for Overholdelse af Menneskerettigheder i Udlandet*, 4 ERHVERVSJURIDISK TIDSSKRIFT 315, 317 (2013).
[821] One related case is the High Court case Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1992 p. 12 V (Den.) on liability for industrial injuries where a company was identified with another company and subjected to a fine according to the health and safety at work act, cf. Ulfbeck, *id.*, n. 38. However this is a case of a company paying a fine to the state rather than compensation to the victim.

clear whether a Danish court would impose liability in the same way as the English court in the *Chandler or Lungowe* case on the basis that the parent company took part in the management of the subsidiary or took on responsibility for the subsidiary's policies and therefore owed a duty to the subsidiary's employees.

Another question is whether a parent company can incur liability under Danish law for the acts of its supplier, e.g. if a company in Denmark could be held liable for purchasing products from a supplier that commits human rights violations against its workers in the course of production. Assuming that the company is not an owner or joint owner of the supplier but only has a contractual relationship with it, the company's influence and control over the supplier would most often be much more limited than in the case of subsidiaries. Presumably, it would be more difficult to recover for damages in cases against suppliers rather than subsidiaries. A case could be filed under the legal doctrine of "aiding and abetting" if the business collaborated with governmental authorities, e.g. the military in the host state committing atrocities, or if a company has taken part in a subsidiary's human rights violations by instructing or omitting to take action against its subsidiary's activities or practices, or if a business can be said to have established or sustained poor working conditions for workers by purchasing goods from a supplier, or by providing financial support to suppressing regimes in the host state. Under the Danish principle of fault, aiding and abetting would require that the company knew or ought to have known about the human rights violations in question. At this writing, there has not been a case against a Danish company before Danish courts, however, there has been a legal complaint by a group of activists and NGOs against the French subsidiary of the Danish company DLH (Dahlhoff, Larsen & Hornemann) before the Public Prosecutor at the Court of Nantes, France. The complaint alleged that during the Liberian civil war, from 2002 – 2003, DLH bought timber from Liberian companies that provided support to Charles Taylor's government. The group claimed that DLH continued to buy timber from Liberian suppliers despite strong evidence of their involvement in corruption, tax, evasion, environmental degradation, UN arms sanctions violations and human rights abuses. The complainants also alleged that DLH was guilty of "recel" – the handling and profiting from goods obtained illegally, punishable under French criminal law. There was no claim for compensation and the complaint was dismissed by the public prosecutor requiring "no further action."[822] Given the reluctance of public prosecutors

[822] *DLH lawsuit (re Liberian Civil War),* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://business-humanrights.org/en/dlh-lawsuit-re-liberian-civil-war (last visited Mar. 23., 2017).

to pursue corporate actors, the NGOs have submitted the complaint to the Senior Magistrate of the Regional Court of Montpellier as a civil party, in order to obtain justice for victims.[823] The case is still pending. It will be interesting to see if Danish law will be chosen as the applicable law since the Rome II Regulation applies in France and it could be argued that the wrongful acts were carried out by the parent company in Denmark.

Comparative Observations

The European approach to the field of private international law in general and the field of choice of law in particular reflects norm and policy neutrality contrary to the less cautious American approach of including broader public interests in the different States such as applying the law imposing a higher standard of conduct for the tortfeasor. However, in cases where EU law refers to domestic law, English case law demonstrates that judges consider victims' possibility for access to justice and the substantive issue to be tried for granting jurisdiction while Danish law demonstrates exorbitant jurisdiction often based on policy reasons and more leeway for applying Danish law.

Before the U.S. Supreme Court decided to limit application of ATS jurisdiction in *Kiobel* and *Jesner*, plaintiffs seemed to have better prospects pursuing justice in U.S. courts than in European courts. However, federal cases following *Kiobel* and *Jesner* demonstrate that while it is possible to satisfy the "touch and concern"test, ATS jurisdiction is limited to claims that demonstrate a U.S. focus and relevant conduct in the U.S. Consequently, Esther Kiobel has taken legal action to the EU in Shell's home country, the Netherlands after dismissal from the U.S. [824] Also considering U.S. courts' upholding of the procedural obstacle *forum non conveniens*, plaintiffs may have better access to jurisdictions under the Brussels I Regulation, the additional jurisdictional gateways for serving non-EU corporations in England and Denmark, and the CJEU's dismissal of *forum non conveniens.* However, jurisdiction may still be declined in England if a duty of care of the parent company cannot be established to the claimants for the acts of its supplier or subsidiary.[825] By contrast, jurisdiction has been

[823] *Complaint Accuses International Timber Company DLH of Trading Illegal Timber And Funding Liberian War*, GLOBAL WITNESS, (Mar. 12, 2014) https://www.globalwitness.org/en/archive/complaint-accuses-international-timber-company-dlh-trading-illegal-timber-and-funding-0/.
[824] *Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni 9 as Writ Served in Dutch Court,* AMNESTY INTERNATIONAL, https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/ (last visited Apr. 26, 2018).
[825] HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell Plc and another [2018] EWCA Civ 191 (Eng.).

granted in Denmark even though it could not be proven that the parent company was liable under the principle of fault.[826]

In the event that the corporation is non-EU based, Brussels I does not apply but refers to domestic law. In this case, extraterritorial jurisdiction of English courts extends wider than that of U.S. courts considering that it is possible to serve a claim out of jurisdiction as long as the case has a sufficiently close connection with England so as to make it reasonable for the prospective defendant to be required to defend the allegations in England.[827] For example, England has several gateways, expanded in 2015, for serving of English proceedings out of the jurisdiction at common law on defendants who have no presence in England. One example pointed out above is the English CPR Practice Direction 6B paragraph 3.1 (21) on misuse of private information. This gateway could be relevant for a case with the same facts as the U.S. case *Xiaoning, Tao et. al. v. Yahoo*! et. al. [828] Chinese journalist Shi Tao anonymously advocated for democratic reform and sent details via Yahoo e-mail of a Chinese government memo to a U.S. human rights forum. Yahoo gave China access to Tao's mail account leading to Tao being charged with disclosing of state secrets. He was tortured and incarcerated from 2004-2013 while assigned to forced labour and suffering from heart problems, ulcer and a skin condition. Case was eventually settled. Before settlement, Yahoo filed a motion to dismiss for lack of personal jurisdiction which would have caused plaintiffs great difficulty to prevail against. On a case with the same facts in England, suit against the parent could be filed if it could be proven that it contributed to handing over personally identifiable information of its users to the Chinese government, cf. paragraph 3.1 (21) (b) "detriment which has been, or will be suffered, results from an act committed […] within the jurisdiction". Suit against the subsidiary could be filed pursuant to the paragraph 3.1 (3) (b) the "necessary or proper party" gateway.

In regards to the plaintiff's residence or temporary stay, England provides a jurisdictional gateway over non-EU domiciled defendants in paragraph 3.1 (9) (a) on claims in tort where damage is sustained within English jurisdiction as demonstrated in *Al-Adsani*. By contrast, jurisdiction was rejected in the U.S. Supreme court case *Kiobel v. Royal Dutch Petroleum Co*[829] even though the claimant Esther Kiobel, accusing Shell for colluding in her husband's

[826] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 2010 p. 2717 V (Den.).
[827] International Law Association Human Rights Committee, *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad,* 2 EUR. HUM. RTS. L. REV 129, 141 (2001).
[828] Xiaoning, Tao v. Yahoo!, Inc., No. C07-02151 (N.D. Cal. Nov. 13, 2007) (joint stipulation for dismissal).
[829] *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013). *See supra* text accompanying notes 546-604.

imprisonment, subjection to torture and 1995 execution in Nigeria, resided in the U.S. suffering continuous psychological and emotional distress. She suffered assault and kidnapping in Nigeria by a Lt. Colonel when trying to visit her husband in prison before his execution. Refugee asylum to the U.S. was granted to Kiobel and her children after having spent two years in a refugee camp in Benin Republic suffering continous political persecution and threats of kidnapping and execution from the Nigerian government.[830]

By contrast to England, Danish jurisdiction over non-EU based corporate defendants only requires that the defendant has goods in Denmark, or that the matters in dispute pertain to the activities of Danish offices or branches of those foreign defendants. In comparison English courts require the claim against the foreign defendant to derive from a business with permanent establishment in England. Subsidiary and parent do not qualify because the separate legal personalities and presence of goods do not suffice as permanent establishment. However, as demonstrated, England has several jurisdictional gateways that can be obtained with permission absent a business within English jurisdiction. U.S. courts require the claim to "touch and concern" U.S. territory and foreign corporations cannot be sued anymore under the ATS even if they have business activities on U.S. territory.

In regard to the choice of law issue, plaintiffs have a better chance for applying Western standards to their case before U.S. and Danish courts that use the flexible contacts approach rather than English courts that apply the Rome II Regulation' *lex loci damni* with only a few special exceptions. It is however a requirement for the application of U.S. and Danish law that the geographical location of the defendants and the allegedly wrongful behavior causing the tort were within their jurisdictions. Looking to European governments' take on extraterritorial law for enforcing accountability for environmental and human rights costs of business activity, unfortunately for plaintiffs, it appears to be aligned with the majority opinion in *Kiobel.* The *amici briefs* filed by the United Kingdom, the Netherlands, Germany, and the EU Commission argued for a presumption against extraterritorial application of the ATS allowing for universal jurisdiction only on *forum necessitatis* grounds.[831] The EU

[830] *One Woman vs. Shell*, Amnesty International https://www.amnesty.org/en/latest/campaigns/2017/06/one-nigerian-widow-vs-shell/ (last visited May 2, 2018).

[831] Supplemental Brief for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting Neither Party, at 6, 33–34, Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013); Supplemental Brief for the European Commission on Behalf of the European Union as Amicus Curiae Supporting Neither Party, at 18, Kiobel v. Royal Dutch Petroleum Co., 133 U.S..1659 (2013); Brief for the Federal Republic of Germany as Amicus Curiae Supporting Respondents at 2, 14, Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013).

Commission's stance on universal civil jurisdiction indicates that it would not be interested in a reverse *Kiobel* scenario, where a U.S. corporation is sued by a non-EU human rights victim before a European court relying on ordinary tort jurisdiction. The CJEU might be more willing to allow exercise of extraterritorial jurisdiction than the U.S. Supreme Court if the EU Member States filed for a judicial opinion.

As regards practical procedural barriers, U.S. courts are generally more plaintiff-friendly than English and especially than Danish courts. For instance, the U.S. offers class action law suits which are not permitted in England or Denmark, although England offers group litigation orders. The "lose and pay" system is the general rule in Denmark and many European civil-law countries but does not apply in the U.S. Also, In England it is possible to enter a conditional fee agreement for legal aid ('no win no fee').

As for the substantive outcome of cases, there is some precedent to rely on in each of the jurisdictions even though there are only a few cases finally decided on in substance rather than settlement namely in the U.S. [832] In the U.S. the ATS is a rare legal venue for plaintiffs because it uses human rights law and tort law against corporations. The substantive basis for a lawsuit under the ATS (i.e. which law should supply the theory of liability) can either be federal common law, federal common law informed by international or just international law. E.g. defendants could be held liable under an aiding and abetting theory provided by international law or federal common law. In the U.S., plaintiffs have mainly achieved success with several settlements. Generally, from the cases admitted to the courts, it appears more likely for plaintiffs to recover for a negligence claim by proving an element of control when the defendant is the parent company of a fully owned subsidiary, e.g. *Doe v. Unocal*[833] rather than connected by contract, e.g. *Doe v. Wal-Mart Stores*[834]. Before English courts some cases have reached preliminary substantive outcomes. It is established in *Chandler* that a parent company owes a duty to a subsidiary's employees if the parent took part in the management of the subsidiary and in *Lungowe* if the parent in its human rights policy explicitly takes responsibility to oversee its subsidiaries. It is an uncertain substantive outcome plaintiffs face before an English court because the Rome II Regulation stipulates application of host state

[832] Filartiga v. Peña-Irala, 630 F 2d 876 (2nd Cir. 1980); Locarno v. Drummond, Ltd.; Jimenez, JVR No. 478482, 2007 WL 4855173 (N.D.Ala. 2007); Soler v. Drummond, Ltd.; Jimenez, JVR No. 478483, 2007 WL 4855174 (N.D.Ala. 2007); Bowoto v Chevron, No. 99CV02506(SI), 2008 WL 5264690 (N.D. Cal. 2008); Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F. 3d 42 (2nd Cir. 2014). *See supra* text accompanying notes 540-44.
[833] Doe et al. v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002)(admitted but ended in settlement).
[834] Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (dismissed).

law so the conventional three-part *Caparo* test of foreseeability of harm, proximity and reasonableness will most likely not apply in a negligence suit. Although English law was effectively applied in *Okpabi* because Nigerian law follows English common law, Justice Fraser found that the claims against Royal Dutch Shell failed to establish a duty of care under the *Caparo* test and could not proceed in England.[835] If a Danish court finds that Danish law applies to the case using the contacts approach the plaintiff must be able to prove liability under the principle of fault, in Danish "culpa". The damage must have been foreseeable and caused by a wrongful act to which culpability attaches whether deliberate or negligent. There is no case law parallel to the transnational human rights cases in the U.S. and England that could determine the substantive outcome of the case. However, the principles of *U 2010.217 V* may apply to a future case. The Danish High Court found that a Danish worker hired directly by Man B&W Diesel (not by a subsidiary or contractor) could not recover for damages incurred during work at a shipyard in China because Man Diesel A/S only had limited influence on the arrangement of the workplace and no possibility to supervise the work. Man Diesel could therefore not be held liable under the principle of fault. Presumably, it would be more difficult to recover for damages in cases against suppliers rather than subsidiaries because the company's influence and control over the supplier would most often be much more limited than in the case of subsidiaries.

TWAIL Assessment

1) Reinforcement of human rights governance capacity over MNCs in host states.

TWAIL has critiqued the exercise of extraterritorial home state jurisdiction by Western courts as diminishing Third World governance capacity and constituting a post-colonial infringement of host state sovereignty. [836] As stated above, Chimni finds that the imposing of the "bourgeois state on dependent and dominated societies" makes it "difficult to deliver on the promise of the realization of social and economic rights."[837] Turning to Western regimes for rights enforcement may be considered a confirmation that the enfeebled human rights governance of host states over MNCs is a lost cause. Yet, Baxi strongly criticises Judge Keenan who dismissed the Union Carbide case[838] arguing that the U.S should not inflict the standards of American justice on Bhopal victims lest this might constitute "yet another

[835] HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell plc and another [2017] EWHC TCC 89 (Eng.), para. 113.
[836] ANGHIE, *supra* note 106, at 235-36.
[837] Chimni, *An Outline of a Marxist*, *supra* note 158, at 25.
[838] *See supra* text accompanying notes 518-19.

example of imperialism".[839] Baxi points out that Judge Keenan, not wanting to deprive the Indian judiciary of an "opportunity to stand tall before the world and pass judgment on behalf of its own people" found nothing incongruous in directing the importation of American discovery processes in Indian courts: "In order to "stand tall" in the Third World, one does need the First World high heels, after all!"[840] Third World victims of corporate harm have some assurance of justice before a First World judicial regime with a variety of differences in conflicts of laws compared to mandating the case to a Third World post-colonial forum. However, transnational human rights litigation does not provide a solution to the underlying problem of the reluctance of host states to effectively govern human rights protection because of the fear of capital flight.

2) Democratic inclusion that gives voice to host state local communities.

TWAIL advocates the full representivity of all voices, particularly those non-state, non-governmental, rural and urban poor who constitute the majority in the Third World.[841] It appears that TWAIL considers extraterritorial jurisdiction as excluding advocates of transitional justice while shielding MNCs and recovering the loss of jurisdiction after decolonization.[842] Chimni warns against a so-called "substantivism" in U.S. courts, a term which Buxbaum defines as " a choice-of-law methodology whose goal is to select the better law in any given case."[843] While democratic on the face of it, "substantivism" means, "the potential over-application of US law, and the potential for process-related unfairness"[844] as well as "forcing convergence…outside the political process that generally structures the harmonization movement."[845] Chimni considers this expansion of extraterritorial jurisdiction as a bourgeois imperial international law entrenched through the unilateral move to harmonize.[846] Also, Mutua conveys sharp criticism against the last five centuries of European hegemony, the U.S. policing every corner of the world, and the colonial administrator as the commercial profiteer, the exporter of political democracy and now the human rights crusader.[847] TWAIL disavows such Western universalization of imperial state laws and calls

[839] UPENDRA BAXI, INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE 69 (1986).
[840] *Id.* at 1.
[841] Mutua, *What Is TWAIL?*, *supra* note 104, at 503. Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 348 (1996).
[842] Chimni, *An Outline of a Marxist*, *supra* note 158, at 18.
[843] Buxbaum, *supra* note 166, at 957.
[844] *Id.*, at 966.
[845] *Id.*, at 972.
[846] Chimni, *An Outline of a Marxist*, *supra* note 158, at 20.
[847] Mutua, *What Is TWAIL?*, *supra* note 104, at 502-03.

for "dialogic maneuvers across cultures to establish, where necessary, the content of universally acceptable norms."[848] Therefore, TWAIL opposes transnational judgments that unilaterally impose home state values or standards but does not exclude home state regulation that allows for participation, consultation and consent of Third World communities.[849] From a TWAIL perspective, the home state regulation applied in a case can only be legitimate if it incorporates democratic engagement of Third World local community views and culture, e.g. communities impacted by extractive industry. Therefore, rather than ousting transnational human rights litigation as undemocratic judicial activism, it can be acknowledged from a TWAIL perspective as giving a voice and influence to plaintiffs of subaltern local host state communities on where to draw the line for MNCs' operations. TWAIL's appeal is to "write resistance into international law" [850] by recognizing the voices of the subaltern in the international legal system,[851] however, transnational human rights litigation can also accord with subaltern perceptions of legitimacy on a unilateral basis.

3) Access for Third World Communities to enforce the measures.

In many cases, transnational human rights litigation has provided a remedy to Third World plaintiffs through settlement with the company paying damages and success with final verdict in a few cases.[852] Variations between private international law rules in Western jurisdictions may increase inequalities and create legal uncertainty for victims which is not in the interest of TWAIL. As Baxi points out about choice of law "the statutory, treaty and adjudicatory régimes in Western Europe more cogently foreground the cause of protection of the vulnerable communities, or the "weaker parties", than appears to be, generally, the case with Anglo-American conflicts theory and practice."[853] In some cases, e.g. pursuant to the Rome II Regulation, a Western court may need to apply host state law, which is generally not considered as safeguarding the human rights or including the voice of subaltern Third World peoples because of the agenda of the ruling elite of the Third World to deregulate and accord protection to developed state investors.[854] It may not make any difference applying host state

[848] *Id.*, at 502.
[849] Sara Seck, *Unilateral Home State Regulation; Imperialism or Tool for Subaltern Resistance?* 46 OSGOODE HALL L.J. 565, 568 (2008).
[850] RAJAGOPAL, *supra* note 173, at 9.
[851] ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 202 (1971).
[852] E.g. Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F. 3d 42 (2nd Cir. 2014) (affirmed for the TVPA part but reversed for the ATS part). Doe et al. v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002) (interim judgment on substantive issues granting plaintiffs claim that Unocal knowingly assisted the military in perpetrating the abuses).
[853] Baxi, *Mass Torts*, *supra* note 169, at 343.
[854] *Id.* at 363. Chimni, *International Institutions*, *supra* note 103, at 6 & 32.

law, e.g. in *Okpabi,*[855] where the court applied Nigerian common law which is affected and guided by English common law. Either way, the judge would apply common law case precedents finding no duty of care on the parent company leading to defeat for the plaintiffs.[856] Many TWAIL scholars have also opposed the way that Western courts have dealt with these cases by denying, as Chimni calls it, "justice jurisdiction"[857] using the doctrine of *forum non conveniens*[858] which Baxi refers to as "nothing but the convenience of the powerful".[859] This being so, TWAIL encourages the possibility of granting Third World peoples remedy in Western courts but at the same time questions it as an optimal solution for redress. Victims face considerable legal, financial, practical and procedural barriers to transnational human rights litigation. Many Western courts' reluctance to accept these cases by referring to absence of clear legislative or executive support surrounds transnational human rights litigation with controversy and too much legal uncertainty to provide all Third World individuals and local communities with access to remedy.

Subconclusion

ATS litigation in the U.S. has since the 1980s been a protagonist in building an impetus for transnational human rights litigation in jurisdictions all over the world as well as an infrastructure for the business and human rights movement. Even though only a few cases have been decided on in substance and rarely in favour of plaintiffs, victims have received a remedy in the form of settlement. Also most defendant corporations have adjusted or adopted additional measures to their human rights policies during or shortly after the legal proceedings.[860] However, settlements out of court provide little impact on regulation or policy. Also, transnational human rights litigation faces increasing discouragement with the U.S.' upholding of *forum non conveniens* and the ATS presumptively applying neither extraterritorially nor to foreign corporations. Ordinary tort-based claim is another option but if the plaintiff desires to sue a foreign corporation, the strict interpretation to the "minimum contacts" for personal jurisdiction must be taken into account. European courts can no longer apply the doctrine of *forum non conveniens* but jurisdiction may still be declined in England

[855] HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell plc and another [2017] EWHC TCC 89 (Eng.).
[856] *Id.,* para. 119.
[857] Chimni, *An Outline of a Marxist*, *supra* note 158, at 20.
[858] Baxi, *Mass Torts*, *supra* note 169, at 352; Zhenjie, *supra* note 170, at 159; Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States in* TORTURE AS TORT 491 (Craig Scott ed., 2001).
[859] Baxi, *Mass Torts*, *supra* note 169, at 352.
[860] Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies*, 145 JOURNAL OF BUSINESS ETHICS 545 (2017).

if a duty of care of the parent company cannot be established to the claimants for the acts of its supplier or subsidiary. Denmark offers better prospects for exercising jurisdiction, however, precedent shows that corporate liability under the principle of fault even in a company-employer relationship is not easily established in a transnational case. TWAIL encourages the possibility of granting Third World peoples remedy in Western courts but at the same time questions it as an optimal solution for redress because extraterritorial regulation imposes home state values and standards without democratic engagement of host state communities. For such an interactional process, it may be necessary to pursue multilateral efforts and institutions to ensure coherence and precedence in decisions and provide more predictability for victims filing actions.

Chapter 4 - Case Study on Multi-Stakeholder Initiatives in Support of Human Rights

Introduction

This chapter contributes with an assessment of a private regulatory solution to corporate accountability for human rights impacts. The case study addresses the Tamil Nadu Multi-Stakeholder (TNMS) Program in India to improve conditions for young female workers in cotton spinning mills. This example has been chosen because the predominantly exposed in the global outsourcing industry are women and Third World peoples. The TNMS program is representative of a variety of stakeholders and illustrates the issues ethnic women face and how multi-stakeholder initiatives (MSIs) respond to this. Although the case is focused on India, it conveys general lessons from the typical issues MSIs face when pursuing change on the ground in a country that prioritizes foreign direct investment (FDI). The study takes stock of the program's achievements, the efficacy of MSIs, and discusses how the remaining challenges for implementing better human rights standards should be met. The study is helped by telephone- and face-to-face interviews of which some of the interviewees have agreed to be quoted. The chapter will be concluded by assessing whether MSIs satisfy the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures. [861]

Multi-Stakeholder Profile

Ethical Trading Initiative (ETI)

ETI is an alliance of companies, non-governmental organisations (NGOs) and trade union organisations established as an independent non-profit organisation. ETI strives to improve the lives of workers in global supply chains by promoting responsible corporate practice that supports this goal. The ETI works after a Base Code founded on International Labour Organisation (ILO) Conventions and has specialised in developing tools for implementing codes of practice for supply chain labour conditions, making the ETI widely recognised as a

[861] *See Chapter 1 supra* text accompanying notes 148-87.

global leader in this area. ETI initiated the Tamil Nadu Multi-Stakeholder Program (TNMS Program) in 2012 that aims to catalyse positive change within Tamil Nadu's garment industry, particularly in concern to the empowerment of young women workers who work under an apprentice scheme known as *Sumangali*. 17 brands are part of the program, including Swedish H&M and American Gap.

Business for Social Responsibility (BSR)

BSR is a non-profit organisation consisting of a global network of more than 250 member companies, which aims to develop sustainable business strategies and solutions through consulting, research, and cross-sector collaboration. BSR initiated the HERproject for women's empowerment in supply chains addressing issues like health and financial inclusion. HERproject's work place based programme is used by ETI to address Sumangali.

International Labour Organisation (ILO)

ILO is a UN agency and standard setting organisation for labour standards and social protection. The ILO adopts conventions and protocols that can be binding law if ratified by countries, as well as recommendations that are not binding but can be observed and used to design policies. The first non-binding social responsibility standard for companies was adopted in 1977 by the ILO. This is the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy amended in 2000. It is the first social responsibility standard and the basis of the whole corporate social responsibility (CSR) movement afterwards including the OECD Guidelines[862] and the UN Guiding Principles on Business and Human Rights (UNGPs).[863] The ILO is the only UN organisation that has three pillars in its governance structure so that member states, employers, and workers have a voice when negotiating labour standards. At the International Labour Conference (ILC), each member state has two government delegates: an employer delegate, and a worker delegate that can vote as they wish. The ILO works with employer organisations on a sectoral basis but also with individual companies and factories, e.g. ILO Better Work Program to promote labour standards. The ILO is active in engaging factories and buyers in combating violations of labour standards and large scale industrial tragedies in the garment sector in line with the recommendations of the UNGPs on increased brand monitoring of supply chains.

[862] OECD GUIDELINES, *supra* note 3.
[863] UNGPs, *supra* note 3.

Case Analysis

The Setting for the Tamil Nadu Multi-Stakeholder Program

The South Indian state Tamil Nadu is home to about 1,600 spinning mills and employs around 400,000 workers.[864] 60 % of these workers are girls and young women coming from rural districts in search of employment.[865] This implies that female labour is significant to the functioning of the global fashion industry. Major clothing brands, including C&A, HanesBrands, Mothercare, H&M, Gap, and Primark outsource some of their production to thousands of smaller textile and garment factories as well as larger enterprises engaging in the production process from the cotton stage to the finished clothes.

A dozen large enterprises in Tamil Nadu stand out because of their vertically integrated operations meaning that the supply chain of the enterprise is owned by that enterprise.[866] The production process is so that after the cotton has been harvested, the fibre is separated from the seed in a process called ginning. After ginning, the cotton is prepared for spinning and then spun into yarn in the spinning mills. Afterwards, the yarn is woven into fabric, followed by bleaching and dyeing. Finally, the fabric is manufactured into garments through cutting, stitching, embroidering, buttoning, labelling and packing.[867]

Tamil Nadu has become known after the discovery of their recruitment practices for the spinning mills under an apprentice scheme widely known as *Sumangali*. The Tamil word Sumangali means a married woman who leads a happy and contented life with her husband with all fortunes and material prosperity. It is linked to the fact that the Sumangali scheme promises a lump sum pay and the idea is to use it as down payment for a dowry. Payment of dowry has been prohibited in India since 1961, however, in rural India it is still a general practice and families incur high debts to pay dowry. The Sumangali scheme exists in a different form today than it did five years ago. Back then, it was more widespread and had industry-wide backing, but reportedly spinning mills have now stopped using the title "Sumangali" for recruitment purposes.[868] The Sumangali practices still exist but because of

[864] CENTRE FOR RESEARCH ON MULTINATIONAL CORPORATIONS (SOMO), AND INDIA COMMITTEE OF THE NETHERLANDS (ICN), FLAWED FABRICS 14 (2014).
[865] FAIR WEAR FOUNDATION, THE SUMANGALI SCHEME AND INDIA'S BONDED LABOUR SYSTEM 1 (2015).
[866] SOMO AND ICN, CAPTURED BY COTTON 3 (2011).
[867] *Id*. at 7.
[868] *Id*. at 3.

international scrutiny, the original form has morphed and fragmented into different schemes at workplaces.[869]

Thousands of girls and young women have been lured into substandard employment and working conditions in Tamil Nadu's cotton mills.[870] The majority of the girls are of the Dalit caste and younger than 18.[871] Historically, Dalit has been the poorest and most oppressed group of the Indian society and still is in rural areas of India. While dominant castes enjoy most rights and least duties, in practice, Dalits have few or no rights and are considered 'lesser human beings', 'impure' and 'polluting' to other caste groups. "Untouchables", as they are called, are often forcibly assigned the most dirty, menial and hazardous jobs, such as cleaning human waste.[872] In recent years though, India has introduced a quota system and affirmative action program for Dalits to obtain decent work. In India, the caste system is legal but untouchability is illegal. In spite of this, untouchability is still widely practiced, for example in teashops by having a double tumble system with one cup for the Dalits and one cup for the higher caste. These cups are not mixed and the Dalits must wash their own cups.

Dalit parents living in largely poor and marginalised communities are persuaded by the recruiters of the Sumangali scheme to sign up daughters aged between 14 and 25 for spinning, weaving and dyeing cotton. [873] The promise: a decent wage, comfortable accommodation and a considerable lump sum of money upon completion of their three-year contract. However, the working conditions these girls face are forced labour including bonded, prison labour, excessive work hours, and trafficking, as well as pay below living wage, limited freedom of association, health issues leading to illness, child labour, gender discrimination and sexual harassment as well as absence of grievance mechanisms.[874]

Working Conditions under the Sumangali scheme

The working conditions under the Sumangali scheme amount to bonded labour because the end-of-contract sum is not a bonus but part of the regular wage that is withheld by the

[869] Telephone interview with Martin Buttle, Apparel and Textiles Category Leader, Ethical Trading Initiative London (Jan. 9, 2015).
[870] FLAWED FABRICS REPORT, *supra* note 864, at 8.
[871] *Id*. at 9.
[872] K. NARAYANASWAMY & M. SACHITHANANDAM, A STUDY TO UNDERSTAND THE SITUATION OF ARUNTHATIYAR GIRLS EMPLOYED UNDER THE 'SUMANGALI THITTAM' SCHEME IN ERODE, COIMBATORE, TIRUPUR, VIRUTHUNAGAR & DINDIGUL DISTRICTS OF TAMIL NADU, INDIA (2010).
[873] SOMO AND ICN, MAID IN INDIA – YOUNG DALIT WOMEN CONTINUE TO SUFFER EXPLOITATIVE CONDITIONS IN INDIA'S GARMENT INDUSTRY 23 (2012).
[874] CAPTURED BY COTTON REPORT, *supra* note 866, at 3.

employer.[875] According to Coen Kompier, Senior Specialist on Labour Standards, ILO, New Delhi, the ILO it is not the employer giving an advance to the workers but the workers giving an advance to the employer.[876] If the worker leaves the factory before the end of the contract period, payment of the lump sum is refused. It has been documented that in 652 cases the lump sum was not paid out at all.[877] Leanne Melnyk, ILO Specialist on Forced Labour, Geneva, explains that within the period of time of their contract, workers may get sick or need to leave because help is needed at home. In some cases due to non-completion of the contract, the worker is paid less than originally promised or may not get paid at all for the time spent at the factory.[878]

There is prison labour and excessive forced working hours in many cases following the trafficking of migrant works by unscrupulous agents. Many workers are confined living in hostels owned by the factory. Those workers are extremely vulnerable to be subjected to excessive and forced overtime work and they have no access to grievance mechanisms or redress. A large number of workers in the Tamil Nadu textile and garment industry work at least 12 hour days, six days a week, sometimes without any breaks, and they are often expected to work another 4 hours without pay. During production peaks, workers are forced to complete two shifts (16 hours) or even three shifts (24 hours) in a row. Workers also reported that they are frequently woken up in the middle of the night to complete urgent orders.[879]

Under the pretext of cultural traditions and a strong paternalistic attitude to keep young women safe, female workers are effectively locked up. They are confined to live and work on factory premises and are not allowed to leave the hostel accommodation freely in their free time. When female workers leave the hostel they are accompanied by a guard and closely monitored. Male workers do not experience this limitation in freedom of movement.[880] The workers also have very limited contact with friends and family. According to a study by the Centre for Research on Multinational Corporations (SOMO) and the India Committee of the

[875] INTERNATIONAL LABOUR CONFERENCE, 103RD SESSION, APPLICATION OF INTERNATIONAL LABOUR STANDARDS 2014 (II) 34 (2014).
[876] Telephone Interview with Coen Kompier, ILO Specialist on Labour Standards, ILO New Delhi (Jan. 8, 2015).
[877] MAID IN INDIA REPORT, *supra* note 873, at 21.
[878] Telephone Interview with Leanne Melnyk, Programme and Operations Officer of Special Action Programme to Combat Forced Labour - Focal Point for Asia, ILO Geneva (Jan. 8, 2015). See also MAID IN INDIA REPORT, *supra*, note 873, at 27.
[879] MAID IN INDIA REPORT, *supra* note 873, at 23.
[880] *Id.* at 41.

Netherlands (ICN) focusing on four vertically integrated enterprises in Tamil Nadu, parents are allowed to visit their daughters once a month on Sundays, for one hour. Permission to receive visits must be requested beforehand. The warden handles all incoming and outgoing phone calls and workers may only make phone calls to their parents.[881]

There is pay below living wage, because the average monthly wages amount to between INR 3,266 (€ 40) and INR 5,404 (€ 66) but the minimum monthly wage for apprentices in textile mills is INR 5,820.10 (€71.40) gross. [882] Food is free of charge except for the workers at the spinning mill Best (INR 55 a day, € 0,65/ INR 1,650- per month,€ 20,-) and the spinning mill Sulochana (INR 60 a day, € 0,70 /INR 1,800 a month, € 22,-).[883] There are no extra costs for accommodation. However, rooms are shared with up to 35 people and there are hardly any beds or furniture. Each toilet is shared by 35 – 40 workers.[884] The girls are sent to work under the Sumangali scheme to support their families, as they have no other options to make ends meet.[885] The monthly living wage for India to support a household of 2 adults and 2 children including rent, education, and healthcare is of INR 16,291 (€ 200) according to The Asia Floor Wage Alliance.[886] All the workers' wages are given to their parents and spent on basic necessities for their families (food, housing, medical expenses,etc.) and on the education of other siblings as well as repayment of debts and to save up for dowry and other marriage expenses.[887] If the workers do not get the lump sum payment, average monthly pay only ranges from INR 1,600 (€ 20) to INR 4,270 (€ 52). The disclosed wages are net wages as gross wages are unknown. Most workers are paid in cash. [888]

There is limited freedom of association and collective bargaining, because given the young age of many workers, they cannot join unions. In India, union membership is not allowed for workers under the age of 18. Trade unions are not even allowed to enter the factories and one of the likely reasons why the girls are hired in the first place is that the management sees them as obedient and not likely to organise and thus stir any trouble.[889]

[881] CAPTURED BY COTTON REPORT, *supra* note 866, at 20.
[882] FLAWED FABRICS REPORT, *supra* note 864, at 43.
[883] *Id*. at 57.
[884] *Id*. at 56.
[885] *Id*. at 32.
[886] *Id*. at 77.
[887] *Id*. at 49.
[888] *Id*. at 43.
[889] *Id*. at 53.

There are health issues leading to illness, because working conditions under Sumangali are hazardous such as exposure to cotton dust and, in some cases where chemical washing and bleaching takes place in spinning mills, chemical burns on hands and arms[890] due to lack of safety equipment and appropriate training.

There is child labour because of the combination of working conditions and the workers' age. According to the ILO Convention on the Minimum Age for Admission to Employment (C. 138)[891], art. 7, there are exceptions which lower the minimum age for children in developing countries to work down to 12 years old if it is light work and as long as it does not threaten their health and safety, or hinder their education or vocational orientation and training. However, under the ILO Convention on the Worst Forms of Child Labour (C. 182)[892], art. 3, it is prohibited for workers under 18 to perform work that is likely to harm their 'health, safety or morals'. This includes 'work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer'.[893] Some spinning mills commit age fraud by declaring that all workers are over the age of 14, but girls below the age of 14 have been found working in the spinning mills.[894] Workers sometimes have fake IDs, which the factory managers do not scrutinise carefully.[895] A study by a local NGO supported by KFB Austria shows that out of a sample of 1,638 Sumangali workers, 18% were younger than 15 at the time they entered the factory.[896] The long working hours, the confinement of the girls in hostels and the negative health consequences of working in the spinning mills and garment factories mean that all the girls aged below 18 are child labourers according to the ILO definition.

India has not ratified the ILO Convention on the Worst Forms of Child Labour[897] but since this convention is part of the ILO Declaration on Fundamental Principles and Rights at

[890] VERITÉ, HELP WANTED, HIRING, HUMAN TRAFFICKING AND MODERN-DAY SLAVERY IN THE GLOBAL ECONOMY. REGIONAL REPORT – INDIAN WORKERS IN DOMESTIC TEXTILE PRODUCTION AND MIDDLE-EAST-BASED MANUFACTURING, INFRASTRUCTURE AND CONSTRUCTION 32 (2010).
[891] Convention Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 298. [Hereinafter *Convention on Minimum Age for Admission to Employment*].
[892] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, 2133 U.N.T.S.161. [Hereinafter *Convention on the Worst Forms of Child Labor*].
[893] ILO, *Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour*, R190, 87th ILC session (Jun. 17, 1999).
[894] FLAWED FABRICS REPORT, *supra* note 864, at 47.
[895] Telephone interview with Martin Buttle, *supra* note 869.
[896] KFB AUSTRIA, ADVOCACY STUDY ON THE IMPACT OF THE SUMANGALI SCHEME ON THE ADOLESCENT GIRLS FROM RURAL AREAS OF SOUTHERN TAMIL NADU (2011).
[897] Convention on the Worst Forms of Child Labor, *supra* note 892.

Work[898], it is binding upon every member country of the ILO regardless of ratification. Moreover, in May 2015 the Prime Minister Nahendra Modi's Cabinet approved amendments to the Child Labour (Prohibition & Regulation) Amendment Act, 2012[899] which prohibits work by all children under the age of 14 and proscribes hazardous work for children under age 18. The amendments seek to remedy the inconsistencies between the Child Labour Act, 1986[900], which allows children above 14 years to work in hazardous occupations, and the Convention on the Worst Forms of Child Labour[901]. The amendment was passed by the Indian Parliament in July 2016. It is uncertain whether these amendments will eliminate hazardous child labour in the mills since Indian legislation still classifies mills and garment factories as non-hazardous environments, consequently allowing workers from the age of 15 to be exposed to the conditions under the Sumangali scheme.

There is sexual harassment and gender discrimination because, in some cases, the Sumangali scheme is involved with a network of sex traffickers. Brokers who supply girls for prostitution and sex trade in Tiruppur, a city in the state of Tamil Nadu, have contacts with some of the hostels housing Sumangali girls that sell the girls into prostitution.[902] Brokers deal with girls who belong to two different types of backgrounds: local girls who do not work in a factory and are specifically procured for prostitution; and girls who are specifically brought to Tirupur under the Sumangali scheme to work in the factories, in which they work during the day and are sold as prostitutes during the night. A broker interviewed by the U.S.-based NGO Verité has pronounced that his maximum revenue comes from the girls working under the Sumangali scheme.[903] The customers do not contact the recruiters directly but contact them through managers of the hotels they stay in or through their drivers or supervisors of the factories where the girls work. Customers are the international buyers, the company owners, the senior management, supervisors and mid-level management.[904] The female factory workers also experience frequent verbal and physical abuse and very often

[898] ILO Declaration, *supra*, note 206.
[899] Child Labour (Prohibition & Regulation) Amendment Act, 2012, no. 62, Acts of Parliament, 2012 (India).
[900] Child Labour (Prohibition and Regulation) Act, 1986, no. 61, Acts of Parliament, 1986 (India).
[901] Convention on the Worst Forms of Child Labor, *supra* note 892.
[902] VERITÉ REPORT, *supra* note 890, at 29. The Woven Land – First for Labor Then for Sex, Anchal Project, https://anchalproject.org/blogs/news/60764355-the-woven-land-first-for-labor-then-for-sex (Feb. 15, 2013).
[903] VERITÉ REPORT' *supra* note 890, at 31.
[904] *Id.* at 32.

requests for sexual favours from male supervisors and male workers.[905] Local authorities are "paid their bit" to "keep their eyes and ears closed" to all that is occurring in Tiruppur.[906]

In the following section, the issues with the Sumangali scheme are addressed from the point of view of organisations obtained through interviews on their work with combating Sumangali.

The Tamil Nadu Multi-Stakeholder Program

The Tamil Nadu Multi-Stakeholder (TNMS) Program is a multi-stakeholder project initiated by the Ethical Trading Initiative (ETI), an alliance of companies, trade unions and NGOs, to improve conditions for young women workers in the textile and garment sector of Tamil Nadu. The program promotes worker peer groups within the mills, works with communities from which the workers are recruited, and lobbies for policy change. It was initiated after a number of NGOs, including Anti-Slavery International, Dutch SOMO, and ICN published reports[907] about the Sumangali scheme. Initially, Anti-Slavery International approached the corporate members of the ETI and asked them to sign up to a commitment to eradicate Sumangali in supply chains. Some of the ETI corporate members then drafted a position statement, which ultimately led to the TNMS Program. The ETI has been running the program since 2012 with clothing brands outsourcing from the area, local spinning mills, NGOs, and trade unions. 17 brands are part of the programme including big retailers such as Swedish H&M and American Gap.[908] The ETI works with the non-profit organisation Business for Social Responsibility (BSR) on the programme. The International Labour Organisation (ILO) has also supported the ETI in addressing the Sumangali scheme.

ETI states that the reason why the brands have chosen the collaborative approach rather than having their own programme is because the spinning mills in Tamil Nadu are several steps away from the global brands. Global brands tend to buy ready-made clothing and work directly with the factories that manufacture the clothing. The issues regarding spinning mills that make cotton into yarn are several stages removed from the brand in the supply chain. ETI explains that although some of the brands have visibility of which cotton mill is supplying their fabric for their garments, many of them do not. Meanwhile, the notion of buyers'

[905] *Id.*, at 31.
[906] *Id.*, at 19.
[907] ANTI-SLAVERY INTERNATIONAL, SLAVERY ON THE HIGH STREET, FORCED LABOUR IN THE MANUFACTURE OF GARMENTS FOR INTERNATIONAL BRANDS (2012); CAPTURED BY COTTON REPORT, *supra* note 866; MAID IN INDIA REPORT, *supra* note 873. FLAWED FABRICS REPORT, *supra* note 864.
[908] Telephone interview with Martin Buttle, *supra* note 869.

extended supply chain responsibility beyond first-tier suppliers is affirmed by the UNGPs. The leverage of the international brands to create any change on their own is however limited, if they are three steps away commercially from the spinning mills and the issues in their supply chain. H&M explains that this is why a collaborative approach is required and that they cannot achieve any impact on their own because the spinning mill industry is a very closed industry. The majority of the spinning mills industry, around 55%, works for the local market and brands in India and does not go beyond for export. In order to change the mind-set of the industry, it is necessary to have a close dialogue with the industry associations on improving the industry and understanding the issues. The brands contribute and send a very strong signal to the industry in India by coming together as multinational companies and high street fashion brands and declare that the Sumangali scheme is unacceptable. The TNMS Program is a sizeable program and the brands also contribute by sharing the costs of funding the programme as well as contributing in kind, taking part in the advisory process to deal with the issues. H&M believes that it is the discussions that take place with the industry associations that are the most important to achieve the long-term goal of improving the industry as a whole. It is also an equal learning process for the brands because they had not worked on human rights issues with spinning mills before. No brand knows more than the other and they are in the programme together with equal starting knowledge.[909]

There are three different workstreams within the program. One workstream is focused on developing worker peer groups within the mills themselves. Another workstream is collaborating with NGOs that are operating on the ground within different regions of Tamil Nadu in the communities from which the girls are being recruited. A third workstream focuses on working with various stakeholders, national governments, trade associations, trade unions, and companies to lobby for policy change.

In the first workstream developing worker peer groups, the ETI uses the HERproject (acronym for Health Enables Returns), which was invented and developed by BSR. The project is one of the most global and successful of BSR's projects.[910] The HERproject is workplace based and aims to identify and empower women to become leaders while raising awareness on womens' health related issues. It is done by training peer-educators at the factory on six health topics: personal hygiene, maternity health, child care, pre- and post-

[909] Telephone interview with Maritha Lorentzon, Manager, Hennes & Mauritz, Sustainability Department, Stockholm (Feb. 11, 2016).
[910] Telephone Interview with Maria Pontes, Manager, Partnership Development and Research, Business for Social Responsibility (BSR) Paris (Dec. 12, 2014).

natal care, sexually transmitted diseases and HIV. It is important to understand that many of the girls and women are illiterate or come from backgrounds where they are not encouraged to speak up about their issues and their rights so they could be frightened to raise concerns around serious labour issues. The HERproject is only phase one of the worker peer group workstream. The approach to start with health related issues is to empower the workers so that they start to speak up about more crucial labour rights issues that they may have experienced in their recruitment and employment within the mills. In the course of 2015 the ETI initiated phase two of the workstream to start addressing broader labour rights issues. This is done with the Centre for Responsible Business, a non-for-profit entity based in New Delhi, to develop a Workers' Rights and Responsibilities Program within the mills. In 2016, 20 women mill workers took part in a one-day review of the TNMS project and one of them, Shivapriya, had the courage to share her experience as a peer educator in front of an audience of over a hundred including workers, trade unionists, NGOs, mill employers, and international brands. Other workers also raised issues about working hours, the need for proper salary slips and other rights at work.[911] Workplace committees have been established to address sexual harassment, supervisors'cruel and discriminatory treatment is being dealt with by management and women have started to be promoted into supervisory roles.[912] The second workstream on community outreach has, according to independent evaluator Aidenvironment, been implemented in eight districts of Tamil Nadu reaching 163,365 community members (majority female). Although the outreach has increased awareness on worker rights, there was no evidence of community members claiming their rights or feeling more robust to deal with worker rights violations. Some recruiters have indicated to NGO-partners that they are not yet ready to commit to ethical practices while other recruiters have declared that they will follow more ethical practices. As for the third workstream on policy reform, NGO-partners have reached out to 1,858 government representatives. There was no evidence that local/regional government representatives put pressure on national governments to pass a law on reduction on length of apprenticeships in Tamil Nadu. Some government representatives had agreed to facilitate passing of a law against fraudulent recruitment

[911] Peter McAllister, *Women Workers Speak Out About Labour Rights in Tamil Nadu Spinning Mills*, ETHICAL TRADING INITIATIVE (Apr. 5, 2016), *http://www.ethicaltrade.org/blog/women-workers-speak-out-about-labour-rights-in-tamil-nadu-spinning-mills.*

[912] Martin Buttle, *Improving Young Women's Rights in Tamil Nadu Spinning Mills*, ETHICAL TRADING INITIATIVE (Jul. 20, 2017), *https://www.ethicaltrade.org/blog/improving-young-womens-rights-in-tamil-nadu-spinning-mills.*

practices but it is unknown if this law has passed. It remains unclear if local government representatives are able to influence national governments to change the law.[913]

For general oversight and development of the program, the clothing brands and NGOs (Dalit Solidarity Network, Homeworkers Worldwide) as well as international trade unions (IndustriALL and the International Trade Union Conference) are brought together on a quarterly basis. There is also an advisory group, which is a smaller multi-stakeholder group that meets more often and is more actively involved in shaping the program. At the local level within Tamil Nadu, there is also an advisory committee – a multi-stakeholder group that brings together NGOs (Tirupur Peoples' Forum, Campaign against Camp Coolie) and local trade unions (International Trade Union Confederation, Hind Mazdoor Sabha) at some of the sourcing offices of some of the global brands. Progress on implementing the programme is measured by a participative approach, empowering and consulting the workers themselves in the worker peer-groups on whether the program is effective. Also, as described above, the programme has been independently evaluated by consultancy company Aidenvironment.[914]

The TNMS Program in its current form addresses only the tip of the iceberg, considering that there are 1,600 mills in the Tamil Nadu region. In early 2015, the ETI was working with five mills but the program steadily expanded to working with seven mills and two factories at the end of 2015. The ETI achieved additional funding for another 20 mills and aimed to expand the program with the ambition to work with 35 mills by early 2017.[915] As of July 2016, the TNMS programme had been implemented in 8 units (6 spinning mills and 2 garment factories) with mainly phase I activities carried out (health related issues)[916] and by July 2017 the health program had been rolled out in more than 30 mills and factories.[917] The ETI hopes that the other mills will take lessons from the work the ETI has done and apply it more broadly. The five mills the ETI started out working with were nominated by brands that had visibility that the mills were in their supply chain. In the course of 2015, the TNMS Program hoped to work with some mills nominated by one of the mill associations and this has happened with the Southern India Mills Association (SIMA).[918] According to Alok Singh,

[913] AIDENVIRONMENT, EVALUATION OF PHASE I OF ETI'S TNMS PROGRAMME 5 (2016.)
[914] *Id.*
[915] Telephone interview with Martin Buttle, *supra* note 869.
[916] AIDENVIRONMENT, *supra* note 913, at 5.
[917] Anuradha Nagaraj, *Fashion Brands Bring Hand-washing but little else to India's garment workers, say Critics*, THOMSON REUTERS FOUNDATION NEWS, (Apr. 5, 2016), *http://www.ethicaltrade.org/blog/women-workers-speak-out-about-labour-rights-in-tamil-nadu-spinning-mills.*
[918] Telephone interview with Martin Buttle, *supra* note 869.

ETI's South Asia head, it has been challenging for the ETI to achieve this since the mill associations have been skeptical to the criticism on labour practices they have received from the NGO community and not interested in transparency among the mills. [919] The TNMS programme has also been met with criticism from trade unions and labour rights charities, some of them partners in the initiative, for merely being used as a platform for big brands to safeguard themselves and pay lip service to the rights of garment workers. The criticism refers to the hygiene awareness strategy as flawed and lacking results in fair wages, contracts and a workplace free of abuse as well as a failure to get brands to map and disclose information on supply chains which is key to ending exploitation of workers. The ETI denies the claims and maintains progress has been made through the community programmes and peers groups at factories and mills that discuss rights beyond hygiene.[920]

When asked about the brands' responsibility for poor labour conditions, the ETI responds that the brands have a responsibility when choosing suppliers. There is variability in factory conditions in India: some have very good labour standards, and some have very poor labour standards. Monitoring and auditing is not successful in every case to identify issues present in the supply chain, but in other cases, generally on health and safety related topics, it can be one part of the solution.[921] The more progressive and successful the brands are in choosing better suppliers in the first place, the better the brand will be able to communicate its expectations and work with the suppliers to address the issues they find in the supply chain. They will also have a better chance to provide skills and capacity building to put the suppliers in a better position. The ETI believes its approach is probably the right one but that it needs to be scaled up, so that they are working with more mills and more communities across Tamil Nadu.

According to a Danish sourcing-house BRICpro that specializes in assisting companies finding socially responsible factories in the textile and furniture industry, it is important to use economic arguments as to why it is necessary to raise standards in production. [922] BRICpro primarily works with Danish small and medium sized enterprises (SMEs) and start-

[919] Nagaraj, *supra*, note 917.
[920] *Id.*
[921] Ivanka Mamic, *Managing Global Supply Chain: The Sports Footwear, Apparel and Retail Sectors*, 59 J. BUS. ETHICS 81, 84 (2005); Xiaomin Yu, *Impacts of Corporate Code of Conduct on Labor Standards, A Case Study of Reebok's Athletic Footwear Supplier Factory in China*, 81 J. BUS. ETHICS 513, 519 (2007); Laura Spence & Michael Bourlakis, *The Evolution from CSR to Supply Chain Responsibility: The Case of Waitrose*, 14 SUPPLY CHAIN MGMT. INT'L J. 291, 297 (2009).
[922] Interview with Signe Mørk Sørensen, CSR Consultant, BRICpro, in Copenhagen, Denmark (Jan. 12, 2015).

ups whose first priority is to get business up and running. They may not have the budget to run major improvements at factories but they are capable of paying extra for a sourcing-house like BRICpro to ensure that their production is outsourced to factories that have safe and responsible working conditions.[923] Having worked especially with factories in India and China with a workforce from 50 up to 50.000 workers, BRICpro has experienced that the greater orders they can offer suppliers from acknowledged Western brands and the longer time they collaborate with suppliers, the greater leverage and opportunity is created to change conditions. Submitting a code of conduct at a factory and expecting the supplier to adhere to it does not suffice. A code of conduct requires interpretation and guidance. Therefore, BRICpro emphasizes the importance of being present at factories and establishing a face-to-face dialogue with the factory manager and owner on guidelines to make improvements. BRICpro has had the most success with a down-to-earth strategy to make an impact on the mentality and ways of thinking in the industry rather than relying on theoretical standards created by people that have not been in India.[924]

ILO's Work on the Sumangali Issue

The ETI has also worked with the ILO to address the Sumangali scheme. The ETI first approached the ILO in Geneva and New Delhi for support to look into recruitment issues. Leanne Melnyk, ILO Specialist on Forced Labour, Geneva, first became involved in the work in 2011 while Coen Kompier, ILO Senior Specialist on Labour Standards, New Delhi, has been working on the Sumangali scheme for quite some time back. As part of a small program funded by the UK Department for International Development (DFID), the ILO conducted a baseline assessment looking at the issues from the trade union perspective and to what extent the ILO could work with trade unions as a means of ensuring sufficient collective ways within the industry to overcome some of the vulnerabilities that are faced by the workers. The ILO found some degree of inter-state migration to the factories but that most recruitment takes place within Tamil Nadu. The girls may enter the factories not knowing the full magnitude of the working conditions and hours, but they are bound to stay because of the delayed payment scheme.[925]

Oftentimes, it is not the girl's choice but very much a family decision to send the girl to work in the factory. There is an inbuilt cultural perception that it is a safe and protected

[923] Interview with Nichlas Hassing, Co-founder & Creative Business Director, BRICpro, in Copenhagen, Denmark (Jan. 12, 2015).
[924] *Id.*
[925] Telephone Interview with Coen Kompier, *supra* note 876.

environment for the girls to work in because it is collective and they are in dormitories that are locked up in the evening. Oftentimes, the parents or the head of the household are not necessarily aware of what they are committing their daughters to when the recruiters come to the rural villages and present the appointment letter. The baseline assessment concluded that there were indicators of forced labour such as deception, confinement and trafficking for labour exploitation.[926] It also showed that there are some girls below the age of 14 even though they say at the factories that the workers are above the working age.

Following the baseline assessment, the ILO had a meeting with three spinning mill owners from SIMA and Tirupur Export Promotion Agency (TEA) in Tirupur in August 2012. Present at the meeting were also the ETI and Indian labour authorities. Coen reported that the purpose of the meeting was to discuss the Sumangali recruitment systems and develop a plan towards fair recruitment practices.[927] The spinning mill representatives claimed at the meeting that workers no longer accept the practice of lump sum payment. Rather, payments were made monthly and through banks for 40% of all workers in Tamil Nadu. Allegedly, "Add-on Cards" were issued to the parents of workers enabling parents to withdraw the salary from ATMs, and workers received a yearly gratuity bonus of INR 150,000 (€ 2,040). When faced with allegations that child labour amounted to 27% of workforce in the spinning mills, the representatives denied and emphasised that they were under constant scrutiny of United States trafficking reports. They stated that they do not issue employment contracts, but that the workers are presented with appointment letters, which they do not sign. These letters summarise working hours, salary, gratuity, deductions, and disciplinary matters.[928]

Subsequently, Coen had a meeting with Vyakula Mary, a leader of SAVE, an NGO actively engaged in creating decent work conditions for young women workers in the Tamil Nadu spinning mills. Mary explained that a number of factories do run their own ATMs but they are sometimes not reliable and workers can only withdraw small amounts of money. Moreover, the "Add-on Cards" were sometimes used by parents to withdraw entire salaries of their daughters. Mary estimated that there are still 200,000 girls working under the Sumangali system, living in factory premises in Tirupur, Coimbatore, Dundigul and Erode districts.[929] Following the meeting with the spinning mill owners, the ILO had a multi-stakeholder

[926] Telephone interview with Leanne Melnyk, *supra* note 878. See also *Maid in India Report*, *supra*, note 873, at 27.
[927] Coen Kompier, Mission Report, Coimbatore (Tamil Nadu) 1 (Aug. 30 – 31, 2013) (unpublished report) (on file with author), at 1.
[928] *Id*. at 2.
[929] *Id*. at 3.

meeting in February 2013, where the ETI and brands such as Gap was present. At this meeting, it was recommended that the ILO offer technical advisory services in a reform process to negotiate and gradually adapt the terms of employment and eliminate deceptive recruitment practices, the lump-sum payment system, and the excessive use of apprentices. In case of lack of progress, union complaints to the ILO should be considered to exert pressure for a more equitable labour system.[930]

Since these two meetings, the ILO has not been able to do anything in Tamil Nadu. Participation of the ILO in this meeting was only justified given efforts by the Central Ministry of Labour to work towards ratification of ILO Convention No. 181 dealing with Private Employment Agencies. This entails that the member state works at the national level towards registration and licensing of employment agencies promoting decent work.[931] So far, the work the ILO has achieved with the ETI, SAVE, and the Tirupur People's Forum for Protection of Environment and Labour Rights (TPF) has been informal. This is because there are sensitivities around the ILO working in the garment sector in India. The government of India seeks to keep the issues of international labour standards and trade separate.[932] In 1998, the ILO adopted the Declaration of Fundamental Principles and Rights at Work, in which it is clearly stated in art. 5 that labour standards should not be used for protectionist trade purposes.[933] ILO New Delhi explains that the government of India is very serious in taking up this point. The concern with bringing labour issues into trade is that it would be a bid by industrial nations to undermine the comparative advantage of lower wage trading partners, and could undermine their ability to raise standards through economic development if it hampers their ability to trade. However, the issue with the ILO Declaration's art. 5 is that it aims to secure the competitive advantage of developing countries but it does not take into account the reverse situation where low labour standards are purposely used to lower production costs. The issue of labour rights in supply chains has been undergoing renewed international attention since the UNGPs' adoption[934] and was further discussed at the International Labour Conference in 2016 which included a standards setting discussion on supply chains. Delegates of Human Rights Watch recommended that the 2016 International Labour Conference initiated a process for a binding convention under which governments

[930] Coen Kompier, Mission Report, ETI/ILO Tripartite Plus meeting on recruitment in "Sumangali", Coimbatore, India, (Feb. 11-13, 2013) (unpublished report) (on file with author), at 2.
[931] *Id.*, at 1.
[932] Telephone Interview with Coen Kompier, *supra* note 876.
[933] ILO Declaration, *supra* note 206, art. 5.
[934] Telephone interview with Leanne Melnyk, *supra* note 878.

would require companies to have due diligence in place throughout their global supply chains. The recommendation was adopted in the International Labour Conference's Resolution Concerning Decent Work in Global Supply Chains.[935]

An explanation as to why it is hard to get the Indian government on board with legislative intervention aiming at mills and garment factories could be the dynamics of the Indian government and Prime Minister Narendra Modi's pro-business approach, which makes it a more challenging environment for the NGOs and labour rights communities. The responsibility for upholding labour laws is shared between the national government and the state governments but it is the state government, in this case the government of Tamil Nadu, that has the primary responsibility. TPF, supported by NGOs, are working with trade unions in Tamil Nadu to lobby the Tamil Nadu government to consider labour rights in trade relations. The government of Tamil Nadu has indicated that they have been stepping up with inspection procedures in the spinning mills. However, ILO New Delhi has not been able to confirm whether the inspections have actually been stepped up, as the Ministry of Labour in Tamil Nadu has not responded to their request for a copy of the order reflecting the increased inspection, under the Right to Information Act 2005.[936]

By contrast, the governments of Jordan, Lesotho, Bangladesh, Pakistan, Cambodia, and Vietnam have no problem with the ILO working in garments. Especially Bangladesh has been very keen on implementing the ILO Better Work Program to work on labour issues in the wake of the Rana Plaza factory collapse in 2013, killing thousands of garment workers. The ILO started the Better Work in partnership with the International Finance Corporation (IFC) in order to improve labour standards in labour-intensive industries. Prior to Rana Plaza, for years and years, the ILO tried to establish Better Work in Bangladesh.[937] It did not happen because it required amendments to the Bangladesh Labour Act 2006[938] that were not enacted by the government until after Rana Plaza, in the Bangladesh Labour Amendment Act 2013 in collaboration with ILO Better Work.[939] The government and ILO Better Work also collaborated in developing the Bangladesh Labour Rules (2015).[940] The government also

[935] International Labour Conference's Resolution Concerning Decent Work in Global Supply Chains, at 4, 105th Session (June 10, 2016).
[936] Right to Information Act, 2005, no. 22, Acts of Parliament, 2005 (India).
[937] Telephone interview with Leanne Melnyk, *supra* note 878.
[938] Bangladesh Labour Act, 2006, no. 42, Acts of Parliament, 2006 (Bangladesh).
[939] Bangladesh Labour Amendment Act, 2013, no. 30, Acts of Parliament, 2013 (Bangladesh).
[940] *Better Work Bangladesh: Our Partners*, BETTER WORK, (last visited Dec. 8, 2017) https://betterwork.org/where-we-work/bangladesh/bwb-our-partners/.

faced issues with buyer pressure and opposition to changes by factory owners. In 2013, at least 33 members (10 %) of the parliament were factory owners who blocked parliamentary adoption of stricter regulations for buildings.[941] Another problem is that the supply chain includes a vast number of entities that are not registered. For example the maker of a shirt is a formal factory registered receiving some products and services such as buttons or thread from suppliers that are not registered. Therefore it has been difficult to get a dialogue with them about socially responsible working standards. Because of the global pressure in the Ready Made Garment (RMG) sector, foreign buyers and the Bangladeshi government are coordinating with the formal factories to have them work along the value chain to put sustainable working standards into practice.[942] It took the Rana Plaza disaster for the government to get serious about accepting the Better Work Programme within the country. The Bangladesh garment industry is worth about 80% of Bangladesh's export earnings and the government has ambitions to reach USD 50 billion in export earnings from the garment industry by 2021. In this context, the Rana Plaza collapse and the criticism was far more critical to the overall development path of Bangladesh than the situation with spinning mills in Tamil Nadu is to India. Bangladesh is such a special and unique case because it rests on such a huge disaster but it raises awareness to the government of India to pay attention and perform due diligence to their own industry.

In lieu of India's unwillingness to engage with ILO in the garment industry, ILO may utilise the representations procedure that is open to trade unions and employer organisations. A representation can be filed under articles 24 and 25 of the ILO Constitution against any member state, which "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party."[943] Coen has attempted several times with trade unions in India to file a representation and even set it up and drafted it but the Indian trade unions did not file it at first. Then he approached a Dutch union because of the involvement of a major Dutch company trading in India's garments but that also did not work out. Finally, he approached the International Trade Union Confederation (ITUC) in Brussels whether they could file the representation. In September 2015 they submitted a comment on the Sumangali scheme under article 23 of the ILO Constitution on violation of the ILO

[941] *Safety and Labour Conditions: the Accord and the National Tripartite Plan of Action for the Garment Industry of Bangladesh* 8 (International Labour Office & Global Labour University, Working Paper no. 38, 2015).
[942] Interview with Shahamin Zaman, CEO at CSR Centre, Dhaka, Bangladesh and UN Global Compact Network Bangladesh contact person (Oct. 1, 2014).
[943] Constitution of the International Labour Organisation, art. 24, June 28, 1919, 49 Stat. 2712, 2713-14, 225 Consol. T.S. 373 [hereinafter the ILO Constitution].

Convention Concerning Forced or Compulsory Labour (C. 29).[944] The comment addresses the ILO Committee of Experts on the Application of Conventions and Recommendations[945] and points to deceptive recruitment practices, threats and penalties at the workplace, restricted freedom of movement, as indicators of forced labour. Following their submission, the Garment Labour Union (GLU) in Bangalore has also submitted an article 23 comment in October 2015. The comment urges intervention against the Sumangali scheme and is filed against the government of India on their application of the ILO Convention on Forced Labour, ILO Convention Limiting Hours of Work (Industry) (C. 1),[946] ILO Convention on Minimum Wage-Fixing Machinery (C. 131)[947], and ILO Convention on Discrimination (Employment and Occupation) (C. 111)[948]. When a representation is filed about Sumangali, the ILO Committee will reflect this in its report, and then the ILO has a justification to act on it. ILO can then start a standard setting process and look into the recruitment procedure, the delayed payment procedure, the working hours, the confinement, and the sexual violence.

By means of the standard setting process, the ILO is one of the few UN agencies able to assert real pressure on member states to do something. The ILO does not exert pressure through coercive means but by convening parties to discuss and find solutions and put the issues in the spotlight. Every year there is the International Labour Conference (ILC), where there is a standards committee that present cases before every member state present. The audience is tripartite so there are representatives from trade unions, global employers' organisations, and ministries of labour from all around the world. These are the top people that are elected to go to Geneva for the conference. Everyone wants to keep up appearances and show they are doing a good job within their country. It is quite embarrassing for a country when a case is brought up about them before the ILC. Therefore a slew of activity often takes place by member states just prior to or after the ILC. That is the way progress is achieved within the country. It is less about the ILO itself engaging in all kinds of activities on the ground because the ILO is essentially a small and specialised organisation. It does not have a huge amount of manpower and resources but it can start the standard setting process, which can lead to a very powerful movement.[949] Prime Minister Modi is doing everything he

[944] Convention Concerning Forced or Compulsory Labour, June 26, 1930, 39 U.N.T.S. 291 [hereinafter *Convention on Forced Labour*].
[945] Hereinafter the ILO Committee of Experts.
[946] Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, Nov. 28, 1919, 38 U.N.T.S. 17.
[947] Convention Concerning the Creation of Minimum Wage-Fixing Machinery, June 16, 1928, 39 U.N.T.S. 3.
[948] Discrimination (Employment and Occupation) Convention, June 25, 1958, 362 U.N.T.S. 31.
[949] Telephone interview with Leanne Melnyk, *supra* note 878.

can to present a positive image for the country, stating on television that "India is up and coming", "India is the tiger rising". If anything threatens that image of the country, such as an issue like Sumangali, then the government would probably start to move. Because of what is happening in the country's economy, it would be a huge leverage point for the government to stand up at the ILC and state its reasons, its rationales and its actions about what they are doing to combat the Sumangali issue. But there has to be a political will for India to accept ILO or other stakeholder support to do something. The political will has to be both at the local and the national level. ILO Geneva's impression from participation in meetings and reading reports is that there is some political support within the local labour commissions to do something about Sumangali but that it is not necessarily mirrored at the national or the state level.

Dutch NGO SOMO's report "Flawed Fabrics" concludes that brands have a limited understanding of supply chain responsibility and that monitoring and corrective actions are limited to the end manufacturing units, so that problems in earlier production phases such as spinning of yarn and weaving of fabrics remain unnoticed and unaddressed.[950] ILO New Delhi's impression is that the brands do not want to take more responsibility for the labour standards than they already have but throw the ball in another court. They expect the national government, the state government or the spinning mill associations to take action. ETI believes that this is due to a growing realisation that brands are not the only actors responsible for ensuring compliance with labour standards. The reason why campaigners tend to focus on brands is that they are the most responsive to campaigners' concerns, and not because brands necessarily have the power to change conditions. [951] The UNGPs also emphasize the role of states as the primary duty bearers under international human rights law to protect against human rights abuses from business enterprises.[952] For instance, this is why the Dutch government is investing considerably in the ILO Better Work project in Bangladesh following the Rana Plaza disaster. Dutch companies are also involved in Bangladesh but they do not take such action in India. India is supposed to be an emerging world power and if foreign companies and governments start becoming too critical about India, it will cost them money in trade. This is why they are holding back and targeting small countries rather than big countries with whom they have entered bilateral trade agreements with.

[950] FLAWED FABRICS REPORT, *supra* note 864, at 73.
[951] Telephone interview with Martin Buttle, *supra* note 869.
[952] UNGPs, *supra* note 3, at 6 & 9.

Another way to use trade agreements is to implement and enforce labour standards in garments through partnerships. Vinicius Pinheiro, Deputy Director in ILO New York explains that the Dominican Republic – Central America Free Trade Agreement (CAFTA-DR) is a governmental way to drive a partnership with the ILO because the free trade agreement includes labour clauses as well as a provision on technical co-operation for enforcement based on ILO expertise.[953] If there is a problem, for instance, child labour or forced labour in coffee production in Colombia, the parties come together to phase out the problem by mediating with the advice from ILO's supervisory bodies. Bilateral trade agreements between the U.S. and Cambodia, and U.S. and Vietnam, also include labour standards and the ILO technical co-operation provisions.[954] Therefore, the ILO has been able to implement their Better Work Programme by sending inspectors to the factories to make sure the factories comply with basic labour standards. The ILO inspectors collaborate with workers and workers organisations and issue a certification if the factory in question is compliant, e.g. free from child labour.

Among the critical issues in the EU-India Free Trade Agreement (FTA) negotiations that started in 2007, an important one is the labour standards. The EU insists on including labour standards especially to target the issues of child labour and discrimination against Dalits. The EU's concerns are based on the fact that India has yet to ratify four core ILO Conventions including the ILO Convention on Minimum Age for Admission to Employment[955] and the Worst Forms of Child Labour Convention.[956] So far, India has been opposed to including provisions on labour standards in the EU-India FTA with the major argument that the EU is using labour standards for protectionist purposes to overcome the advantage of low-cost labour which India has over the EU. However, a sustainability impact assessment commissioned by the European Commission, 'Trade Sustainability Impact Assessment for the FTA Between the EU and the Republic of India', rebuts this concern. It predicts that since many foreign companies looking to export Indian goods desire labour standards, exports may rise through the adoption of such standards in a FTA.[957] The EU-India FTA negotiations have largely stalled since 2013 because of EU's intellectual property rights restrictions on pharmaceuticals made in India. However, Commerce and Industry Minister Suresh Prabhu

[953] Interview with Vinicius Pinheiro, Deputy Director, ILO, New York, United States (Dec. 3, 2014).
[954] *See chapter 2 supra* text accompanying notes 250-268 on corporate responsibility provisions in BITs and FTAs.
[955] Convention on Minimum Age for Admission to Employment, *supra* note 891.
[956] Convention on the Worst Forms of Child Labor, *supra* note 892.
[957] ECORYS, CUTS International and CENTAD, 'Trade Sustainability Impact Assessment for the FTA Between the EU and the Republic of India', (2009) Final Report TRADE07/C1/C01.

has indicated that negotiations are likely to resume.[958] If the EU stands firmly on not exempting labour clauses, the conclusion of the EU-India FTA might be a leverage point for the ILO to work with India to combat the Sumangali Scheme.

It is a matter of a cost benefit analysis for India whether they will agree to EU's demands about labour standards. On the one hand, an India-EU Free Trade Agreement may require India to work with ILO, which India does not want. But including the ILO in a FTA would be in a "lighter version" than the traditional ILO procedure in the sense that it would be a situation like in the CAFTA-DR, where ILO provides technical co-operation for implementing labour standards. And in return, committing to a Free Trade Agreement with the EU would give India enhanced access to the European Market and the free movements within, rather than having to trade with EU countries on a state-by-state basis.

Achievements of the TNMS-Programme

This case study has described the ETI's and ILO's work on the Sumangali issue in Tamil Nadu's garment industry. The efficacy of an MSI may be defined as the extent to which the standards fit the problem at hand, and are relevant for solving the problems effectively.[959] E.g., a standard might not provide an adequate solution, either because the requirement on the corporation is too low[960] or does not correspond with the rule-targets, e.g. unrealistic expectations on small companies in developing countries.[961] Vogel points out that even if the MSI addresses the problem correctly, it may be deemed ineffective if it creates additional negative externalities.[962] Roberts and Engardio provide the example that smaller companies in developing countries may seek to deceive the private inspectors responsible for certifying their compliance if the private regulatory requirements of Western manufacturers are too costly and burdensome.[963] The TNMS Program is comprehensive, targeted and has appropriate standards for solving the problem lined up. However, the health-based approach

[958] *India-EU FTA Negotiations Likely to Resume Soon*, THE ECONOMIC TIMES (Mar. 26, 2018), https://economictimes.indiatimes.com/news/economy/foreign-trade/india-eu-fta-negotiations-likely-to-resume-soon/articleshow/63467513.cms

[959] Dieter Rucht, *Civil Society Plus Global Governance: What can we expect? in* GOVERNANCE AND SUSTAINABILITY: NEW CHALLENGES FOR STATES, COMPANIES AND CIVIL SOCIETY 219 (Ulrich Petschow et. al. eds., 2005).

[960] S. PRAKASH SETHI, SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS 151 (2003).

[961] Susan Summers Raines, *Perceptions of Legitimacy and Efficacy in International Environmental Management* 3 GLOBAL ENVIRONMENTAL POLITICS 47, 70 (2003).

[962] David Vogel, *The Private Regulation of Global Corporate Conduct*, 49 BUSINESS & SOCIETY 68, 68 & 81 (2010).

[963] Dexter Roberts & Pete Engardio, *Secrets, Lies and Sweatshops*, BLOOMBERG BUSINESS WEEK, Nov. 27, 2006, at 50-58.

has received criticism from independent evaluator Aidenvironment and trade unions partnering with the initiative for not bridging properly as the intention were, to produce results for workers in raising wages, requiring transparency from corporations to map and disclose information on supply chains, providing contracts and a workplace free of abuse. So far the TNMS Program has only initiated the stage that works on setting higher requirements to the factories to directly address and eventually solve the human rights issues. However, the program has managed to create awareness amongst a group of workers, many local communities, and to raise the issue at an industry level with multiple stakeholders, recruiters and government representatives. The ETI also reports that in some cases, workers receive pay increments and committees have been established to respond to allegations around workplace temperatures, harsh and discriminatory treatment and use of inappropriate sexual language by supervisors.[964] It will take a long time until the programme addresses all of the Sumangali scheme issues such as forced labour, harassment of workers, and the conditions under which the young girls are recruited and employed. The ILO has responded to requests for support from the ETI by pursuing collective ways within the industry. Following several requests from the ILO, the international union ITUC and the women-led union GLU submitted an article 23 comment under the ILO Constitution on violation of the Forced Labour Convention to the ILO Committee. The next step is that the government of India must respond to the comments by request from the ILO Committee but there has not yet been any updates on the outcome.

According to the ETI, it does not suffice to issue a trade union card and raise a complaint with the ILO alone. Complaint mechanisms such as the OECD contact points[965] where a complaint is launched against a company before a mediation body are more effective if there is a direct commercial relationship between a brand and a factory. It is reasonable to expect the brands to be able to influence the factories where their clothing is being manufactured. However, if there is a broader systemic issue across the industry several steps upstream, like the Sumangali issue, it must be addressed by bringing together different stakeholders to work collaboratively on these issues. H&M believes that although there is a delay in delivering results, the TNMS Program's strategy to access the spinning mills starting with a neutral approach such as health is a way forward because both the factory managers and the workers consider it beneficial. However, changing an entire industry's systemic problem is a long-

[964] *Women Millworkers in Tamil Nadu*, Ethical Trading Initiative https://ethicaltrade.org/programmes/women-millworkers-tamil-nadu (last visited May 29, 2018).
[965] The OECD contact points enforce the OECD GUIDELINES, *supra* note 3.

term goal since the spinning mills and the industry associations in India are not very responsive to participating in achieving sustainability and social responsibility. The spinning mill industry is a very closed industry and around 55% works only for the local market and brands in India. Outside of the TNMS Programme, H&M does audits in spinning mills and recommend their suppliers that make the fabric to only use cotton from mills that produce under decent working standards. The company tries to trace back the origins of the yarn to make sure that it is not produced under the Sumangali scheme.[966] In 2016 the company was able to trace back 50% of the yarn[967] and 60% in 2017.[968] This is quite a remarkable number considering the long supply chain where the yarn is produced in the spinning mills and sold to weaving mills that process the yarn to sell it to the company's suppliers that make the fabric.[969] In order to change the mind-set of the industry, it is necessary to team up with other stakeholders and intensify the dialogue with the industry associations, including SIMA and Tamil Nadu Spinning Mills Association (TASMA), on improving the industry and understanding the issues. The reason why there is a soft law approach such as the UN Guiding Principles is that implementing it in practice is difficult and requires many different stakeholders and a contextual understanding of the issues that have led to a diversity of problems in different industries. It takes a long time to change an entire industry and it needs to be achieved by changing the behaviors, hearts and minds within the industry itself. A general lesson to be learned from the case is that there is no secret to success for MSIs in producing better labour standards and each situation has to be taken on a case-by-case basis. Moving forward, MSIs are important civil governance mechanisms to achieve results on the ground but the complexity of the business and human rights agenda calls for additional solutions to address the root causes of corporate impunity for violations of human rights. These include the policies and practises of international financial institutions and the global trade regime's effect on host-state governance capacity. MSI literature agrees with TWAIL that the legitimacy of an MSI must be measured in democratic inclusion of the people most affected by the social and environmental externalities of business operations. Democratic legitimacy of the TNMS programme will be further discussed in the TWAIL analysis.

[966] Telephone interview with Maritha Lorentzon, *supra* note 909.
[967] *Id.*
[968] H&M, H&M GROUP SUSTAINABILITY REPORT 2017 88 (2017), http://about.hm.com/content/dam/hmgroup/groupsite/documents/masterlanguage/CSR/reports/2017%20Sustainability%20report/HM_group_SustainabilityReport_2017_FullReport.pdf.
[969] Telephone interview with Maritha Lorentzon, *supra* note 909.

TWAIL Assessment

1) Reinforcement of human rights governance capacity over MNCs in host states.

MSIs involve mainly corporations and civil society organisations that make an effort to fill the gap where governments are not able or willing to regulate the externalities of business activity. In some cases though, MSIs may result in host states strengthening their human rights governance capacity. One example mentioned above[970] is ILO Better Work involving companies, inter-governmental agencies, including the ILO and the IFC, and national governments in the governance of labour standards in Bangladesh. Although there is disagreement in the literature as to what extent ILO Better Work can be considered an MSI,[971] it is an example of a soft law initiative involving multiple stakeholders based on private regulation of factories which has led to strengthened host state regulation.[972] The ETI has also worked with the ILO to address the Sumangali scheme in India and strengthen the governance of Indian labour authorities to perform due diligence to their own industry.[973] However, as described above, India is a challenging environment for NGOs and the labour rights communities. ILO has attempted to strengthen the Indian government's legislative intervention in the garment industry by partnering with labour unions in a complaint against the government for the ILC. The government is concerned that demands in labour standards might weaken the advantage of low-cost labour in trade compared to Western nations. The TNMS Programme along with the ILO may eventually help to raise sufficient awareness of human rights issues through economic arguments[974] including that attracting more companies will require the government to adopt stronger labour standards.[975] However, the policy reform efforts in the TNMS Programme are not on track to deliver intended results. Although

[970] *See supra* text accompanying notes 937-41.
[971] It is argued by Rossi that the ability to convene governments, workers' organizations and employers' organizations as well as brands is one of the key factors differentiating the Better Work programme from MSIs, cf. Arianna Rossi, *Achieving Better Work for Apparel Workers in Asia*, *in* LABOUR IN GLOBAL VALUE CHAINS IN ASIA 31, 34 (Dev Nathan et al. eds. 2016). Mena and Palazzo use MSI as an umbrella term covering private regulatory initiatives including Better Work, Sébastien Mena & Guido Palazzo, *Input and Output Legitimacy of Multi-Stakeholder Initiatives*, 22 BUSINESS ETHICS QUARTERLY 527, 533 (2012).
[972] The Bangladesh Labour Act (2013) and the Bangladesh Labour Rules (2015).
[973] *See supra* text accompanying note 925.
[974] As the sourcing-house Bricpro points out, it is necessary to present economic arguments to companies to raise standards in production, s*ee supra* text accompanying notes 922-24.
[975] The ILO endeavours to expose ILO member states to public criticism through the standard setting process with the aim to incentivise governments to react in order to save the image of the country and promote the economy. *See supra* text accompanying note 949. Also, the 2016 International Labour Conference initiated a process for member states to adopt a binding convention to require companies to have due diligence in place throughout their supply chains. *See supra* text accompanying note 935.

the programme has reached local government representatives to put pressure on the national government to pass laws on reduction on length of apprenticeships in Tamil Nadu and against fraudulent recruitment practices, it is uncertain whether higher-level governmental bodies have been influenced to pass the laws.[976]

2) Democratic inclusion that gives voice to host state local communities.

From a TWAIL point of view, the legitimacy of MSIs depends on whether Third World peoples have a voice in the deliberations and decision-making process.[977] Deliberations must be structured in such a way that power relations between stakeholders are neutralized.[978] For example, the ETI includes an even number of representatives on their Board of Directors from three different kinds of stakeholders: trade unions, NGOs and corporations. Even though an MSI includes a large number of stakeholders, its legitimacy might be low if it does not directly involve the people most affected by the social and environmental externalities of global business activities. For example, even though an MSI like the Forest Stewardship Council (FSC) on sustainable forest management involves NGOs[979], the FSC has been criticised by activist NGOs for insufficiently including indigenous communities living in the forests and for ignoring developing countries' interests [980] Also, TWAIL especially encourages inclusion of Third World women[981] since, as exemplified in the TNMS case study, the economic success of MNCs rests on the labour of Third World women and both gender and ethnic divisions of employment are inherent to the outsourcing supply chain. The TNMS Programme has included local communities by raising awareness of the reality of working in mills before recruitment and working to create open communication between workers and managers. Also, the progress of the program is reviewed using a participative approach including young women workers and community members. [982] Moreover, the efforts of the ILO to address Sumangali has included an Indian trade union organising garment workers. It is yet to be seen whether their comment to the ILO Committee exerts pressure on the Indian government to intervene. The ILO provides democratic inclusion of workers, employers and member states but there has to be political will from the member state to accept intervention from the ILO. From a TWAIL perspective, soft law and private

[976] *See supra* text accompanying note 913.
[977] Seck, *supra* note 849, at 568.
[978] Mena & Palazzo, *supra* note 971, at 539.
[979] *Id.*, at 534.
[980] *Id.*, at 539.
[981] Chimni, *Third World Approaches*, *supra* note 108, at 22; Heng, *supra* note 123, at 30; CECILIA M. BAILLIET, NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS 104 (2012).
[982] AIDENVIRONMENT, *supra* note 913, at 9 & 11.

regulatory schemes, such as MSIs, operate in a space with several democratic shortcomings. Although soft law is normally created through communicative action and power, it remains marginal to the operation of the international legal system. In particular, TWAIL and feminist scholars point out that gender issues suffer a double marginalization: they are seen as "soft"issues of human rights and are developed through "soft"modalities of law-making that allow states to appear to accept such principles while minimizing their legal commitments.[983] Rather than being left in the unregulated periphery, feminist legal theorists call for women to be included and protected by international law. While the TNMS programme includes the women in evaluation and reaches out to governmental bodies, it has not yet been possible to provide for democratic inclusion on a policy level with governmental bodies perhaps due to the private and voluntary nature of MSIs.

3) Access for Third World communities to enforce the measures.

TWAIL opposes how texts adopted in the non-governmental world are banished to the realm of soft law because according to mainstream international law scholarship "soft law" is "not law".[984] Soft regulation created through MSIs has been strongly criticised as a blue[985]- or green-washing[986] tool for corporations, e.g. for not bringing real change to factory workers' conditions.[987] MSIs rely on monitoring that sometimes fails[988] and voluntary compliance, rather than on sanctions that can be authoritatively and legally applied. The ETI reported that the TNMS Programme provides access to remedy for the workers by establishing committees to address sexual harassment and supervisors' cruel and discriminatory treatment.[989] However, trade unions and labour rights charities complain that the program lacks enforcement in fair wages, contracts and a workplace free of abuse.[990] Although an international and Indian trade union have filed a comment to the ILO Committee, it is uncertain if the Indian government will act as the committee's pronouncements are non-

[983] CHARLESWORTH & CHINKIN, *supra* note 128, at 66; Chimni, *An Outline of a Marxist, supra* note 158, at 16.
[984] MALCOLM SHAW, INTERNATIONAL LAW 92 (1997).
[985] Blue-washing indicates a partnership between the United Nations and a corporation that have signed on to the UN Global Compact.
[986] Green-washing signifies deceptive communication on corporate environmentally friendly practises to the public.
[987] Debora L. Spar & Lane T. La Mure, *The Power of Activism: Assessing the Impact of NGOs on Global Business* 45 CALIFORNIA MANAGEMENT REVIEW 78 (2003).
[988] JOHN J. KIRTON & MICHAEL J. TREBILCOCK, HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (2004); Peter Utting, *Regulating Business via Multistakeholder Initatives: A Preliminary Assessment, in* VOLUNTARY APPROACHES TO CORPORATE RESPONSIBILITY: READINGS AND A RESOURCE GUIDE: PREPARED FOR UNRISD 61, 92 (Rhys Jenkins et al. eds 2002) https://unngls.org/images/multilateralism/Section_II.pdfEuropean Union Reports
[989] Buttle, *supra* note 912.
[990] Nagaraj, *supra* note 917.

binding[991] and have been referred to as "soft law labour standards jurisprudence."[992] As for community outreach there is no evidence that the TNMS program has lead to Tamil Nadu community members claiming their rights.[993] Communities seem to feel disempowered to enforce their rights because they need money from working in the mills.[994] In particular, poverty, lack of alternative employment, a culture that favors silence in girls and shielding girls from conflict, are preventing communities from claiming rights and confronting employers and recruitment agents.[995] Also, capacity for monitoring and enforcement of laws is very limited in Tamil Nadu.[996] Third World feminists have emphasized that allowing states and Western corporations to insist on soft and voluntary instruments as appropriate regulation of matters of concern to women, e.g. in the global outsourcing industry, reinforce the patriarchal and colonial international legal system.[997] Also, Ishay and Prabhash are concerned about the development of neo-liberal states that are "hard and soft" simultaneously, soft towards global capital and hard towards their own working women and men depriving them of security and other human rights.[998] As Baxi points outs, economic globalization has pushed for "a borderless world for global capital, even though it stands cruelly bordered for the violated victims,"[999] e.g. Union Carbide and its subsidiary vs. the mass disaster-violated Indian community; and multinational clothing retailers and suppliers vs. mutilated Bangladeshi workers and families of deceased victims seeking access to remedy.

Subconclusion

MSIs may be governance with and without government and has in some cases resulted in host state government intervention such as the ILO Better Work Bangladesh. However, Bangladesh is a special and unique case because it rests on such a huge disaster as the Rana Plaza factory collapse which urged government action. Activists, labour rights charities, and evaluators of the TMNS programme have pronounced that more transparency about brands'

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[991] Claire La Hovary, *The ILO's Supervisory Bodies' "Soft Law Jurisprudence"*, in Research Handbook on Transnational Labour Law 316, 321 (Adelle Blackett & Anne Trebilcock eds., 2015).
[992] *Id.*, at 316.
[993] AIDENVIRONMENT, *supra* note 913, at 5.
[994] *Id.*, at 37.
[995] *Id.*, at 40.
[996] *Id.*, at 37.
[997] CHARLESWORTH & CHINKIN, *supra* note 128, at 49. Annie Rochette, *Transcending the Conquest of Nature and Women: A Feminist Perspective on International Environmental Law, in* INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 220 (Doris Buss & Ambreena Manji eds., 2005).
[998] MICHELINE R. ISHAY THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIME TO THE GLOBALIZATION ERA 286 (2004); J. Prabhash, *Human Rights in a Globalized World: Market Friendly Rights Vs. People Friendly Rights, A Theoretical Construct*, in Human Rights in a Changing World 47 (P. Sukumar Nair ed. 2011).
[999] UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 247 (2006).

supply chains is key for an MSI to make it possible for global advocacy organisations to increase public pressure on companies to take action to ensure respect for labour rights.[1000] Although MSIs, like TNMS and ILO Better Work, have created awareness on industry- and sometimes governmental level, TWAIL has expressed profound discontent with reliance on the private sector. For instance, in spite of the significance of increasing engagement of MNCs in CSR activities, the UN Global Compact is considered a benign approach to regulating MNCs.[1001] Especially Third World Women have spoken out against deeming matters of concern to women appropriately regulated by soft, non-binding instruments.[1002] At the same time TWAIL has pointed out that soft norms can be useful to protect human rights in the near future rather than the slow process of pursuing a binding treaty.[1003] While TWAIL does not negate the results MSIs have achieved and the flexibility they offer for a normative framework, not all companies embrace voluntary initiatives on business and human rights. MSIs do not adequately address some core issues on TWAIL's agenda such as the right to remedy and the need for accountability in a manner fully consistent with international human rights standards.

[1000] Tim Connor, lecturer at Newcastle Law School, Australia, and co-author of a 2016 report on the ETI's effectiveness, Nagaraj, *supra* note 917.
[1001] WHITE (citing Chimni), *supra* note 177, at 24.
[1002] Rochette, *supra* note 997, at 220.
[1003] *See infra* chapter 5 text accompanying note 1131.

Chapter 5 – The UN Guiding Principles on Business and Human Rights and National Action Plans

Introduction

On 16 June 2011, the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights [1004] providing – for the first time – a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The UNGPs provide guidance for both states and companies. The domestic implementation by states of the UNGPs are essential to properly measure the effectiveness of these international standards in particular the extent to which they are transformed into "hard law". This chapter will begin by presenting selected UNGPs that address TWAIL concerns and interpret their expectations to states using the UNGPs commentary and the book "Just Business" [1005] written by UNGPs' author, Professor John Ruggie. The next section will evaluate the progress in the National Action Plans (NAPs) of the U.S., England, and Denmark on adopting effective legislative measures in accordance with the selected UNGPs. The chapter aims to conclude whether the UNGPs and the NAPs satisfy the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures. [1006]

The Development of the UN Guiding Principles

The UNGPs arose out of an earlier failed attempt by the UN to adopt the "Norms on Transnational Corporations and other Business Enterprises," [1007] to address the adverse impact of business activities on human rights. The Norms were drafted by a subsidiary body of the then UN Commission on Human Rights (UNCHR) [1008] and were to impose duties under international law on private enterprises. However, the initiative was opposed by the businesses community criticizing the Norms for their "binding and legalistic" approach [1009]

[1004] UNGPs, *supra* note 3.
[1005] RUGGIE, *supra* note 186.
[1006] *See Chapter 1 supra* text accompanying notes 148-87.
[1007] UN Sub-Commission on the Promotion & Protection Of Human Rights, *Norms on the Responsibility of Transnational Corporations & Other Business Enterprises with Regard to Human Rights.*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003) [Hereinafter the Norms].
[1008] The UNCHR was replaced with the United Nations Human Rights Council in 2006.
[1009] Report of the UN Economic and Social Council, *Joint Written Statement Submitted by the International Chamber of Commerce and the International Organization of Employers, Non-Governmental Organisations in General Consultative Status*, at 2, UN Soc. E/CN.4/Sub.2/2003/NGO/44 (July 23, 2003).

transferring to companies obligations that they believed belonged to states. The Norms also lacked support from governments considering an intergovernmental process inappropriate for achieving progress on such a new, complex, and politically charged issue without first agreeing on a common platform from which to move forward.[1010] Due to this scepticism the Norms were never adopted.

In response, the then UNCHR in 2005, appointed John Ruggie, a Harvard professor as a Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. Throughout his tenure as SRSG, Professor Ruggie left behind the controversy arisen from the Norms and instead adopted an approach he called "principled pragmatism".[1011] This involved nearly fifty international consultations with a wide range of stakeholders on five continents with numerous site visits and pilot projects, and several thousands pages of research reports conducted over six years.[1012] Although the mandate of the SRSG was originally only two years and involved only identifying and clarifying the existing standards and practices, it evolved throughout six years into the UNGPs formally endorsed by the Council in its resolution 17/4 dated June 16, 2011.[1013]

The Structure of the UN Guiding Principles

The UNGPs comprise of three foundational pillars forming the "protect, respect, and remedy" framework; (1) the state duty to protect human rights; (2) the corporate responsibility to respect human rights, and (3) access to remedy. The main human rights treaties generally contemplate a duty for States to adopt binding rules in relevant areas and promote respect for human rights[1014] as well as providing remedial measures including investigation, punishment and access to adjudication.[1015] Pillar I aims to clarify this duty and identifies ways for states to discharge this duty more effectively.[1016] Pillar II spells out the implications of the corporate responsibility to respect human rights and what companies need to do to meet this responsibility. Pillar III affirms that states must ensure access to effective judicial remedy for human rights abuses and that business enterprises should establish or

[1010] RUGGIE, *supra* note 186, at xviii.
[1011] *Id.*, at xlii
[1012] *Id.*, at xx.
[1013] Human Rights Council Res. 17/4, U.N. Doc. A/17/1 (15. June 2011).
[1014] International Covenant on Civil and Political Rights (ICCPR), art. 2, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 2, Dec. 16, 1966, 993 U.N.T.S. 3; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (UDHR) (Dec. 10, 1948).
[1015] ICCPR art. 2 (3); UDHR art. 8.
[1016] RUGGIE, *supra* note 186, at 84.

participate in effective grievance mechanisms for individuals and communities that may be adversely impacted.[1017] Although the UNGPs are voluntary, they should apply to all states and all business enterprises, regardless of size, location, or structure. Similarly, the UNGPs are to be applied in a non-discriminatory manner and special attention paid to those individuals or groups that may be vulnerable or marginalized and to recognize the different risk that men and women may be exposed to.[1018] The SRSG explains that "the Guiding Principles' normative contribution lies not in the creation of new international law obligations"[1019] but in "enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities […]."[1020] However, the SRSG also defines the UNGPs as a "common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments",[1021] perhaps referring to the future implementation in the NAPs or binding international norms. In the following, it will be clarified what is expected of states under the UNGPs focusing on principles that address TWAIL concerns. The assessment will also include principles on human rights due diligence in company practises because the UNGPs indicate a state duty to adopt provisions on human rights due diligence.[1022] The assessment will use John Ruggie's book "Just Business"[1023] and the UNGPs Commentary. Next, it will be explained how the selected principles correspond with the interests of TWAIL. The objective is to evaluate the prospects of their transition into hard law looking at the NAPs of the U.S., England, and Denmark in order to determine whether they address the concerns of Third World communities or whether there is also a need for an international legal obligation to do so.

Pillar I: The State Duty to Protect Human Rights

The following assessment will clarify what is expected of states in terms of adopting legislative and other preventative measures on business and human rights focusing on extraterritorial regulation and conflict-affected areas.

Principle II

[1017] *Id*, at 102.
[1018] UNGPs Annex, at 6.
[1019] UNGPs, Introduction, at 5.
[1020] UNGPs, Annex, at 6.
[1021] *Id.*
[1022] UNGPs 7, Commentary, at 11.
[1023] RUGGIE, *supra* note 186.

States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.[1024]

This Principle regards a home state's extraterritorial regulation of businesses activities because it is not so simple for a host state to hold an MNC accountable operating within its territory. If the MNC has outsourced business to a separate contractor in the host state, in this way carrying out operations indirectly in the host state, the MNC is outside the jurisdiction of the host state. Also, even if the MNC operates directly in the host state, the host state might not uphold its obligation to protect its citizens against human rights abuses by the MNC, because the government may be less economically powerful than the business enterprise. An example is the collusion between BHP, an Australian mining corporation and the government of Papua New Guinea when a tort lawsuit was filed against BHP for polluting Ok Tedi River adjacent land and prejudicing the plaintiffs' enjoyment of that land and waters. Because of BHP's strong influence over Papua New Guinea and its income, the government passed laws to protect BHP from legal challenge over its activities there.[1025]

In the commentary to Principle II, the SRSG clarifies that states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.[1026] However, the SRSG reminds states that they are not prohibited to regulate their businesses extraterritorially and he encourages them to do so, provided there is a recognized jurisdictional basis.[1027] Some home states observe their responsibility by having embassies advise businesses on staying clear of risks of involvement in human rights abuses abroad and warn companies when they are close to having a negative impact on human rights. [1028] However, the SRSG observes that home states typically lack the policies, and their embassies the capacity to do so.[1029] In order to determine the Principle's expectations on states the extent of the term "jurisdiction" should be clarified.

[1024] UNGPs 2, at 7.
[1025] BHP v. Dagi [1996], 2 VR 117 (Austl.); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 138 (2013).
[1026]The U.S. challenged the use of the term "jurisdiction" to define the duty's geographic scope, insisting on "territory". The SRSG suspected that the U.S. had the Guantánamo prison in mind, which is not U.S. territory but arguably under U.S. jurisdiction, RUGGIE, *supra* note 186, at 89.
[1027] UNGPs 2, Commentary, at 7.
[1028] See *Information about the Trade Council*, DENMARK IN BANGLADESH, MINISTRY OF FOREIGN AFFAIRS OF DENMARK http://bangladesh.um.dk/en/The%20Commercial%20Section offering Danish companies tailor made counselling on compliance and CSR when doing business in Bangladesh (last visited Jan. 16, 2018)
[1029] RUGGIE, *supra* note 186, at 88.

The Inter-American Commission on Human Rights has interpreted the term "jurisdiction" in *Saldaño v. Argentina*[1030] in which a petition was filed against Argentina claiming that Argentina had failed to protect its citizen during a trial in the U.S. that resulted in a death sentence. The Commission pronounced that "jurisdiction" is not limited to national territory but rather that a state may be responsible for the acts and omissions of its agents, which produce effects outside that state's territory.[1031] Similarly, the European Court of Human Rights handed down judgments in *Al-Skeini and Others v United Kingdom*[1032] and *Al-Jedda v United Kingdom*[1033] confirming that the U.K.'s human rights obligations are not limited to its territory but can extend overseas to situations in which British officials exercise 'control and authority' over foreign nationals. A parallel of these interpretation of jurisdiction may be drawn to transnational business and human rights cases, if the company is owned, controlled and funded by a state.[1034]

The jurisdiction issue was also considered when the Commission authorized precautionary measures in favour of detainees being held by the U.S. at Guantanamo Bay, Cuba.[1035] The Commission found that, although the detainees were outside the territory of the United States, they were subject to its jurisdiction because they were "wholly within the authority and control of the United States government".[1036] Drawing on this interpretation, it could be argued that a state may have jurisdiction over an overseas-based individual, including a corporation, if the individual is "within the authority and control" of the state. The authority and control could be derived from where the individual is domiciled. However, since corporations often operate through contractors or subsidiaries that are not domiciled in the state of the parent corporation, it is difficult to argue that they are "within the authority and control" of the home state.

Nonetheless, there are several instances where states have chosen to regulate the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, in areas such as competition law, shareholder and consumer protection, anti-bribery and corruption, and tax law. States have even concluded a treaty, the UN Convention Against Corruption[1037] which

[1030] Saldaño v. Argentina, Inter-Am. Comm'n H.R., Report No. 38/99, ser. A (1999).
[1031] *Id.* at 17.
[1032] Al-Skeini and Others v. the United Kingdom, no. 55721/07 Eur. Ct. H.R. (2011).
[1033] Al-Jedda v United Kingdom, no. 27021/08 Eur. Ct. H.R. (2011).
[1034] See UNGPs 4.
[1035] Detainees at Guantanamo Bay, Cuba (Precautionary Measures), Inter-Am. Comm'n H.R., 1 Annual Report 2002, OAS Doc. OEA/Ser.L/V/II.117, doc. 1 (2003).
[1036] *Id.* at 533.
[1037] UN Convention Against Corruption, Oct. 31, 2003, 43 I.L.M. 37.

was motivated by the U.S. Foreign Corrupt Practices Act.[1038] The treaty imposes obligations on state parties to establish laws and criminal sanctions with respect to corruption of foreign public officials and to extend liability (whether criminal, civil, or administrative) and sanctions to legal persons. In want of such a multilateral agreement, a parent company might take advantage of its legal structure and incorporate in another state in order to avoid home state regulation.

Principle VII

Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.[1039]

More and more business, especially manufacturing companies outsource part of the production process to states where either the labour or the raw material is cheaper. These states may be conflict-ridden areas where the risk of gross human rights abuses is heightened. Therefore, states should help to ensure that businesses operating under these conditions are not involved in negative impacts on human rights. States are encouraged to engage with companies as early as possible on helping them to identify, prevent and mitigate human rights related risks so that they are prepared to assess and deal with the heightened risks they are subjected to in these areas. Critical situations may arise in connection with the businesses' daily activities or when the assignments are handled by local contractual partners. When

[1038] *See supra* text accompanying note 153.
[1039] UNGPs 7, at 11.

hiring local contractual partners it is important that the businesses make sure that they also respect human rights, since it otherwise can affect the business itself.[1040]

States should also when counseling the business raise attention to gender-based and sexual violence which is particularly occurring in conflict-ridden areas since womens' rights are often non-existent or limited in these areas. States are also encouraged to take more restrictive precautions, e.g. by refusing a business public support or service if it is involved in acts that have very negative influence on human rights and not willing to co-operate on solving the situation.

Principle 7 also prescribes that home states should assist business enterprises by establishing closer political cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host government actors. Appropriate consequences should be ensured if an enterprise fails to cooperate in these contexts, e.g. by denying or withdrawing existing public support or services.[1041]

Similarly, states must make sure that their current policies, legislations, regulations and enforcement measures effectively address this heightened risk in conflict-ridden areas, including through provisions for human rights due diligence for business. This will send a signal to businesses about the heightened risk of being involved in human rights abuses in conflict-ridden areas. If there are gaps, states should take appropriate steps to address them. This could happen for instance by exploring possibilities for civil, administrative, or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. States are also encouraged to enter multilateral agreements and support effective collective initiatives in order to help the host state to protect human rights in the conflict-ridden area. [1042]

Principle IX

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.[1043]

[1040] UNGPs 7 Commentary, at 11.
[1041] UNGPs 7, Commentary, at 11.
[1042] *Id.*
[1043] UNGPs 9, at 12.

Even though there is a need for states to collaborate in creating international standards, it is important that they ensure keeping an adequate domestic policy space to comply with their human rights obligations. This entails that host governments must avoid signing overly restrictive investment agreements that constrain their ability to adopt human rights protecting regulation because of the threat of being sued by foreign investors because the measures alter the economic equilibrium outset of the investment treaty.[1044] An example could be when a host state enters a long-term contract with another state that includes an investor-to-state dispute settlement (ISDS) clause that provides foreign companies with a possibility to circumvent national courts and sue host states through arbitration if they find that state regulation, e.g. public interest regulation, is inconsistent with rules of an investment treaty.[1045] Since states have the primary responsibility for implementing human rights in their national systems, they must maintain sufficient domestic political power to stand by their responsibility.

Principle X

States, when acting as members of multilateral institutions that deal with business-related issues should:

a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.[1046]

Greater political coherence is not just necessary on a national level, but also on the international level. It is important that States are aware that they preserve their international human rights obligations when they act as members of international trade and financial institutions. Accordingly, States must ensure that their membership of these institutions does not limit their ability to protect human rights, but instead use it to advance business respect

[1044] RUGGIE, *supra* note 186, at 109.
[1045] The ISDS mechanism is further discussed above in chapter 2, note 250-56.
[1046] UNGPs 10, at 12.

for human rights on the international level. [1047] The multilateral institutions' assistance may consist of capacity-building and awareness-raising to help all States to fulfil their international human rights obligations, including by the sharing of information about challenges and best practices. When acting collectively through multilateral institutions, States are encouraged to look to the UNGPs as a point of reference that takes into account the respective roles and responsibilities of all relevant stakeholders.[1048]

Pillar II: The Corporate Responsibility to Respect Human Rights

The following assessment will focus on businesses' human rights due diligence process and the responsibility of states to further human rights due diligence in company practises.

Principle XV

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due-diligence process to identify, prevent, mitigate and

account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts

they cause or to which they contribute.[1049]

This Principle explains how corporations fulfil their responsibility to respect human rights. The corporate responsibility to respect human rights is defined by the SRSG as non-infringement on the rights of others, and addressing harms that occur. Its substantive content consists of internationally recognized human rights. The scope of the company's responsibility is the actual or potential adverse human rights impacts by its own activities or through the business relationships connected to those activities.[1050] See e.g. in the Apple case from early 2012 where one of its manufacturing factories, Foxconn in China, producing iPads had a negative impact on human rights which hurt Apple's reputation. The press accounts

[1047] UNGPs 10, Commentary, at 12.
[1048] UNGPs 10, Commentary, at 13.
[1049] UNGPs 15, at 15.
[1050] RUGGIE, *supra* note 186, at 100.

described serious and sometimes deadly safety problems, excessive overtime, underage workers, and even a rash of suicides.[1051]

Corporations must develop a corporate policy commitment and self-regulate through corporate-defined due diligence and remediation processes. The means for companies to "know and show" that they respect human rights is by conducting human rights due diligence.[1052] The key elements of the human rights due diligence process are set out in UNGPs 17-21. The process entails having systems in place that enable the business to meet its responsibility to respect human rights. The following assessment of human rights due diligence will focus on UNGP 17 because it emphasizes the role of states in giving human rights due diligence a legal meaning in terms of liability.

Principle XVII

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and

communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise

may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk

of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change

over time as the business enterprise's operations and operating context evolve.[1053]

This Principle defines the parameters for human rights due diligence.[1054] For guidance when creating the concept of human rights due diligence, the SRSG looked to transactional due

[1051] Charles Duhigg & David Barboza, *In China, Human Costs Are Built into an Ipad*, N.Y. TIMES, Jan. 25, 2012, at A1.
[1052] RUGGIE, *supra* note 186, at 113.
[1053] UNGPs 17, at 16.
[1054] UNGPs 17, Commentary, at 16.

diligence which aims to ensure that a contemplated merger or acquisition has no hidden risks. Companies started in the 1990s to perform internal controls for the ongoing risk management to both the company and to stakeholders, for example to prevent employment discrimination and to comply with environmental commitments.. The concept of human rights due diligence draws on these already established practises but goes beyond to include the risks the company's activities and associated relationships may pose to the rights of affected individuals and communities.[1055] It must profoundly engage human rights-holders and be conducted periodically over the life cycle of the particular project since situations on the ground may change – often simply because of the company's presence.[1056] The due diligence requirement applies not only to a company's own activities, but also to the business relationships linked to them, e.g. its supply chain, security forces protecting company assets, and joint venture partners.[1057] The Principle recommends businesses to initiate human rights due diligence as early as possible when entering a new relationship with a business partner because human rights risks can be dealt with when structuring contracts or through mergers and acquisitions. Business relationships are understood to include business partners, other entities in the enterprise's value chain, and any other non-state or state entity directly linked to its business.[1058] Where a business discovers that its operations, products or services are directly linked to human rights abuses through another entity in the supply chain, e.g. a supplier using bonded labour unknown to the business and in violation of contractual agreements – the business should assert its influence over the supplier to mitigate the impact, and if unsuccessful, it should consider terminating the relationship.[1059] The SRSG illustrates with the pottery shop warning sign, "You Break It Or Contribute To Breaking It, You own It" and recalls how Nike's initial response to the campaign concerning its Indonesian supplier factories – that it did not own the problem because it did not own the factories was socially unsustainable.[1060] The response provoked consumers' protests against insufficient factory conditions including protests, hunger strikes and boycotts.[1061] Feminist groups also mobilized boycotts of Nike products after learning of the unfair conditions for the primarily female workers. In the early 1990s when Nike began a push to increase advertising for female

[1055] RUGGIE, *supra* note 186, at 99.
[1056] RUGGIE, *supra* note 186, at 100.
[1057] *Id.*, at 114.
[1058] *Id.*, at 98.
[1059] *Id.*, at 114.
[1060] *Id.*, at 98.
[1061] See Liza Featherstone, *The New Student Movement: Protests Rock the Corporate University*, THE NATION MAGAZINE, (May 15, 2000) http://www.thirdworldtraveler.com/Youth/NewStudentMovement.html

athletic gear, these groups created a campaign called "Just Don't Do It" with the goal being to inform women of the poor conditions of the factories where women created Nike products.[1062]

In some host states there may be significant restrictions on gender equality, freedom of association and privacy rights, which cause dilemmas for transnational businesses to comply with national legal requirements and the corporate responsibility to respect human rights. The SRSG recommends that the business looks to internationally recognized human rights, comply with these rules and demonstrate it through the due diligence process. If the company foresees a risk of becoming complicit in gross human rights abuses committed by e.g. host governments' agents, the risk should be treated as a legal compliance issue and it may be considered severing the business operations if the risk is too high in the area.[1063]

The commentary to the Principle uses the terminology "complicity" for when a business contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. A number of national jurisdictions allow for criminal liability of business enterprises in case of their complicity in the commission of a crime and also a civil action can be filed on the basis of a company's alleged contribution to human rights abuse, although it may not be framed in human rights terms. The Principle points out that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. On this basis, the SRSG argues that when a business conducts human rights due diligence, it helps them address the risk of legal claims against them by showing that they took every reasonable precautionary measure to avoid getting involved in human rights abuse.[1064] Businesses are advised to prioritize where they have large numbers of entities in their supply chains and focus human rights due diligence on the areas with the most significant human rights risks.[1065] It is emphasized, though, that conducting human rights due diligence does not automatically exonerate a business enterprise from liability in cases of human rights abuses.[1066] The concept of human rights due diligence provides the basis for a process standard that can be adopted by companies themselves, however, the SRSG points out that it can also be required from companies by governments. Some business associations and government representatives expressed the concern that

[1062] George H. Sage, *Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes*, 16 SOCIOLOGY OF SPORT JOURNAL 206–235 (1999).
[1063] RUGGIE, *supra* note 186, at 100.
[1064] UNGPs 17, Commentary, at 17.
[1065] *Id.*, at 16.
[1066] *Id.*, at 17.

human rights due diligence should not increase corporate liability or impose undue burdens on small and medium-sized enterprises.[1067] By adopting a due diligence requirement, states would have to balance these concerns with, on the one hand, the need for handling human rights risks on the outset and on the other hand requiring due diligence only when it is relevant for the company's transnational operations. It must also be taken into account that a company's commitment to dealing with human rights risks should not backfire in the sense that if the company took all reasonable steps in human rights due diligence, it must have known about the risk and incur higher punishment. The section below on NAPs will consider states' stand on adopting the corporate human rights due diligence requirement as part of its duty to protect.

Pillar III: Access to Remedy

Apart from a duty to prevent human rights violations by third parties[1068], states also have an obligation to provide remedial action including investigation, sanctions and ensuring adjudication access for the aggrieved party. The remedial actions are outlined further in Pillar III. The following assessment will be limited to the principles laid down in regards to states in order to clarify if states meet these expectations in their NAPs.

Principle XXV

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.[1069]

This Principle reaffirms the existing obligation that states have to ensure effective access to remedy in case of business-related human rights abuse within their territory and/or jurisdiction. E.g., if a host state has ratified existing human rights treaties, it already has an obligation to enforce them.[1070]

International human rights law leaves some discretion to states as to how a remedy can be provided, however, it must be "accessible and effective…[with] appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic

[1067] RUGGIE, *supra* note 186, at 101.
[1068] UNGPs 1, at 6.
[1069] UNGPs 25, at 22.
[1070] RUGGIE, *supra* note 186, at 62.

law."[1071] Enforcement could be carried out by national courts or administrative bodies of the state, and procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.[1072] To authorize access to remedy from businesses, the SRSG recommends legislative means through amendment of the states' company law, including director's duties[1073], working towards extraterritorial regulation of companies' and their subsidiaries' activities that could impact the protection of human rights negatively[1074], and extending criminal law to include corporate activity.[1075]

The SRSG clarifies that remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through for example, injunctions or guarantees of non-repetition. The principle points out the types of grievance mechanisms through which remedy may be sought: state-based or non-state-based, judicial or non judicial. State-based judicial and non-judicial grievance mechanisms are recommended to form the foundation of a wider system of remedy.[1076]

Principle XXVI

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.[1077]

This Principle addresses state-based judicial mechanisms. It is recommended that States provide for effective judicial mechanisms for remedy and reduce legal and practical barriers to judicial process by ensuring impartiality, integrity and ability to accord due process.[1078] Legal barriers include difficulty in allocating liability among members of a corporate group and practical barriers may include serious financial costs for bringing claims and procedural

[1071] Human Rights Committee on the International Covenant on Civil and Political Rights, International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, HRI/GEN/1/Rev. 9 (Vol. I), Comment 31, paragraph 15, (27 May 2008).
[1072] UNGPs 25, Commentary, at 22.
[1073] RUGGIE, *supra* note 186, at 191.
[1074] *Id.*, at 103 and 141.
[1075] *Id.*, at 190.
[1076] UNGPs 25, Commentary, at 22.
[1077] UNGPs 26, at 23.
[1078] UNGPs 26, Commentary, at 23.

problems such as who has the standing to sue.[1079] The SRSG points out that it is not possible to provide uniform answers to addressing barriers, because of the diversity of national legal systems, for example if class action provisions were to be adopted in all national legal systems, it might have implications in other areas of the law apart from human rights. Another serious legal barrier highlighted by the SRSG is where claimants face a denial of justice in a host state and cannot access home state courts regardless of the merits of the claim. This is because of objections to extraterritorial jurisdiction from a broad spectrum of governments. The SRSG offered suggestions to the Human Rights Council for the follow-up process to his mandate and proposed that governments consider establishing an intergovernmental process to draft a new international legal instrument that clarifies the applicability to businesses of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes. [1080] Also, the instrument should resolve which country may take jurisdiction and under what conditions.[1081] The SRSG also suggests a remedial process that gives particular attention to the rights and specific needs of individuals from groups or populations at heightened risk of vulnerability or marginalization such as indigenous peoples and migrants. This is because these individuals often face additional cultural, social, physical and financial impediments to accessing, using and benefitting from state-based judicial mechanisms.[1082]

Principle XXVII

States should provide effective and appropriate non-judicial grievance mechanisms alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.[1083]

This principle provides recommendations on state-based non-judicial grievance mechanisms to play a complimentary role in order to relieve the pressure on judicial systems. This would be useful in cases where judicial remedy is not required or favoured by the claimant. The SRSG recommends that non-judicial mechanisms handle complaints using a mediation-based or adjudicative approach or they could follow other culturally-appropriate and rights-compatible processes for the remedy of business-related human rights abuses. In addition

[1079] RUGGIE, *supra* note 186, at 103.
[1080] *Id.*, at 117.
[1081] *Id.*, at 118.
[1082] UNGPs 26, Commentary, at 24.
[1083] UNGPs 27, at 24.

they could offer guidance and support to companies as well as stakeholders on dealing with human rights issues and stakeholders. [1084]

States are recommended to set up new non-judicial mechanisms or expand the mandates of existing non-judicial mechanisms, in particular the mandates of national human rights institutions. These administrative bodies are already established on all continents, constitutionally or by statute, to monitor and provide advise on the human rights situation in their respective countries. The SRSG points out that around 70 national human rights institutions on a global scale are fully recognized for meeting the UN standards on independence from governmental institutions. States could expand their national human rights institutions' mandates to address business-related human rights complaints instead of only authorizing them to do so when a business performs on behalf of the state or affects certain rights. [1085] The National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises are also suggested as a venue for handling cases to provide effective remedy. Around the same time as the UNGPs were endorsed by the UN Human Rights Council, the OECD incorporated a new human rights chapter in its Guidelines for Multinational Enterprises mirroring the UNGPs. Before the Guidelines were updated, NCP's used to rule out contractual relationships including ones between a brand and its supply-chain partners, as well as lending institutions. Another deficit in the guidelines was that findings against companies lack official consequences. [1086] The SRSG and his team worked closely with those leading the OECD revision process to expand the scope of the Guidelines. In effect, the Guidelines now cover the majority of multinational enterprises and extend the due diligence requirements to their business relationships, including supply chains. The SRSG therefore considers the OECD's NCP system to have the potential of providing effective remedy for human rights complaints regarding any and all internationally recognized rights, including workplace standards, against multinational enterprises operating in or from the 46 countries that adhere to the Guidelines, including several from emerging market countries. [1087]

[1084] UNGPs 27, Commentary, at 24.
[1085] RUGGIE, *supra* note 186, at 103.
[1086] RUGGIE, *supra* note 186, at 104.
[1087] John Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges* 6 (Mossavar-Rahmanai Center for Business and Government, Harvard Kennedy School, Corporate Social Responsibility Initiative Working Paper 2015).

The SRSG emphasizes that states must deal with imbalances between the parties to business-related human rights claims are dealt with, especially taking into account groups or populations at heightened risk of vulnerability or marginalization.[1088]

Moreover, the Principle refers to the recommendations in Principle 31, which sets up a set of effectiveness criteria for non-judicial-grievance-mechanisms both state-based and non-state-based.[1089]

Principle XXXI

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use

they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are

intended, and providing adequate assistance for those who may face particular

barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative

timeframe for each stage, and clarity on the types of process and outcome available

and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable

access to sources of information, advice and expertise necessary to engage in a

grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress,

and providing sufficient information about the mechanism's performance to build

confidence in its effectiveness and meet any public interest at stake;

[1088] UNGPs 27, Commentary, *supra* note 1, at 24.
[1089] RUGGIE, *supra* note 186, at 118.

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.[1090]

Principle 31 is a set of benchmarks for framing non-judicial grievance mechanisms to ensure their effectiveness in practise. The first seven criteria provide recommendations for both state- and non-state-based mechanisms. In order to meet the criteria, states should take on accountability for ensuring that parties to a grievance process cannot interfere with its fair conduct; ensure access to the mechanism by raising awareness that it exists and address barriers such as language differences, illiteracy, costs, physical location and fears of reprisal; provide transparency about the procedure of the mechanism including timeframes; ensure a fair process by redressing imbalances between business enterprises and aggrieved stakeholders considering that the latter are often in an inferior position in terms of access to information, specialist advise and financial resources; ensure regular communication to parties of individual cases and earn broader trust by guaranteeing confidentially and demonstrating the legitimacy of the mechanism through statistics, case studies or more detailed information about case processing; ensure rights-compatibility so that outcomes and remedies are in line with internationally recognized human rights; analyse regularly the circumstances around cases including causes and patterns to identify lessons to prevent future harm.[1091] The eighth criterion regards operation-level mechanisms that business enterprises

[1090] UNGPs 31, at 27.
[1091] UNGPs 31, Commentary, at 27. RUGGIE, *supra* note 186, at 118.

help administer and should aim to reach solutions through dialogue or adjudication provided by an impartial third-party mechanism.[1092]

The UN Guiding Principles from a TWAIL Perspective

After having clarified what is expected of states and companies under selected UNGPs, it will be explained how the selected principles correspond with the interests of TWAIL. Overall, the UNGPs aim to address the regulatory gaps in regards to transnational business activity particularly in Third World states. A consistent feature of the business and human rights debate has been the insistence by states and corporations on soft or voluntary forms of regulation and this approach has characterized the work of the SRSG. The mandate of the SRSG was limited "to elaborate the implications of existing standards and practice into practical guidance rather than seeking to create new international legal obligations for companies or to seek to assign legal liability" [1093] – an approach that was well received by members of the Human Rights Council (HRC) and the business community.

However, the TWAIL critique of the UNGPs is that the framework was driven by the Global North and players there.[1094] NGOs[1095] and Global South members of the Human Rights Council have expressed that they would have preferred an internationally binding framework. Ecuador declared to the UN Human Rights Council that it would not stand in the way of consensus out of consideration of the five sponsoring countries while stating that the resolution swept aside several issues important for setting up a binding legal framework.[1096] Upon the SRSG's presentation of his annual report to the 14th session of the Human Rights Council on June 1 and 2, 2010, the Council held an interactive dialogue. South Africa suggested that the SRSG outline in a roadmap steps towards a legally binding business and

[1092] RUGGIE, *supra* note 186, at 104.
[1093] *Joint Statement on Business & Human Rights to the United Nations Human Rights Council*, INTERNATIONAL ORGANISATION OF EMPLOYERS, INTERNATIONAL CHAMBER OF COMMERCE & BUSINESS AND INDUSTRY ADVISORY COMMITTEE TO THE OECD (May 33, 2011) at https://business-humanrights.org/sites/default/files/media/documents/ioe-icc-biac-submission-to_the-un-hrc-may-2011.pdf.
[1094] Interview with Clinical Professor of Law Tyler Giannini, co-counsel in Alien Tort Statute suits representing victims of human rights abuse, Harvard Law School, International Human Rights Clinic, in Cambridge Mass. (May 6, 2016); STÉFANIE KHOURY & DAVID WHYTE, CORPORATE HUMAN RIGHTS VIOLATIONS – GLOBAL PROSPECTS FOR LEGAL ACTION 44 (2017).
[1095] *Comments in Response to the UN Special Representative of the Secretary-General on Transnational Corporations and Other Business Enterprises: Guiding Principles - Proposed Outline*, AMNESTY INTERNATIONAL (Nov. 4, 2010) at https://www.amnesty.org/en/documents/IOR50/001/2010/en/. *UN Human Rights Council: Weak Stance on Business Standards*, HUMAN RIGHTS WATCH, https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards (last visited Oct. 17, 2017).
[1096] Ecuadorian representative Mauricio Montalvo, Address to the UN Human Rights Council at the Palais des Nations, Geneva, Switzerland (June 16, 2011) http://www.un.org/webcast/unhrc/archive.asp?go=110616.

human rights framework. Bangladesh suggested that when drafting the guidelines, the SRSG should include elements of responsibility of the home states in holding businesses to account. The Deepwater Horizon oil spill in the Gulf of Mexico was mentioned by Indonesia who suggested that states should establish legislative safeguards to ensure that corporations take greater care of the environment and communities in which they operate.[1097]

By using soft law rather than subjecting corporations to the same human rights obligations as states, corporate entities avoid international oversight while at the same time benefitting from the international legal protection of trade- and investment treaties.[1098] A situation that TWAIL scholars have pointed out as undermining the ability of Third World states to control and regulate transnational corporate actors since colonial times.[1099] Erika George believes that the history of colonialism and imperialism are instructive for understanding the current answers to corporate abuses offered in the form of developing norms, such as the UNGPs.[1100] George points out that the "new emerging norm of business responsibility to respect human rights is parallel to the past requirements imposed by the Crown [in the colonial era] as a condition of granting the privilege of incorporation– that the corporation serves a public purpose,"[1101] although at that time "public purpose" meant supporting the colonial project with trade and exploration. Today, however, the public interests are those of stakeholders including "consumers, social investors and affected communities" gathered in transnational advocacy networks that, for want of regulatory efforts, "issue the social license to operate."[1102]

Even though the UNGPs as a starting point represent voluntarism rather than hard law and enforcement, some of them provide solutions responding to the TWAIL benchmarks. In the following, it will be explained how the principles presented above correspond with the interests of TWAIL.

[1097] *Council Discusses Report of SRSG on Business and Human Rights*, INTERNATIONAL SERVICE FOR HUMAN RIGHTS *(June 7, 2010)*. *http://www.ishr.ch/news/council-discusses-report-srsg-business-and-human-rights*.
[1098] *See supra chapter 2* text accompanying note 257.
[1099] ANGHIE, *supra* note 106, at 234. Chimni, *Third World Approaches*, *supra* note 108. BAXI, *THE FUTURE*, *supra* note 999, at 252. NAOMI KLEIN, NO LOGO 206-212 (2000).
[1100] Erika George, *The Enterprise of Empire*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE - MOVING FORWARD, LOOKING BACK 21 (Jena Martin & Karen E. Bravo eds. 2016).
[1101] *Id.*, at 49.
[1102] *Id.*, at 50.

UNGPs 2 and 7 - Transposition of Western Law to Third World States

UNGPs 2 and 7 both encourage home states to play a greater role in closing the "governance gaps" created by globalization especially in addressing the human rights abuses in conflict-affected areas.[1103] However, the SRSG recommends in UNGPs 2 commentary that the perceived and actual reasonableness of states' extraterritorial legislation and enforcement must be considered taking various factors into account including whether they are grounded in multilateral agreement.[1104] Moreover, it is emphasized in UNGP 7 in regard to gross human rights abuses in conflict-affected areas that states should consider multilateral approaches to prevent and address such acts as well as support effective collective initiatives.[1105] From a TWAIL perspective, it has already been established that the application of Western concepts of law is considered colonial for diminishing Third World economic governance capacity, serving the home state's policy goals, and excluding local communities from influence.[1106] However, from an enforcement perspective, the UNGPs 2 and 7 recommendations on extraterritorial home state regulation cannot be discounted by TWAIL insofar that they support Global South communities' access to justice. As Nwapi points out, "From the perspective of local communities, any argument that home-state litigation of transnational corporate crimes is imperialistic and that it would erode the sovereignty of third world states is state-centric."[1107] Since local Third World local communities already have very few mechanisms to protect themselves, it would be counterproductive to the TWAIL project to encourage home states to deny "justice jurisdiction" with their courts.[1108]

UNGP 9 - The International Trade- and Investment Regime's Impact on Third World States

Another concern raised by TWAIL is the liberalization requirements imposed by the trade agreements – which WTO members states were required to adopt as a complete package – and the impact on the ability of states to comply with their international human rights

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[1103] John Ruggie, *Keynote Presentation at EU Presidency Conference on the "Protect, Respect and Remedy" Framework*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, (November 10-11, 2009), at 4, https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-presentation-Stockholm-10-Nov-2009.pdf. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights: further steps toward the operationalization of the "protect, respect and remedy" framework*, UNHRC, 14th Sess, UN Doc A/HRC/14/27 (Apr. 9, 2010), at para. 48.

[1104] UNGPs 2, Commentary, at 7.

[1105] UNGPs 7, Commentary, at 11.

[1106] *See supra chapter 2* text accompanying note 389.

[1107] Chilenye Nwapi, *Adjudicating Transnational Corporate Crimes in Foreign Courts: Imperialism or Assertion of Functional Jurisdiction?*, 19 AFRICAN YEARBOOK OF INTERNATIONAL LAW 143, 152 (2014).

[1108] Chimni, *An Outline of a Marxist*, *supra* note 158, at 20.

obligations.[1109] This is the case with the WTO Agreement on Agriculture (AoA) which has prevented WTO member states from introducing farm subsidy programs over certain minimum levels and required reduction of export subsidies.[1110] For Third World states, in early stages of economic development, state intervention in the agricultural sector is critical to ensuring agricultural growth[1111], however, few of them had any subsidy programs in place before the AoA rules following the structural-reform programs of the World Bank and the IMF. At the same time, the AoA rules allowed certain industrialized states to maintain certain subsidy programs and to set high initial tariffs on many products crucial to Third World States terms of food supply, employment, economic growth and poverty reduction.[1112] MNCs have benefitted from protected subsidies that allow them to sell on the world market at below the cost of production. In turn, Third World states are unable to compete on a global scale against such commodities with their exports. Also Third World States have been unable to prevent cheaper subsidized goods from undercutting the price of locally produced agricultural products in domestic markets. In both cases, the livelihoods of farmers and farm labourers are placed at risk with long-term negative consequences for poverty and food security. [1113] In this way the AoA restricts government capacity to introduce regulation and policies with important implications for human rights while privileging the property interests of MNCs over the human rights of local peoples and communities.[1114] UNGP 9 addresses these concerns by recommending states to retain adequate policy space and regulatory ability to meet their international human rights obligations when pursuing bilateral investment treaties, free-trade agreements or contracts for investment projects. However, the Principle needs to clarify better how states could recover policy space restricted by WTO agreements in order to address the TWAIL concerns on implications of international economic law for human rights and governance properly.

[1109] Chimni, *International Institutions, supra* note 103, at 25.
[1110] Penelope Simons, *International Law's Invisible Hand, in* CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS, NEW EXPECTATIONS AND PARADIGMS 79, 102 (Lara Blecher et. al. ed., 2014).
[1111] Harmon Thomas & Jamie Morrison, *Trade Related Reforms and Food Security: A Synthesis of Case Study Findings, in* TRADE REFORMS AND FOOD SECURITY; COUNTRY CASE STUDIES AND SYNTHESIS 2, 41 (Harmon Thomas ed., 2006).
[1112] *Synthesis of Country Case Studies,* FAO OF THE UNITED NATIONS (Paper No. 3 of the FAO Symposium on Agriculture, Trade and Food Security: Issues and Options in the Forthcoming WTO Negotiations from the Perspective of Developing Countries, Geneva, September 23-24, 1999) at 19, www.fao.org/docrep/meeting/X3065E.htm.
[1113] Penelope Simons, *Binding the Hand that Feeds Them: Sovereignty, the Agreement on Agriculture, Transnational Corporations, and the Right to Adequate Food in Developing Countries*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 399 (Wenhuan Shan, Penelope Simons & Dalvinder Singh eds., 2008); FOOD & AGRICULTURE ORG. OF THE UNITED NATIONS (FAO), STATE OF FOOD AND AGRICULTURE 2005: AGRICULTURAL TRADE AND POVERTY – CAN TRADE WORK FOR THE POOR? 6 (2005).
[1114] Orford, *supra* note 148, at 183.

UNGP 10 – International Financial Institutions' (IFIs) Impact on Third World States

An essential concern of TWAIL is the history of colonization of international organisations including UNSC, GATT/WTO, IMF, and the World Bank diminishing Third World states' governance capacity.[1115] Upendra Baxi emphasizes how the lack of binding regulation and accountability is prevalent in host states of economic globalization by contrasting hard and soft states: "A soft state or "progressive" state "is one that is a good host state for global capital…that protects global capital against political instability and market failures…[and one] that represents accountability not so much directly to its people, but one that offers itself, as a good pupil, to the World Bank and International Monetary Fund." Hard states "must be market-efficient in suppressing and de-legitimizing human rights-based practices of resistance or the pursuit of alternative politics. Rule of law standards and values need to be enforced by the state on behalf, and at the behest, of formations of global economy and technology."[1116] In order to redress this power imbalance, binding legal obligations of IFIs could be necessary to support Third World host states in fulfilling their duty to protect.

Some civil society organisations called on the SRSG to consider the impact of policies and practices of the World Bank and IMF on Third World states economies.[1117] However, this recommendation is only slightly further developed in UNGP 10: "States, when acting as members of multilateral institutions that deal with business-related issues, should: (1) seek to ensure that those institutions neither restrain the ability of their members States to meet their duty to protect nor hinder business enterprises from respecting human rights (…) (2) encourage those institutions (…) to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising." The focus is on state governance capacity and the human rights obligations of member states of multilateral institutions rather than the need for changes in the policies of these institutions.[1118] Also, the institutions are encouraged to help states fulfil their duty to protect, however, from the point of view of TWAIL, such help seems unrealistic considering past experiences with the World Bank and IMF undermining human rights governance capacity of developing states. [1119] The World Bank has some grievance

[1115] Bhupinder Chimni, *International Organizations 1945 – Present*, in The Oxford Handbook of International Organizations 113, 124 (Jacob Katz Cogan et al. eds., 2016).
[1116] BAXI, *THE FUTURE*, *supra* note 999, at 249.
[1117] *Submission to the UN Secretary General's Special Representative on Business and Human Rights (SRSG)* CANADIAN NETWORK ON CORPORATE ACCOUNTABILITY, (July 21, 2008), www.halifaxinitiative.org/updir/CNCA_statement_re_Ruggie_report-July_08.pdf.
[1118] Simons, *International Law's Invisible*, *supra* note 1110, at 111.
[1119] *Id.* at 112.

mechanisms established including the World Bank's Inspection Panel and the Compliance Advisor Ombudsman but these only apply to specific projects and do not address the significant cultural and structural transformation of the financial institution. In particular, the decision-making structure of the World Bank keeps the issue of human rights marginalized within the organization. The board of executive directors, made up of member states, acts as the policy-making organ of the bank. If consensus is not attained, member-state governments have to delegate authority to bank officials. The board has been deeply divided over human rights issues and bank officials have consequently been hesitant to propose a human rights agenda.[1120] Consensus building has been difficult among bank employees from different sectors and disciplinary backgrounds, who held divergent views on how to define human rights and interpret them with respect to the Bank's operations.[1121] In addition, the World Bank's organizational culture is dominated by economists and their prospects for promotion are based on the approval of projects and the size of those projects in terms of money lent. Thus, the bank's safeguard policies (which address some human rights-related concerns) are perceived by many employees as an obstacle to lending because they add constraints to the tasks and thereby reduce efficiency and opportunities for promotion.[1122] From a TWAIL point of view, the UNGPs should have articulated greater accountability and responsibility for IFIs to protect human rights in order to reverse their role in undermining host-state governance capacity. Such responsibility would be consistent with the development of international law in regard to international organisations.[1123]

UNGPs 15 and 17 – Human Rights Due Diligence and Self-Regulation

Vis-à-vis businesses, the UNGPs point to a moral or voluntary responsibility to respect human rights. Corporations are to develop a corporate policy commitment and self-regulate through corporate-defined due diligence and remediation processes.[1124] The human rights due diligence process should include an assessment of actual and potential human rights impacts, corporate integration and action based on the findings, tracking the effectiveness of the

[1120] Galit A. Safarty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. INT'L L. 647, 655-56 (2009).
[1121] *Id.* at 662.
[1122] *Id.* at 669.
[1123] Robert McCorquodale, *Principles for an Internationally Legal Binding Instrument on TNC and other Business Enterprises with Respect to Human Rights*, UN HUMAN RIGHTS COUNCIL, WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS, PANEL II, (July 6-10, 2015), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/McCorquodaleIGWGPanel060715.pdf.
[1124] UNGPs 15.

corporate response to the impacts, and communicating on action taken to address such impacts.[1125] Compliance with such responsibilities is to be monitored and enforced by the "courts of public opinion".[1126] The normative contribution of the UNGPs in articulating the components of human rights due diligence creates a single universal standard but it is nonetheless a privatised voluntary process both in terms of regulating and enforcing, similar to the existing voluntary self-regulation regimes and multi-stakeholder initiatives.[1127] NGOs and some Third World states have expressed views that the SRSG should have gone further and included some reference to the role of binding human rights obligations within his overall strategy for addressing corporate human rights impunity.[1128] Moreover, prominent civil society organisations have expressed on behalf of communities in the Global South that they want hard law and enforcement rather than the UNGPs' soft law approach [1129] and mandatory human rights due diligence has been suggested.[1130] TWAIL scholar Makau Mutua has, however, acknowledged arguments of the Special Representative on the Human Rights of Internally Displaced Persons (IDPs) that Guiding Principles in the context of internal displacement would quickly produce a normative framework "while the elaboration of a treaty or declaration would lead to prolonged negotiations affecting or even blocking the possibility of using international human rights law" to protect IDPs in the near future.[1131] Mutua also commends the Special Representative on IDPs on the fast realization of the Principles by avoiding the lengthy negotiating processes with states at the UN.[1132] Also, Mutua believes that the endorsements of the Guiding Principles on IDPs from the UN General Assembly, The EU, states in Central and Eastern Europe, Africa, the Americas, and Asia give them a "strong *moral standing*" in spite of them being non-binding.[1133] Although

[1125] UNGP 17.
[1126] Report of the UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/8/5 (Apr. 7, 2008), at 54.
[1127] See *supra* chapter 4.
[1128] *Joint NGO Statement to the Eighth Session of the Human Rights Council on the Third Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HUMAN RIGHTS WATCH (May 19, 2008) https://www.hrw.org/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council.
[1129] *See supra* text accompanying note 185.
[1130] U.N. Human Rights Council, Rep. on the Work of Its Thirty-First session, U.N. Doc. A/31/50, (Feb. 5, 2016), ¶ 76.
[1131] Makau Mutua, *Standard Setting in Human Rights, Critique and Prognosis*, 29 HUM. RTS. Q. 547, 560-61 (2007).
[1132] *Id.*, at 561.
[1133] *Id.*, at 562.

critical to regulation by soft norms arguing that it marginalizes Third World peoples[1134], TWAIL recognises the flexibility in developing guiding principles as opposed to binding regulation. However, TWAIL also points out the considerable weaknesses of voluntary processes such as privatization of human rights due diligence as opposed to a treaty, including the general lack of clear performance targets, compliance dates, and a commitment to expend resources.[1135]

UNGPs 25 and 26– Access to Judicial Remedy

In regards to remedy, UNGP 25 provides that states must ensure, through judicial, administrative, legislative or other appropriate manners that when human rights violations occur within their territory and/or jurisdiction victims have access to effective remedy. The SRSG points out that there are situations where claimants face a denial of justice in a host state and cannot access home state courts regardless of the merits of the claim because of objections to extraterritorial adjudication.[1136] Filing claims against MNCs in their home country courts is strongly opposed by businesses while home states fear disadvantaging their corporations and host states often resist it on the principle of non-interference in their domestic affairs. Apart from obstacles of legal principles in cases of extraterritorial jurisdiction, it also involves very high financial costs for all concerned and companies may have a distinct advantage with market-based solutions such as litigation insurance for handling legal fees associated with litigation.[1137] TWAIL scholars share the same concerns and appear to not have much confidence in home state extraterritorial jurisdiction because it implicates Western courts' transposition of Western laws to violations occurring in Third World states. TWAIL is also sceptical to the functioning of legal systems in host states for human rights claims due to diminished governance capacity, including lack of independence of the judiciary and that certain protections such as that related to indigenous peoples' rights may not be recognized or regularly enforced in domestic law.[1138] However, as established above in regards to UNGPs 2 and 7, Western courts' extraterritorial application of home state laws could work from a TWAIL perspective insofar that the foreign court litigation, as formulated by Nwapi, "influences the conduct of other states in a manner that leads to the

[1134] See ISHAY, *supra* note 998; Prabhash, *supra* note 998; BAXI, *THE FUTURE*, *supra* note 999.
[1135] Mutua, *Standard Setting*, *supra* note 1131, at 603.
[1136] UNGPs 26, Commentary, at 23.
[1137] RUGGIE, *supra* note 186, at 103.
[1138] S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009).

creation of international norms that would put the interests of third world [peoples] on the front burner".[1139]

Also UNGP 26 recommends that home state regulation should work towards breaking down barriers that could lead to a denial of access to remedy for Third World peoples. This includes making sure that indigenous peoples and migrants have the same level of legal protection of their human rights that applies to the wider population. Particular attention must be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access procedures and outcome. Barriers should be reduced including bringing down the costs of filing claims, supporting claimants in securing legal representations and options for class action procedures.[1140]

UNGPs 27 and 31 – Access to Non-Judicial Remedy

As pointed out in regards to soft law vs. lengthy negotiating processes for binding measures[1141], non-judicial mechanisms are less intrusive enforcement bodies to states than judicial institutions that can take more than half a century to materialize.[1142] Also, a non-judicial mechanism is likely to operate locally which promotes access for ordinary people and politically excluded groups of the Third World. Some non-judicial bodies provide an avenue for participation, transparency and inclusion responding to the calls of TWAIL such as the World Bank Inspection Panels for private claimants that have been harmed by a World Bank-funded project.[1143] Nevertheless, the process is soft and the non-judicial body can only make recommendations which does not respond to the call from Third World communities wanting hard law and enforcement.[1144] The SRSG encourages non-judicial grievance mechanism in UNGP 27 but advises that, whether state-based, such as national human rights institutions and National Contact Points under the OECD Guidelines for Multinational Enterprises, or non-state-based, non-judicial methods do not suffice for providing a wide system of remedy. [1145] The state duty to protect requires states to provide for access to remedy preferably through multilateral consensus and the UNGPs reaffirm this obligation. The SRSG

[1139] Nwapi, *supra* note 1107, at 147.
[1140] UNGPs 26, at 23.
[1141] *See supra* text accompanying note 1131.
[1142] E.g. the International Criminal Court having been on the agenda since 1948 but not adopted until 1998.
[1143] Agostina Latino, *Up-keeping non-economic values in development assistance: does the World Bank practise what it preaches? Answers from the Inspection Panel*, in GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW 218, 219 (Giorgio Sacerdoti et. al. eds., 2014).
[1144] *See supra* text accompanying note 185.
[1145] RUGGIE, *supra* note 186, at 116.

offered suggestions for governments to consider the possibility of an intergovernmental process of drafting a new international legal instrument to establish clearly the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes and clarity over who may take jurisdiction under what conditions.[1146] This recommendation is not in the UNGPs, but in a separate note, because the SRSG concluded that it was not possible to reach a consensus and that pushing for such a recommendation would only jeopardize coming to an agreement between states on the UNGPs. From a TWAIL perspective, such a recommendation for an international instrument for access to remedy whether judicial or non-judicial is useful because it allows many ideas and voices to be heard. That is why TWAIL scholars look to international law and its "transformative potential" in proposing solutions and remedies to reconstruct a just legal order for Third World peoples.[1147]

UNGP 31 provides for local community influence by recommending correspondence with stakeholder groups for whose use the grievance mechanisms are intended. Recommendations include enabling trust from the stakeholder groups, accessibility to all stakeholder groups, predictability, and transparency. UNGP 31 (h) provides recommendations on a non-judicial grievance mechanism at a company's operational level as remedial system. A company level grievance mechanisms appears useful from a TWAIL perspective as an early preventative solution because it would help Third World communities to address grievances early before they escalate and provide remedy. The SRSG points out that serious human –rights-related confrontations between companies and individuals or communities frequently began as lesser grievances that companies ignored or dismissed, and which then escalated in particular in the extractive industry. A company level grievance mechanism also opens up for influence of Third World communities in that it must be dialogue-based or use third-party mediation to ensure that grievances are not exclusively handled by the companies.[1148] A company-level grievance mechanism cannot stand alone but would provide an early-stage recourse and possible resolution in at least some instances.

[1146] John Ruggie, *Recommendations on follow-up to the mandate*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, (Feb. 11, 2011) https://business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf ; RUGGIE, *supra* note 186, at 117.
[1147] Anghie & Chimni, *supra* note 102, at 101.
[1148] RUGGIE, *supra* note 186, at 104. *See infra* text accompanying notes 1589-90 for further discussion on a corporate obligation to establish a non-judicial mechanism.

National Action Plans for the UN Guiding Principles in the United States, England, and Denmark from a TWAIL Perspective

After having established above that the selected principles address the international legal system's structural problems from a TWAIL point of view, the issue remains that the UNGPs do not by themselves provide a response to the main TWAIL critique: the inadequacy of non-binding standards and lack of oversight mechanism contributing to corporate impunity. The NAPs implementing the UNGPs can be instrumental in transforming the recommendations into binding law. States are not obligated to account for which measures they take to live up to the obligations under the UNGPs but the UN, the EU and other international organisations have encouraged them to develop NAPs for implementation of the principles. Several UN Member States have taken on the request to develop NAPs and at this point around 20% of the Member States have finalized and published their plans.[1149] The majority of completed NAPs are from EU Member States perhaps because the EU Commission expected the development by the end of 2012, while the Council of Europe set the deadline by the end of 2013 in the EU Action Plan on Human Rights and Democracy.[1150] The EU published a new Action Plan on Human Rights and Democracy in 2015 and set a new deadline in 2017 for EU Member States to develop their NAPs or integrate the UNGPs in national CSR strategies. [1151]

The assessment will discuss how far the U.S., England, and Denmark have implemented the Principles pertaining to the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures. The assessment will determine whether the selected Principles are being implemented with sufficient commitment or whether there is a need for a harder instrument to regulate business-related human rights harm. Essentially the NAPs should address:

UNGPs 2 and 7 - Transposition of Western Law to Third World States.

UNGP 9 - The International Trade- and Investment Regime's Impact on Third World States.

[1149] See the progress on *National Action Plans*, BUSINESS AND HUMAN RIGHTS RESSOURCE CENTRE, http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans (last visited Jan. 16, 2018).

[1150] *A renewed EU Strategy 2011 – 14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011), at 14; Council of the European Union, Doc. 11417/12 *EU Action Plan on Human Rights and Democracy*, Outcome 25, Action c. (Jun. 28, 2012).

[1151] European Commission, Action Plan on Human Rights and Democracy (2015-2019) *Keeping Human Rights at the Heart of the EU Agenda* JOIN (2015) 16 final (Apr. 28, 2015), at 17.

UNGP 10 – International Financial Institutions' (IFIs) Impact on Third World States.

UNGPs 15 and 17 – Human Rights Due Diligence and Self-Regulation.

UNGPs 25 and 26 – Access to Judicial Remedy.

UNGPs 27 and 31 – Access to Non-Judicial Remedy.

U.S. National Action Plan

President Obama declared on 24 September 2014 that the U.S. Government would develop a National Action Plan (NAP) on Responsible Business Conduct consistent with the UNGPs and the OECD Guidelines for Multinational Enterprises. Since then, the U.S. Government organised a series of consultations on the NAP with stakeholders, including colleagues across the U.S. government; business associations and individual companies – both large and small; labour unions; civil society organisations; academic experts; international organisations; and affected communities. The U.S. government acknowledged that the most vulnerable individuals and communities who may be impacted by the conduct of U.S. companies abroad are also the hardest to reach. In order to engage with advocates for these populations, the U.S. government, during the Obama Administration, stated its commitment to setting up webinars, as well as videoconferences through certain embassies or consulates.[1152] The fourth and final consultation took place on 16 April 2015 in Washington, DC.[1153] On 16 December 2016, the first U.S. NAP[1154] was released at the U.S. Department of Treasury with a live webcast of the event in Washington D.C. The main points presented of the NAP were to create an online portal gathering all U.S. reports that have been published on responsible business conduct in one place; Continue the work of the National Contact Point of the OECD Guidelines; Continuing to modernise the Secretary of State award for corporate excellence; and to create a mechanism to coordinate MSIs.

[1152] *USG National Action Plan on Responsible Business Conduct*, FAQ, U.S. Department of State – Washington D.C., (Dec. 2, 2015), https://www.humanrights.gov/dyn/2015/usg-national-action-plan-on-responsible-business-conduct/

[1153] *U.S. Govt. holds final consultation for National Action Plan on Business & Human Rights – submissions & commentary*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://business-humanrights.org/en/us-govt-holds-final-consultation-for-national-action-plan-on-business-human-rights-submissions-commentary (last visited Mar. 26, 2017).

[1154] U.S. SECRETARY OF STATE, RESPONSIBLE BUSINESS CONDUCT, FIRST NATIONAL ACTION PLAN FOR THE UNITED STATES OF AMERICA [U.S. NATIONAL ACTION PLAN] (2016) https://www.state.gov/e/eb/eppd/csr/naprbc/265706.htm.

UNGPs 2 and 7

During the NAP process, the Administration developed interagency working groups on the areas of transparency and anticorruption, investment and trade, labour rights (including protections against human trafficking), procurement, human rights, land tenure and agricultural investment to take stock of the existing work and ways to improve and expand through domestic regulatory processes applicable abroad and within the U.S.[1155] The U.S. government states that it remains committed to enforcing relevant laws and regulation that have an international reach.[1156] The NAP provides an annex of existing federal laws and policies relevant to U.S. business conduct abroad, including the U.S. Foreign Corrupt Practices Act[1157] prohibiting companies from bribery of foreign officials abroad, The Trafficking Victims Protection Act[1158] to combat trafficking in persons both internationally and domestically, and The International Emergency Economic Powers Act[1159] addressing any unusual and extraordinary threat, outside the U.S. to national security, foreign policy, or the economy.[1160] The NAP also highlights executive orders including "Strengthening Protections against Trafficking in Persons in Federal Contracts" (E.O. 13627) which mandates compliance plans for federal contracts performed overseas and exceeding $500,000 in value. The regulation emphasized in the NAP may have an impact on business activities abroad in specific areas but they do not protect human rights against business related harm in a broad sense. E.g. in regards to reporting, due diligence and risk assessment, the U.S. government provides guidance but does not provide regulation except in Dodd-Frank Section 1502[1161] which requires certain companies to submit annually a description of the measures taken to conduct due diligence on the source and chain of custody of the four "conflict minerals".[1162] The NAP only states that it is supportive of company efforts to voluntarily report and conduct due diligence on human rights impacts.[1163] In 2012, the U.S. government did issue the Reporting Requirements for Responsible Investment in Burma requiring U.S. persons to

[1155] U.S. NATIONAL ACTION PLAN, at 24. *USG National Action Plan*, U.S. Department of State, *supra* note 1152.
[1156] U.S. NATIONAL ACTION PLAN, at 7.
[1157] The Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. §§78dd-1.
[1158] The Trafficking Victims Protection Act of 2000, Pub. L. 114-38, 22 U.S.C. § 7103 (2000).
[1159] The International Emergency Economic Powers Act, Pub. L. 95 – 223, 91 Stat. 1626 (1977), 50 U.S.C. §§ 1701.
[1160] U.S. NATIONAL ACTION PLAN, at 26-28.
[1161] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o)
[1162] U.S. NATIONAL ACTION PLAN, at 20.
[1163] *Id.*, at 17.

report on their policies related to responsible and transparent business practices, however the President terminated the sanctions program in 2016 and made reporting voluntary.[1164]

UNGP 9

As for the international trade- and investment rules, the Administration has developed an interagency working group on investment and trade, land tenure and agricultural investment. It is emphasized that the NAP must promote responsible investment and promote the role that governments can play in encouraging companies to engage in responsible business conduct in free trade agreements. The NAP emphasizes the Trans-Pacific Partnership (TPP) in which the U.S. is a party and its establishment of a TPP Development Committee promoting broad-based economic growth; enhanced opportunities for women in domestic and global economies; and education, science and technology, research, and innovation. It is also highlighted that U.S. FTAs since 2004 contain transparency and anti-corruption provisions, including requiring trading partners to criminalize both domestic and foreign bribery.[1165] In regards to conducting due diligence in U.S. development funding and trade finance the U.S. Government plans to enhance Overseas Investment Corporation (OPIC) standards that require companies receiving their support to implement responsible business conduct (RBC) principles.[1166] The OPIC is the U.S. Government's development finance institution, which mobilizes private capital and helps U.S. businesses gain a foothold in emerging markets both at home and abroad.[1167] The same RBC principles will be enhanced for the Export-Import Bank of the U.S. (EXIM)[1168], which is the official export credit agency of the United States. The U.S. Agency for International Development (USAID) is also planning to ensure projects properly account for social and human rights risks through accounting for due diligence in social safeguards screening questionnaires.[1169] There is not yet firm expression of plans of the U.S. government to address how some WTO agreements restrict government capacity of Third World states to introduce human rights regulation and policies.

[1164] U.S. NATIONAL ACTION PLAN, at 18.
[1165] *Id.*, at 9.
[1166] *Id.*, at 12.
[1167] THE OVERSEAS PRIVATE INVESTMENT CORPORATION (OPIC), https://www.opic.gov/ (last visited Mar. 26, 2017).
[1168] THE EXPORT-IMPORT BANK OF THE UNITED STATES (EXIM), http://www.exim.gov/about (last visited Mar. 26, 2017).
[1169] U.S. NATIONAL ACTION PLAN, at 12.

UNGP 10

The NAP underlines the commitment of the U.S. Government to play a leading role in encouraging robust safeguard and sustainability policies at the World Bank and other IFIs. E.g. the U.S. supported the World Bank's Safeguards review with new provisions in the Bank's Environmental and Social Framework approved in August 2016 including a new safeguard on labour and working conditions, and encouraged the World Bank to incorporate human rights issues in its safeguards.[1170] Also, the NAP states that the U.S. government establishes mechanisms through the World Bank's Stolen Asset Recovery Initiative[1171], which supports international efforts to end safe havens for corrupt funds.[1172] The U.S. government does not address directly the implications of the structure of the World Bank and IMF on diminished governance capacity of host states. However, the government emphasizes that risks related to business conduct are often most acute in areas where states are unable or unwilling to provide the resources necessary to ensure basic standards of security, rule of law, and governance. The U.S. government stated its plans to involve many of its agencies including the Millennium Challenge Corporation (MCC), a bilateral U.S. foreign aid agency, and OPIC, both collaborating with the World Bank or applying their policies. E.g. the MCC has signed a memorandum of Understanding (MOU) with the World Bank and Ghana's Millenium Development Authority (MiDA) to help strengthen public procurement around the world.[1173] Since the U.S. government identifies lack of governance capacity as a risk related to business conduct, the involvement of the MCC and the OPIC could potentially pave the way for recommendations or collaboration with IFIs to address the implications of their structure on creating an enabling environment for responsible business conduct. Additionally, U.S. Agency for International Development (USAID) is planning to develop a social safeguards screening questionnaire that Missions may use as an assessment tool when designing new projects to ensure that projects carry out due diligence on social and human rights risks.

UNGPs 15 and 17

As mentioned above the U.S. NAP only states that it is supportive of company efforts to voluntarily report and conduct due diligence on human rights impacts[1174] but does not

[1170] *Id.*, at 9.
[1171] *Id.*, at 23.
[1172] THE STOLEN ASSET RECOVERY INITIATIVE (STAR), http://star.worldbank.org/star/ (last visited Mar. 26, 2017).
[1173] *USG National Action Plan*, U.S. Department of State, *supra* note 1150.
[1174] U.S. NATIONAL ACTION PLAN, at 17.

provide regulation except for a reporting requirement on due diligence in "conflict minerals" supply chains.[1175] The U.S. NAP focuses largely on Multi-Stakeholder Initiatives (MSIs)[1176] and facilitating corporate social responsibility (CSR) driven by companies.[1177] The NAP points out that agencies within the U.S. government have provided start-up funding for the Fair Labor Association and facilitated the launch of the Voluntary Principles on Security and Human Rights, which guides oil, gas, and mining companies on respecting human rights. The NAP also points out the U.S. role in the boards of the International Code of Conduct Association (ICoCA) and the Extractive Industries Transparency Initiative (EITI).[1178] New examples of the U.S.' support of MSIs include government agencies' support of promoting worker voice in global supply chains and Wildlife Crime Tech Challenge to combat terrestrial and marine wildlife crime, with a focus on working against corruption and reducing consumer demand for illegal wildlife products.[1179] Ongoing commitments of the U.S. government agencies are e.g. engagement with international cocoa and chocolate industry to address the worst forms of child labour[1180] and engagement in the UN Sustainable Development Goals through the U.S. Department of Labour working with the ILO-led Alliance to eliminate forced labour, child labour and human trafficking.[1181] The U.S. Government also states that it draws on the OECD Guidelines for Multinational Enterprises and the UNGPs as guiding documents to the NAP.[1182] The U.S. NAP is on "responsible business conduct" (RBC), which involves avoiding adverse impacts and addressing them when they do occur. In this connection risk-based due diligence is highlighted as lying at the heart of avoiding and addressing adverse impacts but it is recommended as a voluntary process for companies. At the same time, it is also stated that some issues may be best addressed through legislation alongside voluntary or soft forms of regulation.[1183]

UNGPs 25 and 26

In regards to judicial remedy, it is not specified whether the government intends to reduce barriers for transnational human rights litigation. Rather, the U.S. Government will strengthen judicial systems in other countries through its foreign assistance programs. The

[1175] *Id.*, at 20.
[1176] *Id.*, at 13.
[1177] *Id.*, at 17.
[1178] *Id.*, at 13.
[1179] *Id.*, at 14.
[1180] *Id.*, at 15.
[1181] *Id.*, at 16.
[1182] *Id.*, at 5.
[1183] *Id.*, at 17.

NAP states support to build consensus internationally for a strong remedy mechanism through participation in the UN, OECD, and ILO as well as other multinational organisations.[1184]

UNGPs 27 and 31

The U.S. NAP looks mostly at non-judicial procedures, including those managed through governmental, corporate, and multi-stakeholder processes. The U.S. National Contact Point (USNCP) for the OECD guidelines is highlighted as an important grievance mechanism, which is mediation-based. The USNCP committed to publishing a 2017 outreach plan with procedures to reduce barriers for stakeholders outside the U.S. and stakeholders that want to take part in the USNCP process but do not speak and/or read English.[1185] Moreover, the U.S. Government also highlights its establishment of remedy mechanisms through the World Bank's Stolen Asset Recovery Initiative.[1186]

TWAIL Assessment

The U.S. NAP emphasises that the lack of governance capacity jeopardizes RBC and presents some initiatives that may lead to reinforcement of host state human rights governance over MNCs. In accordance with UNGP 10, the NAP encourages the World Bank to incorporate human rights issues in its safeguards. However, there is no answer as to the implications of the World Bank's organisational structure which TWAIL claims hampers the practise of human rights safeguard policies. In terms of investment policies, the intention of the U.S. Government to enhance some of the OPIC- and EXIM standards with requirements to companies for implementing RBC principles might increase due diligence processes for companies receiving support from these governmental institutions. This initiative corresponds with some of the recommendations in UNGPs 9 on investment projects and 17 on human rights due diligence. However, host states are still up against the same fundamental problem that they must follow certain neo-liberal economic and social policies facilitated by the UNSC, GATT/WTO, IMF, and World Bank.[1187] TWAIL is asking for steps to promote change in the conditionalities used by IFIs that make states of the Global South cede economic and political sovereignty to the advantage of corporate actors in the Global

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[1184] U.S. NATIONAL ACTION PLAN, at 23.

[1185] Published at *U.S. NCP 2017 Outreach*, U.S. Department of State, https://www.state.gov/e/eb/eppd/csr/events/2017/index.htm (last visited Jan. 27, 2018).

[1186] *Id.*

[1187] Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 243-90 (2000).

North.[1188] Generally, the U.S. NAP has been criticized by civil society for focusing too much on past or existing laws and policies and not taking enough new actions to combat business involvement in human rights abuses.[1189] The NAP points out existing federal extraterritorial regulation on reporting on risk assessment in the conflict minerals industry, criminal accountability for companies paying bribe abroad and holding companies to account for exploiting trafficked labour. However, there is no mention of extraterritorial regulation to facilitate transnational human rights litigation for human rights abuses. The NAP mainly supports voluntary company-driven risk assessment, due diligence, mediation, and MSIs for holding companies to account. While the NAP has been criticized for overreliance on MSIs, the NAP has also been commended for its commitment to develop key performance indicators to investigate the effect of MSIs on the ground.[1190]

In terms of democratic engagement of Third World communities, the U.S. government on the outset declared its commitment to include vulnerable and affected individuals and communities in developing the NAP and has after publication been acknowledged for its consultation of multi-stakeholders. Since the government intends to enhance multi-stakeholder processes for access to remedy, e.g. reducing language barriers in the USNCP for the OECD Guidelines, it may encourage Third World communities in the dialogue for resolving company-level grievances. It is also positive from a TWAIL perspective that the NAP encourages an international instrument for access to remedy through intergovernmental process as well as committing to strengthening judicial systems abroad through its foreign assistance programme. How these plans will be implemented in practise remains a bit vague but the U.S. government has underscored that the NAP is the first one published and that it is not an end unto itself.[1191]

[1188] Bhupinder Chimni, *International Financial Institutions and International Law: A Third World Perspective*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 31 - 63 (Daniel D. Bradlow & David Hunter eds., 2010).

[1189] Amol Mehra, International Corporate Accountability Roundtable (ICAR), *Obama's Parting Words on Responsible Business Conduct: A Challenge to the Incoming Administration*, (Dec. 16, 2016) https://www.icar.ngo/news/2016/12/16/obamas-parting-words-on-responsible-business-conduct-a-challenge-to-the-incoming-administration. ICAR is following the NAP process through its dedicated website NATIONAL ACTION PLAN http://nationalactionplan.us/ (last visited Mar. 26, 2017).

[1190] Madeline Hung, *Voluntary Measures: Overreliance on MSIs in the U.S. National Action Plan on Responsible Business Conduct*, MSINTEGRITY, (Jan. 12, 2017). http://www.msi-integrity.org/voluntary-measures-overreliance-on-msis-in-the-u-s-national-action-plan-on-responsible-business-conduct/

[1191] U.S. NATIONAL ACTION PLAN, at 2.

U.K. National Action Plan

The U.K. National Action Plan (NAP)[1192] was published as the first one in September 2013 and an updated version was published in May 2016. In developing the NAP, the U.K. government has placed an emphasis on the increasing influence that the private sector has on the country's financial and societal development.[1193] The Government also acknowledges that as a result of the increasing privatization and internationalization it is now more important than ever that the States contribute to securing businesses' compliance with and respect for human rights. In developing the NAP, the U.K. has stated that it used the structure of the UNGPs' three pillars: the State duty to protect human rights; business responsibility to respect human rights; and finally, access to remedy. The U.K. government also states that the NAP was developed in consultation with affected stakeholders.[1194]

UNGPs 2 and 7

The U.K. NAP emphasizes that the state under special circumstances must regulate businesses' extraterritorial activities, e.g. under treaty regimes, and that the U.K. can choose to regulate businesses' extraterritorial activities, as a matter of policy in certain instances to regulate the overseas conduct of British businesses.[1195] Moreover, British companies can pursuant to the U.K. Bribery Act[1196] be held responsible for corruption committed anywhere in the world. [1197] It is likely that the act will have an influence on businesses' negative influence on human rights since corruption often causes a lack of respect for human rights. On the national level, the government has developed specific laws and policies, which protect human rights and may have an impact on businesses' activities abroad. The Companies Act 2006 section 172[1198] is an example, which sets demands on companies to consider their impact on society, including human rights in their business strategies. The government has also introduced a reporting requirement in the Companies Act 2006 for companies to include information on their influence on human rights.[1199] In order to address forced labour[1200],

[1192] HM GOVERNMENT FOREIGN & COMMONWEALTH OFFICE, GOOD BUSINESS - IMPLEMENTING THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS [U.K. NATIONAL ACTION PLAN] (2013) (Updated 2016) https://www.gov.uk/government/publications/bhr-action-plan
[1193] U.K. NATIONAL ACTIONAL PLAN (2016), at 2.
[1194] *United Kingdom*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE – ACTION PLATFORMS, https://business-humanrights.org/en/united-kingdom (last visited Mar. 26, 2017).
[1195] U.K. NATIONAL ACTIONAL PLAN (2016), at 6.
[1196] U.K. Bribery Act 2010, c. 23 (Eng.)
[1197] U.K. NATIONAL ACTIONAL PLAN (2016), at 7.
[1198] Companies Act 2006, c.46, section 172 (Eng.)
[1199] Companies Act 2006, c. 4A, section 414C, (7) (iii) (Eng.)

the U.K. Modern Slavery Act 2015[1201] has been introduced with a legal requirement on companies with a global annual turnover of over £32 million to prepare a "slavery and trafficking statement." The company must disclose the steps taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or any part of its own business. If the company has taken no such steps it must state that in the report.[1202] The act also introduces tougher penalties for those who perpetrate Modern Slavery and provides help for victims, including through a statutory defense for victims of modern slavery who are forced to commit some offences as a direct consequence of their slavery.[1203] The U.K. government has appointed an Anti-Slavery Commissioner to ensure an international approach in fighting modern slavery. Through the Commissioner's work with other countries' law enforcement agencies, the government can look at intelligence flows and help uncover criminal gangs that create "twinned" towns of modern slavery in the U.K. and other nations.[1204]

Due to the increasing privatization, it has become more common that companies take on state-provided services. In connection with commercial transactions and competitive tendering of state-provided services, the government has committed itself to ensure that human rights are considered. This entails that public authorities can exclude tendering from businesses if there is information that the business has been or is involved in negative impacts on human rights.[1205] Through the British export licensing system, the state exercises controls on the export of "strategic" goods and technology, which are raw material important for weapon production and warfare and therefore requires some regulation. In regards to the request for export licenses, it is required that companies consider their impact on human rights in all their business activities. If this cannot be substantiated, licensing can be denied.[1206]

[1200] ILO Convention 29 Concerning Forced or Compulsory Labour, June 26, 1930, 39 U.N.T.S. 291; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, art. 4.
[1201] U.K. Modern Slavery Act 2015, c.30 (Eng.)
[1202] U.K. Modern Slavery Act 2015, c.30, section 54 (Eng.)
[1203] U.K. NATIONAL ACTIONAL PLAN (2016), at 11.
[1204] Anna Dannreuther, *Prime Minister Declares Britain Will Lead The Way in Eradicating Modern Slavery*, RIGHTSINFO (July 31, 2016), http://rightsinfo.org/prime-minister-declares-britain-will-lead-way-eradicating-modern-slavery/.
[1205] U.K. NATIONAL ACTIONAL PLAN (2013), at 9.
[1206] U.K. NATIONAL ACTIONAL PLAN (2016), at 8.

UNGP 9

The U.K. government recognises the need to ensure that foreign investment agreements incorporate the business responsibility to respect human rights, as well as the specific clauses that are deemed necessary to ensure that the host state's ability to regulate is not undermined.[1207] This statement refers to the violation of stabilization clauses that has led to investor-State arbitral disputes that have regularly seen States unable to argue their need to regulate to avoid harm to the human rights of their communities in face of corporate activity.[1208] In this way, the U.K. government is clearly setting out a strict policy to ensure foreign investment agreements include human rights clauses, which would be relevant if opposed to other traditional investment clauses before an arbitral tribunal.[1209]

In order to reinforce its implementation of its commitments under UNGP 9, the U.K. government will support the EU commitment to consider the possible human rights impacts of free trade agreements, including where these include investment protection provisions, and take appropriate steps including through the incorporation of human rights clauses as appropriate.[1210]

UNGP 10

The U.K. NAP does not address the implications of the structure of the World Bank or other financial institutions on diminished governance capacity of host states.

UNGPs 15 and 17

In regard to promoting soft law on business' impacts on human rights, the U.K. government encourages development of guidelines on business and human rights. The U.K. has joined several initiatives on the international level that aim to improve and set higher demands on CSR, e.g. UN Global Compact and the OECD Guidelines for Multinational Enterprises.[1211] With the NAP, the U.K. government has made an effort to incorporate the principles of these initiatives in existing legislation and policies. For example, the government declares that it will review to what extent activities in state-owned, state-controlled or state-subsidized businesses have been carried out in compliance with human rights and propose

[1207] *Id*.
[1208] Lone Wandahl Mouyal, *Stabiliseringsklausuler i Investeringskontrakter*, 2 JURISTEN 56 (2013); Humberto Cantú Rivera, *The United Nations Guiding Principles on Business and Human Rights in the European Union*, *in* THE BUSINESS AND HUMAN RIGHTS LANDSCAPE - MOVING FORWARD, LOOKING BACK 520 (Jena Martin & Karen E. Bravo ed. 2016).
[1209] Rivera, *id.* at 520.
[1210] U.K. NATIONAL ACTIONAL PLAN (2016), at 11.
[1211] *Id.*, at 7 and 16.

recommendations for securing compliance with the UN Guiding Principles. In addition, the U.K. has played a leading role in the development of the International Code of Conduct for Private Security Service Providers, which sets up standards for businesses' conduct, including in the human rights area.[1212] The NAP also points out that the U.K. implements the OECD 2012 Common Approaches[1213], which recommends Export Credit Agencies to take into account adverse project-related human rights impacts. Export Credit Agencies are public agencies that provide government backed-loans guarantees and insurance to corporations from their home state that pursue business overseas or in developing markets. The U.K. Export Finance (UKEF) will consider any reports made publicly available by the U.K. National Contact Point (UKNCP) in respect of the human rights record of a company when considering a project for export credit.[1214]

In order to promote business respect for human rights, the government also states in the NAP that it will provide guidance to relevant state and non-state authorities, for example the U.K. Accreditation Service and the U.K. embassies. The guidance should ensure that these bodies become competent in providing human rights advice to companies on their social responsibility and their activities' influence on human rights. The guidance can happen through courses and development of guidelines. For example, the government will ensure that its Business and Human Rights Toolkit, a detailed guidance to state employees, is being updated so the program is in accordance with the UNGP. Pursuant to the increasing internationalization of businesses' activities, the government wants to develop an overseas service, Overseas Business Risk Service, with the purpose of informing companies about the business community in countries where it is present. [1215] The service should include information on the countries' human rights activities, the NAPs for the UNGPs and other relevant tools such as guidance and best practises. In addition, the government wants to instruct embassies to discuss issues with local authorities. For instance, regarding situations where British companies have problems with managing their responsibility because the local legislation is incompatible with international human rights.[1216]

[1212] U.K. NATIONAL ACTIONAL PLAN (2013), at 10.
[1213] OECD Council, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches")*, TAD/ECG(2012)5 (revised Apr. 6, 2016).
[1214] U.K. NATIONAL ACTIONAL PLAN (2016), at 8.
[1215] U.K. NATIONAL ACTIONAL PLAN (2013), at 14.
[1216] U.K. NATIONAL ACTIONAL PLAN (2016), at 17.

Moreover, the U.K. has worked with the U.S., Germany, France, the African Union Land Policy Initiative and the Food and Agriculture Organisation of the United Nations (FAO) to develop a land investment due diligence framework[1217] based on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) and other international standards, to guide private sector investments under the New Alliance for Food Security and Nutrition.[1218] In addition, the U.K.'s Department for International Development (DFID) is increasing its work on land, bilaterally and at the global level to drive responsible land investments by the private sector.[1219]

UNGPs 25 and 26

As for judicial remedy, the U.K. highlights employment tribunals, criminal law provisions for specific crimes and avenues to pursue civil law claims. It is not clear whether the reference to civil law claims involves transnational human rights litigation but it is emphasized that the U.K. will continue to ensure access to judicial and non-judicial remedies to victims of human rights harms linked to business activity.[1220] Rather than promoting home state grievance mechanisms, it appears that the U.K.'s actions taken to promote access to remedy have focused more on supporting projects through the Foreign and Commonwealth Office (FCO) Human Rights and Democracy Programme Fund relating to work on remedy procedures in other countries. This includes helping states to develop human rights protection mechanisms and reduce barriers to remedy within their jurisdiction and support civil society and trade union efforts to access effective remedy and promote protection of human rights defenders[1221] working actively with business and human rights issues. In addition, an independent survey of the U.K. provision of remedy has been commissioned to help the government's understanding of judicial and non-judicial remedies available to victims of human rights harms involving business enterprises.[1222]

[1217] *Analytical Framework for Responsible Land-Based Agricultural Investments,* NEW ALLIANCE (May 8, 2015) http://new-alliance.org/resource/analytical-framework-responsible-land-based-agricultural-investments.
[1218] U.K. NATIONAL ACTIONAL PLAN (2016), at 13.
[1219] *Id.*, at 13.
[1220] *Id.*, at 22.
[1221] According to the OHCHR, a "Human rights defender" is a term used to describe people who, individually or with others, act to promote or protect human rights, *Who is a defender,* UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx (last visited Mar. 27, 2017).
[1222] *Id.*, at 21.

UNGPs 27 and 31

The U.K. NAP explains that it has convened mechanisms that allow for non-judicial grievance mechanisms that would see companies and civil society collaborate on issues arising in the business and human rights context. The U.K. government has tasked U.K. Trade and Investment (UKTI) teams in the markets where they operate to advise U.K. companies on establishing or participating in grievance mechanisms for those potentially affected by their activities and to collaborate with local authorities in situations where further state action is warranted to provide an effective remedy. Also, the government has supported and encouraged companies to extend their domestic U.K. practice of providing effective grievance mechanisms to their overseas operations, adapting them where necessary according to local circumstances and consulting interested parties. This also applies to dispute arbitration/mediation mechanisms through their sector of activity or collective industry organisations. The UKNCP established under the OECD Guidelines for Multinational Enterprises[1223] is highlighted as a non-judicial state-based mechanism seeking to mediate an agreement between parties.

TWAIL Assessment

In terms of reinforcement of host state human rights governance, the U.K. government addresses specific concerns of Third World states using soft law including its work to develop a land investment due diligence framework with FAO and the development of the International Code of Conduct for Private Security Service Providers, which sets up human rights standards for businesses' conduct. Moreover, the NAP recognises the need to ensure specific clauses necessary to guarantee that the host state's ability to regulate is not undermined as recommended in UNGP 9. In terms of democratic inclusion, it is positive that the U.K. NAP was developed with affected stakeholders and encourages companies to adapt their grievance mechanisms according to local circumstances and consulting interested parties. As for providing access to remedy for Third World Communities, the U.K. NAP presents already established non-judicial grievance mechanisms, e.g. the UKNCP and UKTI teams. The U.K. government also assures that it will continue to provide access to judicial remedy to victims of corporate human rights harm. The NAP emphasizes that the U.K. reserves the rights to regulate certain conducts extraterritorially which points to possible support of transnational human rights litigation. However, there are no explicit plans in this

[1223] OECD GUIDELINES, *supra* note 3.

regard and the legislative steps already taken mostly amount to reporting requirements, except for extraterritorial regulation of corruption. Rather than promoting extraterritorial jurisdiction to provide for home state litigation, the U.K. NAP is more explicit about working on establishing remedy procedures in other countries. While some of the actions accounted for in the U.K. NAP support the values and objectives of TWAIL, stronger measures should be discussed including the implications of the structure of IFIs on host states' governance capacity, barriers to transnational human rights litigation and an intergovernmental process for business and human rights regulation in order to properly address TWAIL concerns.

Danish National Action Plan

The Danish government first published a NAP for CSR in 2008 containing the first official initiatives to promote CSR including businesses' respect for human rights.[1224] In 2012, a second action plan for CSR was published accounting for specific initiatives in accordance with the UNGPs including a reporting requirement in the Financial Statements Act §99a and the Danish Mediations and Complaints Body explained further below.[1225] The Danish Action Plan on Business and Human Rights[1226] was published in March 2014 and contains a section for each pillar of the UNGPs. The main purpose of the NAP is to provide a summary of the actions that the Danish government has already taken to implement the UNGPs. In addition to summarizing actions already taken, the NAP provides a summary of the UNGPs, the Danish CSR Council's recommendations, and the initiatives the Danish government plans to take to implement the UNGPs. The Danish government states in the NAP that it applies a rights based approach to development furthering political dialogue focusing on rights-holders and duty-bearers.[1227]

UNGP 2 and 7

In regards to home state regulation which protect human rights and may have an impact on businesses' activities abroad Denmark provides a reporting requirement in the Financial Statements Act §99a introduced in 2009 and intensified in 2013 and 2015.[1228] The

[1224] REGERINGEN, HANDLINGSPLAN FOR VIRKSOMHEDERS SAMFUNDSANSVAR (2008).
[1225] REGERINGEN, ANSVARLIG VÆKST – HANDLINGSPLAAN FOR ANSVARLIG VÆKST 2012-2015 (2012).
[1226] DANISH NATIONAL ACTION PLAN – IMPLEMENTATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS [DANISH NATIONAL ACTION PLAN] (2014) http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf (last visited Mar. 26, 2016.)
[1227] *Id.*, at 12.
[1228] ÅRSREGNSKABSLOVEN [Financial Statements Act], §99a, (revised with Act. no. 1580, 2015) (Den.), *available at* https://www.retsinformation.dk/forms/r0710.aspx?id=175792#id5db65fcc-7eef-4538-9c24-1c6ab48869a2. (last visited Mar. 26, 2016).

amendments implement EU's Accounting Directive 2014/95/EU[1229] setting specific demands for reporting on non-financial information in the report of the board of directors and the management for the largest companies in terms of turnover and employees. If the company has CSR policies, the CSR report must explicitly contain information about these policies as a minimum in the area of environment, social affairs, employee conditions, respect for human rights, anti-corruption and bribe.[1230] In the event that the company does not have a CSR-policy, the reason for this must also be stated in the report accounting for each of the mentioned CSR areas.[1231] The NAP also points out an initiative by the Danish trade organisation of auditing, accounting, tax and corporate finance, "FSR – Danish Auditors", which grants an award to the company that produces the best non-financial report.[1232]

Moreover, the Danish penal code allows for regulating and enforcing companies' accountability for activities extraterritorially. The question of whether a Danish penal provision has extraterritorial applicability is not generally regulated by law. Instead, the question depends on an interpretation in each case of the specific penal provision. Also, it is necessary to take into account any conflicts between the Danish penal code and the penal code of the country where the violation has happened. Generally, the penal provisions in the Criminal Code have extraterritorial applicability. Conversely, other penal provisions generally only apply to acts committed within the Danish territory.

The Danish government supports a possibility for extraterritorial enforcement of companies' violation of human rights but prefers to address the issue on the international level. The government has recommended that the Council of Europe should take the lead on the issue of extraterritoriality, because it covers virtually the entire European continent and focuses on the protection of human rights. Furthermore the Council of Europe is already working on these issues through its Steering Committee for Human Rights.[1233] In spite of preferring international regulation, the Danish government has formed an inter-ministerial working group on the national level to conduct a survey of the need to adopt legislation with extraterritorial effect. The group will look at what other countries have done and are doing in this area with the purpose of learning what works and what does not work. Finally, the group

[1229] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[1230] ÅRSREGNSKABSLOVEN, *supra* note 232, section 2, 2.
[1231] *Id*. section 3.
[1232] DANISH NATIONAL ACTION PLAN, at 18.
[1233] *Id*., at 15.

will examine the need for judicial prosecution of severe human rights impacts as recommended by the Danish Council for CSR. [1234]

Another central goal of the Danish NAP is to promote CSR in the public sector with mandatory requirements. The NAP states that the authorities hold an important role in ensuring that underpaid foreign labour does not occur in public projects. Therefore, the government wants to ensure fair and reasonable pay and working conditions in accordance with ILO Convention 94 by increasing the use and better enforcement of labour clauses in public contracts. It is planned that governmental contracting authorities (including companies that are fully owned by governmental authorities and not in competition) must use labour clauses in all public tender calls for construction projects. However, it appears that this requirement will not have extraterritorial effect because the requirement is mentioned in the context that the Danish labour market model prescribes that work performed in Denmark must be performed on Danish pay and working conditions.[1235]

Companies involved in DANIDA Business Partnerships – a governmental instrument that facilitates and provides economic support to develop commercial partnerships between Danish companies and partners from developing countries - are now required to integrate CSR strategically in their business operations and to demonstrate due diligence, including human rights, in order to mitigate adverse impact. The DANIDA Business Finance instrument engages both local buyers and Danish companies in the promotion of human rights and CSR activities through due diligence analysis and requirements to comply with fundamental principles of ILO when providing interest-free loans to public infrastructure projects in developing countries.[1236]

UNGP 9

The Danish NAP points out in regard to investment treaties negotiations that the EU, on behalf of Denmark, adhere to principles and standards on responsible business conduct such as the OECD Guidelines. The adherence is also reflected in negotiations for free trade agreements that includes the area of investment. The guidelines are considered the reference document on CSR, including human rights, intended to balance the rights and obligations between investors and host states. In relation to maintaining adequate policy space, the NAP underlines than when negotiating investment- and free trade agreements it is common

[1234] *Id*., at 16.
[1235] *Id*., at 16.
[1236] *Id*., at 12.

practice to refer in the mandate to the right of the parties to adopt and enforce measures necessary to pursue legitimate public policy objectives such as social, environmental, human rights, security, public health and stability of the financial systems in a non-discriminatory manner. Moreover, the Danish government actively supports substantial Trade and Development chapters in the EU's bilateral free trade agreements as well as human rights suspension clauses in the same agreements. The free trade agreement between the EU and Peru/Colombia from 2013 is an important case in point, being substantially more ambitious in this area than earlier agreements. [1237]

UNGP 10

Denmark has been instrumental in establishing the World Bank's Nordic Trust Fund with the purpose of advancing human rights in the bank's policies and projects. Denmark has also been active in advancing human rights through the International Finance Corporation, a member of the World Bank Group, where customers are supported in handling risks and impacts in the business and human rights field.[1238]

UNGPs 15 and 17

Denmark has joined several initiatives on the international level that aim to improve and set higher demands on CSR, e.g. UN Global Compact and the OECD Guidelines.[1239] In 2004, the Ministry of Business and Growth Denmark developed in collaboration with the Confederation of Danish Industry the CSR Compass which is an online tool to help business to exercise due diligence in regard to supply chain management. The CSR Compass has subsequently been updated in accordance with the UNGPs. In addition to the CSR Compass, the government has developed The Global Compact Self Assessment Tool with the purpose of supporting companies in identifying their performance in all ten principles of the UN Global Compact.[1240] In August 2013, the Danish Institute for Human Rights (DIHR) and the American NGO International Corporate Accountability Roundtable (ICAR) launched a joint project to develop guidance on NAPs in the form of a "toolkit" for use by governments and other stakeholders.[1241] The guidance was published in June 2014, in a report entitled National

[1237] *Id*., at 31.
[1238] *Id*., at 32.
[1239] *Id*., at 12.
[1240] *Id*., at 13.
[1241] *Launch of the National Action Plans (NAPs) Project*, INT. CORPORATE ACCOUNTABILITY ROUNDTABLE (Aug. 26, 2013) https://www.icar.ngo/news/2013/8/26/launch-of-the-national-action-plans-naps-project; *National Action Plans on Business and Human Rights*, DANISH INST. FOR HUMAN RIGHTS, *http://www.humanrights.dk/projects/national-action-plans-business-human-rights* (last visited Mar. 26, 2017).

Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks.[1242] The Toolkit can be used to inform the development of a robust national baseline assessment (NBA), to allow for the evaluation of the state's current implementation of the UNGPs and relevant business and human rights frameworks on a transparent and consistent basis. Also the Toolkit informs development of a corresponding NAP on business and human rights, regardless of the specific form a state selects for a general human rights NAP or whether it has one at all.[1243] In addition, DIHR has developed a free guide for businesses to assess their impact on human rights worldwide.[1244]

The Danish Trade Council provides support and guidelines to Danish companies and their local business partners on how to manage their social responsibility abroad.[1245] Also, the Danish embassies train their staff on the UNGPs and carry out evaluations of local business partners and their activities. The purpose is to ensure that businesses have the necessary information to prevent entering collaboration with local business partners that have a negative impact on human rights.[1246]

In regard to business' activities in conflict-affected areas, the Danish Export Credit Agency (EKF) is developing a model that provides an overview of the business risks that could potentially be related to human rights, labour rights, environment and climate in the countries where EKF is investing. In addition, EKF is screening the companies it invests in to make sure that there has not been any cases involving human rights issues.[1247] Also, together with other OECD members, Denmark has worked and will continue to work to ensure that project-related social and human rights impacts are included in the OECD Common Approaches,

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[1242] DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS TO BUSINESS AND HUMAN RIGHTS FRAMEWORKS (2014) http://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/DIHR%20-%20ICAR%20National%20Action%20Plans%20%28NAPs%29%20Report.pdf.

[1243] *Id.* at 31.

[1244] THE DANISH INSTITUTE FOR HUMAN RIGHTS, ERHVERV OG MENNESKERETTIGHEDER I EN DANSK KONTEKST (2016) http://menneskeret.dk/files/media/dokumenter/international_rapportering/int_rapport/erhverv_og_menneskerettigheder_i_en_dansk_kontekst_-_konsultationsrapport.pdf.

[1245] DANISH NATIONAL ACTIONAL PLAN, at 11 and 28.

[1246] *Id*., at 27.

[1247] *Id*., at 28 and 30.

including that relevant elements from the UNGPs become part of the way export credit agencies undertake their due diligence.[1248]

UNGPs 25 and 26

Danish considerations on access to remedy includes that the issue of judicial remedy is best handled at an international level. The Danish Council for CSR therefore recommends the Danish government to find a solution to gross human rights violations covered by the revised OECD Guidelines at an international level (under the EU umbrella) for example via a UN agency. In addition to the international work, the Council recommends the government to adopt relevant national legislation with extraterritorial effect for particularly gross violations. To this end, the need to prosecute gross human rights violations and maintain an overwhelming sense of justice must be balanced with the possibilities of examining violations in practice. In addition to criminal law consequences, the Council recommends the inclusion of civil law measures against companies committing gross human rights abuse abroad.[1249]

UNGPs 27 and 31

In terms of non-judicial remedy, Denmark contributes with The Mediation and Complaints-Handling Institution for Responsible Business Conduct[1250], which opened in 2012 to enforce the OECD Guidelines with a mandate to oversee and receive complaints over corporate impacts on human rights in supply and distribution chains. The OECD Guidelines have been updated to implement the UNGPs.[1251] The institution works as an OECD National Contact Point (NCP) and Denmark is the only country that has established the institution by statute. The Danish Institution stands out from other NCPs after it was reformed by law [1252] modifying its structure from a tripartite body to a mix of tripartite structure and independent expert body without ministerial representation. The institution follows the preventative and multi-stakeholder approach used in the UNGPs. The institution attempts in the first place to mediate to resolve complaints both on company level and if that is not possible, assisted by

[1248] *Id*., at 25.
[1249] *Id*., at 20.
[1250] THE MEDIATION AND COMPLAINTS-HANDLING INSTITUTION FOR RESPONSIBLE BUSINESS CONDUCT, http://businessconduct.dk/ (last visited Mar. 26, 2017).
[1251] John Ruggie, *Holding Business to Account*, OECD, http://www.oecd.org/forum/oecdyearbook/holding-business-to-account.htm, (last visited Mar. 26, 2017).
[1252] LOV OM MÆGLINGS- OG KLAGEINSTITUTIONEN FOR ANSVARLIG VIRKSOMHEDSADFÆRD [The Act on the Mediation and Complaints-Handling Institution for Responsible Business Conduct], (Jun. 18, 2012) (Den.), *available at* https://www.retsinformation.dk/forms/r0710.aspx?id=142515 (last visited Jan. 31, 2018).

The Mediation and Complaints-Handling Institution. In the second place, where mediation is not possible, the institution can initiate an investigation of the matter and based on the result, make a public statement.[1253] The Danish government has worked on strengthening the knowledge on the institution, e.g. by offering courses and guidance to small and medium sized enterprises. The Government also emphasizes its CSR Compass[1254] updated in accordance with the UNGPs to provide guidance on ways to solve conflicts by actively engaging in a dialogue with the company's stakeholders.[1255]

TWAIL Assessment

Denmark supports reinforcement of host state governance capacity through its active contribution to advancing human rights in the World Bank's policies and projects as well as supporting human rights suspension clauses in EU's bilateral free trade agreements. The NAP's measures on access to remedy are expedient from a TWAIL perspective, considering the Danish government's expression of support of transnational human rights litigation in its recommendation for a civil law remedy in addition to pursuing an international solution to prosecute gross human rights violations. No specific extraterritorial measures have been taken except for reporting requirements on MNCs' overseas operations. However, an inter-ministerial working group has been formed to make a survey of the need to adopt legislation with extraterritorial effect. The government emphasizes that specific measures both in terms of legislation and judicial remedy should be developed on the international level, which is aligned with TWAIL's interest in international law and its "transformative potential" in proposing solutions and remedies to reconstruct a just legal order for Third World peoples. In regard to non-judicial remedy, the multi-stakeholder approach of The Mediation and Complaints-Handling Institution offers inclusion of affected communities since they can file a complaint and participate directly in the mediation process. However, if mediation does not work out the only resort is a public statement on the case outcome. Also, in regard to democratic inclusion, the Danish government applies a rights based approach to development furthering political dialogue focusing on rights-holders and duty-bearers. The Danish-developed CSR Compass also provides guidance on ways to solve conflicts by actively engaging in a dialogue with the company's stakeholders.[1256] From a TWAIL perspective, there is a lack of specific legal requirements such as regulation of home state companies to

[1253] DANISH NATIONAL ACTIONAL PLAN, at 21.
[1254] *See supra* text accompanying note 1240.
[1255] DANISH NATIONAL ACTIONAL PLAN, at 14.
[1256] *Id.*, at 14.

conduct a human rights due diligence process when operating in Third World states. The Danish government has invested in several soft law initiatives, both aimed in general for businesses to assess their impact on human rights worldwide and addressing specific concerns of Third World states including undertaking of due diligence by export credit agencies when supporting business' activities in conflict-affected areas. Most of the initiatives presented in the Danish NAP are useful from a TWAIL perspective but many of them are soft law instruments and further steps need to be taken to move the progressive recommendations on hard law into realization. Overall, Denmark has an advantage for the implementation of the UNGPs through previous experience with developing action plans on CSR.

Comparative Review of the National Action Plans

In terms of host state governance capacity, the U.K. and Denmark strongly support human rights clauses in trade- and investment agreements while there is not yet a firm expression of plans from the U.S. in this area. Also, both Denmark and the U.S. stand out in addressing the effect of IFIs on human rights governance especially by establishing and funding human rights policies in World Bank operations. However, none of the NAPs address directly the TWAIL concern about the implications of the structure of the World Bank and IMF on diminished governance capacity of host states. In terms of democratic inclusion, the U.S. and the U.K. are explicit about their commitment to include and consult affected communities in developing their NAPs. Denmark is less explicit about consulting affected communities during the NAP process but also expresses an approach focusing on political dialogue with rights-holders including establishment of the CSR Compass. As for access to non-judicial remedy, the U.S., U.K. and Denmark have established NCPs where local communities can bring their complaints, however, the Danish one stands out by being statute-based and providing a new Mediation and Complaints-Handling Institution incorporating an independent expert body replacing the old NCP. Denmark is also progressive about adoption of judicial remedy, both extraterritorial- and international level enforcement. The U.S. also encourages an international instrument but both the U.S. and the U.K. express preference to strengthening judicial systems abroad rather than providing home state jurisdiction, although the U.K. supports extraterritorial legislation in certain instances.

Subconclusion

So far, the Danish National Action Plan's initiatives seem best aligned with TWAIL but none of the NAPs appear to "harden" the UNGPs sufficiently to hold states and MNCs accountable for the human rights concerns of Third World peoples. However, as the SRSG concluded at the end of his mandate, the UNGPs are evidence that multilateralism works[1257] and it is possible to form and negotiate a framework with effective participation of victims and affected communities. Therefore the following comparative analysis will determine the added value of a complementary binding agreement to the UNGPs from a TWAIL perspective and whether the U.S., the U.K. and Denmark are likely to support and implement such an approach.

[1257] Presentation of Report to United Nations Human Rights Council by the Special Representative of the Secretary-General for Business and Human Rights, Geneva, UN Commission on Human Rights (May 30, 2011) at 1, http://www.ohchr.org/Documents/Issues/TransCorporations/HRC%202011_Remarks_Final_JR.pdf.

Chapter 6 – The UN Proposal for an International Business and Human Rights Treaty

Introduction

This chapter aims to assess the added value of the UN Business & Human Rights Treaty Proposal to the efficacy of the solutions presented in the previous chapters from the perspective of TWAIL. The chapter will also determine whether there is a potential for applying such an international agreement in the jurisdictions of the United States, England, and Denmark and discuss possible treaty adjustments from a TWAIL perspective. The chapter will assess the added value of the treaty proposal to the current solutions using the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures.[1258] Next, the chapter will determine the prospects of adoption of the treaty proposal in the U.S., England and Denmark by a comparative analysis of whether the jurisdictions will treat a potential international legal framework from a 'monist' rather than a 'dualist' approach. Finally, the chapter concludes with recommendations for possible adjustments to enhance the prospects of adopting a treaty that responds to the concerns of TWAIL.

The Resolution Proposal for a Treaty

During its 26th session in Geneva in June 2014, the UN Human Rights Council adopted two resolutions on the topic of business and human rights. Resolution 26/9[1259] adopted on 26 June 2014 led by Ecuador and South Africa, establishes an open-ended intergovernmental working group (OEIWG) with the mandate "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[1260] That resolution was adopted by 20 votes to 14 (with 13 abstentions).

[1258] *See Chapter 1 supra* text accompanying notes 148-87.
[1259] Human Rights Council Res. 26/9, U.N. Doc. A/26/22 (June 26, 2014).
[1260] *Id.*, at 2.

Resolution 26/22[1261] adopted on 27 June 2014 led by Norway, Argentina, Ghana and Russia includes a request that the OEIWG prepare a report considering, among other things, the benefits and limitations of legally binding instruments[1262] but opts to continue focusing on strengthening national measures through implementation of the UN Guiding Principles (UNGPs), giving special attention to effective judicial and non-judicial remedies, as well as renewing the mandate of the UN Working Group on Business and Human Rights for another three years. That resolution was adopted by consensus and did not require a vote.

The resolutions represent two different approaches in achieving accountability for business-related abuses with the Global South proposing a binding treaty and most of the Western world reaffirming the UNGPs' normative content and voting against resolution 26/9. The EU has subsequently stated that it would not block the adoption of Programme of Work (PoW) of the OEIWG and invited consultations on the next steps.[1263] The EU's stance on the resolution 26/9 appears to have grown more positive over time. This is in line with the SRSG John Ruggie's prediction that the EU would eventually participate in the treaty negotiations in spite of earlier indications that they would not.[1264]

Friends of the Earth Europe believes that resolutions 26/22 and 26/9 are able to operate together and may proceed in parallel, the former to implement the UNGPs through national action plans (NAPs) and the latter simultaneously pursuing a binding treaty.[1265] This was also the opinion of the OEIWG Panel I at its first session[1266], from July 6-10, 2015, established by Resolution 26/9. The second session of the OEIGW took place from 24-28 October 2016[1267] and the third session took place from 23-27 October 2017[1268] in the Palais des Nations,

[1261] Human Rights Council Res. 26/22, U.N. Doc. A/26/1 (June 23, 2014).
[1262] *Id.* at 3.
[1263] U.N. Human Rights Council, Rep. on the Work of Its Thirty-First Session, U.N. Doc. A/31/50, (Feb. 5, 2016), [OEIWG Rep. First Session], http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx (last visited Mar. 27, 2017) ¶ 19.
[1264] Ruggie, *Life in the Global*, *supra* note 50, at 4.
[1265] Carey L. Biron, *Contentious Start for UN Process Toward Business and Human Rights Treaty*, MINTPRESS NEWS (July 10, 2014), http://www.mintpressnews.com/contentious-start-u-n-process-toward-business-human-rights-treaty/193731/.
[1266] OEIWG Rep. First Session ¶ 38.
[1267] U.N. Human Rights Council, Rep. on the Work of Its Thirty-Fourth Session, U.N. Doc. A/34/47, (Jan. 4, 2017), [OEIWG Rep. Second Session], http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx (last visited Mar. 27, 2017).
[1268] U.N. Human Rights Council, Rep. on the Work of Its Thirty-Seventh Session, U.N. Doc. A/37/67, (Jan. 24, 2018) [OEIWG Rep. Third Session], http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx (last visited Feb. 1, 2018).

Geneva. The panellists in all the sessions included the High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein and the Chair-Rapporteur Ambassador and Permanent Representative of Ecuador to the United Nations in Geneva Maria Fernanda Espinosa (Guillaume Long for the third session), law professors from influential universities around the world, business and human rights specialists from OHCHR, NGOs, intergovernmental organisations, employer organisations, and law firms in the field.[1269] Moreover several UN Member States attended the meetings with more Member States participating in the third session than in the first and second sessions. The EU participated through part of the first session, and non-member states including the Holy See and the State of Palestine attended.[1270] The EU and the United Kingdom attended throughout the second session and the third session, however, the U.S. and Denmark did not attend any of the sessions.

The following section will focus only on the issues in resolution 26/9 since it has sparked challenges among states for reaching consensus on a treaty proposal. The UN Human Rights subcommittee has previously attempted to hold corporate actors accountable for human rights violations under international law by circulating the Draft Norms[1271] back in 2003. One main concern with the Draft Norms was the corporations' distrust of the language of "sphere of influence" and "complicity" which the International Organisation of Employers (IOE) and the International Chamber of Commerce (ICC) found too vague.[1272] States' scepticism revolved around the Norms turning international law on its head by directly binding corporations[1273], the extent to which the norms apportion duties and responsibilities between states and corporations[1274] and that not enough was done to consult with the States.[1275] Whereas the Draft Norms were not well received, the implementation of the UNGPs might have changed the political climate in ways so that government and corporations prefer that

[1269] See overview of sessions at http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx (last visited May 29, 2017).
[1270] OEIWG Rep. First Session, ¶ 6-10.
[1271] UN Sub-Commission on the Promotion & Protection Of Human Rights, *Norms on the Responsibility of Transnational Corporations & Other Business Enterprises with Regard to Human Rights.*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003).
[1272] IOE-ICC, JOINT VIEWS OF THE IOE AND ICC ON THE DRAFT NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS (2005).
[1273] David Kinley et al., *The Norms are Dead! Long Live the Norms!*, *in* THE NEW CORPORATE ACCOUNTABILITY 467 (Doreen Mcbarnet et al. eds. 2007).
[1274] David Kinley & Rachel Chambers, *The UN Human Rights Norms for Corporations*, 6 HUM. RTS. L. REV. 447, 467 (2006).
[1275] This was the view of Ambassador Mike Smith, the Australian Permanent Representative to the United Nations in Geneva, after he chaired (on behalf of Australia) the 60th session of the Commission on Human Rights in 2004. See *Id.* at 464.

direct obligations take the form of a new human rights treaty rather than the possibly slow and uncertain development of customary international law.

The Three Sessions of the OEIWG

The sessions highlight the myriad of suggestions and some challenges in coming to an agreement on an appropriate set of treaty obligations. Despite growing consensus throughout the sessions on the need for a binding instrument to ensure MNCs compliance with human rights, there were a number of disputes on the content, scope and form.

The first session mainly raised disagreement between delegations from the Global North and the Global South on the scope of the treaty. While the former argued that the treaty should cover all business enterprises, the latter argued that a binding treaty should focus on transnational corporations. Arguments for covering all business enterprises included ensuring liability of local companies in the host state for human rights violations while arguments against included the need to focus on MNCs that evade human rights responsibilities on jurisdictional grounds rather than local enterprises subject to domestic systems.[1276]

The second session placed stronger emphasis on the right to development and the negative impacts on this right including tax evasion by large corporations as well as free trade agreements' and investment treaties' handing over control of the host state economy from the public to the private sector.[1277] Also, stronger advocacy was raised for the protection of women and indigenous peoples and enhancing their access to remedy in a treaty[1278] as well as applying the binding instrument to international financial institutions (IFIs).[1279]

The third session mainly discussed the elements for a draft legally binding instrument prepared by the Chair-Rapporteur,[1280] especially protection of victims (sensitivity to gender dimensions, human rights defenders, indigenous peoples)[1281] the elimination of impunity (disagreement on whether the treaty should cover international organizations, and national in

[1276] OEIWG Rep. First Session, ¶¶ 13 & 14.
[1277] OEIWG Rep. Second Session, at 8.
[1278] *Id.*, at 6 & 18.
[1279] *Id.*, at 7 & 13.
[1280] Chairmanship of the OEIWG established by HRC Res. A/HRC/RES/26/9, *Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights* (Sep. 29, 2017).
[1281] OEIWG Rep. Third Session, ¶¶ 92 & 125.

addition to transnational enterprises, and suggestions on international monitoring of the treaty)[1282] and access to justice (extraterritorial and universal jurisdiction).[1283]

Throughout the sessions NGOs, some academics, and delegations from the Global South advocated for an international treaty to establish a new comprehensive "hard" law framework[1284] while delegations from the Global North and businesses urged the need to focus on implementing the "soft" standards already achieved, in the shape of the UNGPs in National Action Plans (NAPs).[1285] In the following analysis of the sessions, the added value of the treaty proposal will be discussed from a TWAIL perspective using the TWAIL benchmarks 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures.

The Added Value of the Business and Human Rights Treaty Proposal vis-a-vis Current Approaches from a TWAIL perspective

Added Value to Legal Accountability (Current Regulation)

As presented in Chapter 2, current regulation of business and human rights is a patchwork of domestic reporting requirements, human rights clauses in international investment agreements, criminal law, and international and regional human rights law holding only natural persons or states accountable for their duty to protect against negative impacts of corporations. Third World communities have expressed that they want hard law and enforcement,[1286] but host states may exempt suppliers or subsidiaries operating in their jurisdiction from certain legal and regulatory requirements or neglect to adopt such standards in the first place to attract investments and promote exports.

An international legal framework like the treaty proposal that aims to contribute by unifying standards for corporations to respect human rights and holding corporations directly accountable[1287] could strengthen the legal certainty of marginal groups in the developing world which TWAIL represents. Overall, the proposal is looking to take into account concerns and recommendations of Third World communities, e.g. most NGOs highlighted

[1282] *Id.*, ¶¶ 60, 73 & 122.
[1283] *Id.*, ¶¶ 107 & 110.
[1284] OEIWG Rep. First Session ¶ 41; OEIWG Rep. Second Session, at 5; OEIWG Rep. Third Session ¶ 20.
[1285] OEIWG Rep. First Session ¶ 39. OEIWG Rep. Second Session, at 5; OEIWG Rep. Third Session ¶ 26.
[1286] *See supra* text accompanying note 185.
[1287] OEIWG Rep. First Session ¶ 83.

that a treaty was a unique opportunity to empower host states and local communities to take charge of their own development. In particular, reference was made to the human right to development and the standards in the UN Sustainable Development Goals (SDGs).[1288] E.g., it was argued that tax evasion (mentioned in SDG 16) by large corporations erodes public investment for development and country-by-country tax reporting was suggested. The short- and long-term detrimental effects on the environment and the quality of life of local communities and populations was also discussed.[1289] Calls were made for the binding instruments to include protection of indigenous peoples from abuse by mining and other extractive industries.[1290] It was highlighted that evictions, the depletion of fish stocks and forests, harm to health and the destruction of food, crops, animals and seeds had an impact on the right to self-determination and ability to achieve an adequate standard of living of indigenous peoples. In this connection it was argued that the protection of indigenous territories should be taken into account in relation to their right to subsistence[1291] and FPIC of indigenous peoples.[1292]

The OEIWG has taken a very ambitious approach and recommended that all human rights should be included in a binding treaty[1293] and thereby provide a set of international standards for all MNCs to level the international playing field of their operations.[1294] In addition to including the principle of direct responsibility of MNCs, it was argued that the treaty must set out obligations of states with respect to corporations' conduct.[1295] E.g. the ILO conventions currently only bind states and it was suggested that the treaty should bind corporations to protect workers' rights and clearly outline the duty to ensure a safe and healthy working environment as well as strengthening the work of the ILO.[1296] Building on the work of the ILO Protocol of 2014 to the Forced Labour Convention, 1930 (No.29) was suggested as an inspiration to require governments to support companies in their due diligence.[1297] In this

[1288] OEIWG Rep. Second Session, at 5 & 7.
[1289] OEIWG Rep. First Session, ¶ 35.
[1290] OEIWG Rep. Second Session, at 20.
[1291] OEIWG Rep. First Session, ¶ 32.
[1292] OEIWG Rep. First Session, ¶ 77; OEIWG Rep. Second Session, at 20.
[1293] Chairmanship of the OEIWG, *supra* note 1278, at 2.
[1294] OEIWG Rep. First Session, ¶ 46.
[1295] Robert McCorquodale, Professor of International Law and Human Rights, University of Nottingham, Panel Speech at the OEIWG (July 6, 2015) at http://webtv.un.org/search/2nd-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4340279605001?term=transnational%20corporations&languages=0&languages=0&sort=date&languages=0&page=3#full-text at 1:24:58. OEIWG Rep. First Session, ¶ 47.
[1296] OEIWG Rep. First Session, ¶ 35; OEIWG Rep. Second Session, at 7.
[1297] OEIWG Rep. First Session, ¶ 82;

way, the proposal addresses TWAIL scholars' concerns by bringing transnational corporate actors in from the margins and addressing the legal gaps with a hard law approach.

Additionally, the treaty proposal addresses international law's long-standing structural bias allowing for an imbalance between companies and host states in international trade-and investment agreements at the cost of Third World Communities. Initiatives include referring to the primacy of human rights over international investment instruments and requiring the interpretation of human rights to direct the terms under which the investment instruments are adopted, [1298] including a section requiring States to include human rights, labour and environmental standards in bilateral investment treaties,[1299] and requiring companies to pay legal fees in investment disputes on equal footing with states. Such treaty regulation could counter the imbalance of protections offered to investors, often allowing them to avoid sanctions, and empower host states to adopt human rights and environmental regulation without anticipating claims for large compensations in investor-to-state arbitration tribunals.[1300]

The proposal also provides elements to strengthen democratic inclusion of local communities by highlighting the protection of human rights defenders and the creation of a safe and enabling environment for the work of NGOs that protects the interests of Third World communities.[1301] NGOs stressed the need for effective participation of victims and affected communities to participate in the OEIWG and that feedback was needed at each stage of the drafting process. [1302] The international response also suggests an obligatory due diligence processes involving meaningful consultations with those likely to be affected by corporate activities, including obtaining the free, prior and informed consent (FPIC) of indigenous peoples. [1303] Additionally, it was argued that variations between the economic and development conditions of States, their histories and cultural characteristics must be taken into account.[1304]

Also, as presented in Chapter 2, there is a need to address the obstacles plaintiffs face for access to remedy through the corporate veil. The OEIWG suggested that a treaty could contribute by setting out standards for operationalizing principles of piercing the corporate

[1298] OEIWG Rep. First Session, ¶ 52; OEIWG Rep. Second Session, at 8.
[1299] OEIWG Rep. First Session, ¶ 97; OEIWG Rep. Second Session, at 9.
[1300] OEIWG Rep. First Session, ¶ 91 & 93; OEIWG Rep. Second Session, at 8.
[1301] OEIWG Rep. First Session, ¶ 54; OEIWG Rep. Second Session, at 20.
[1302] OEIWG Rep. First Session, ¶ 28 & 36; OEIWG Rep. Second Session, at 17.
[1303] OEIWG Rep. First Session, ¶ 86; OEIWG Rep. Second Session, at 20.
[1304] OEIWG Rep. First Session, ¶ 103.

veil so a parent company is not allowed to escape responsibility.[1305] E.g. it was recommended to reverse the burden of proof and improve victims access to disclosure.[1306] Also it was suggested to specify the types of conduct for which a parent company could be held liable for acts of subsidiaries and supply chain partners.[1307] Civil codes to attribute liability under a tort-based approach where a legal duty of care is owed by a company were suggested.[1308]

Added Value to Judicial Accountability (Transnational Human Rights Litigation)

As presented in Chapter 3, variations between national jurisdictions may exacerbate inequalities and create legal uncertainty for companies and affected persons. Third World victims of severe human rights abuses face considerable legal, financial, practical and procedural barriers to accessing judicial remedies. In the U.S., there is a problem with exercising jurisdiction beyond nationality jurisdiction after *Kiobel*.[1309] In Europe domestic courts have exercised jurisdiction beyond its own nationals only in rare instances when the foreigner was a co-defendant to a European company.[1310] Also, the EU Commission stated its position of the U.S. possibly exercising jurisdiction over English and Dutch Shell corporations in *Kiobel* and recommended U.S. not to do so.

One objective of the treaty proposal is to target the capability of corporations with transnational activities to evade their human rights responsibilities on jurisdictional grounds.[1311] The OEIWG highlighted that obstacles of ATS litigation including questions of jurisdiction, content of human rights norm and limitation by the U.S. Supreme Court have restricted transnational human rights litigation. It was acknowledged that a robust system of litigation is necessary to bring attention to abusive corporate behaviour and provide victims with meaningful monetary compensation.[1312] E.g. it was recommended to abolish *forum non conveniens*,[1313] facilitating cross-border cooperation in investigations, mutually recognizing national judgements[1314] and to fill gaps to ensure that corporations cannot manoeuvre States' domestic jurisdiction to avoid liability. [1315] It was suggested that states should provide an

[1305] OEIWG Rep. Second Session ¶ 27.
[1306] OEIWG Rep. Third Session ¶ 94.
[1307] OEIWG Rep. First Session ¶ 93; OEIWG Rep. Second Session ¶ 82.
[1308] OEIWG Rep. First Session ¶ 72.
[1309] *See supra* text accompanying note 545.
[1310] *See supra* text accompanying note 690.
[1311] OEIWG Rep. First Session, ¶ 57.
[1312] OEIWG Rep. Second Session, at 20.
[1313] OEIWG Rep. First Session, ¶ 68; OEIWG Rep. Second Session, at 14.
[1314] OEIWG Rep. First Session, ¶71; OEIWG Rep. Second Session, at 18.
[1315] OEIWG Rep. First Session, ¶70.

appropriate forum under the private law principle of *forum necessitatis.* Against this, it was noted that a forum of necessity seemed unrealistic and very ambitious.[1316]

Coming to an agreement on the treaty proposal could eliminate the complications Third World victims face with extraterritorial jurisdiction by introducing universal civil jurisdiction.[1317] Universal civil jurisdiction is the power to determine a civil dispute having a foreign element between two or more parties, all or one of whom is not a state. By contrast, universal criminal jurisdiction represents a customary international law norm and is the power of a state to prescribe, adjudicate and enforce its criminal law in relation to a crime occurring in a territory other than its own and otherwise not affecting its nationals, property or security.[1318] The crimes subject to universal jurisdiction are so heinous that they amount to crimes against the whole of humanity, including piracy, slavery, crimes against humanity, war crimes, torture, and genocide.[1319]

Applying international laws would also confront the issue of transposition of Western Law to Third World States, which is considered colonial from a TWAIL perspective.[1320] For Third World Communities, an international response would provide more predictability for victims filing actions since member states have the chance to provide a stable and coherent legal framework to achieve legal certainty and precedence in the use of corporate legal liability standards for human rights. In this context, the OEIWG suggested standards for corporate legal liability and the conduct for which parent companies could be held liable in regard to the acts of subsidiaries, suppliers, licensees and subcontractors that violate human rights.[1321] The need for adopting uniform human rights standards for companies' transnational operations was also stressed in order to ensure effective remedies for victims, including mechanisms for proper litigation and remediation.[1322] The treaty process aims to address legal and logistical barriers for access to justice, including jurisdictional limitations, corporate veil, impediments to disclosure of documents, restrictions of prescription, legal costs and

[1316] OEIWG Rep. First Session, ¶ 74.
[1317] *Id.*, ¶ 67.
[1318] Hakeem A. Olaniyan, *Nigeria and the Emerging Concept of Universal Civil Jurisdiction*, 5 BRITISH JOURNAL OF ARTS AND SOCIAL SCIENCES, 250 (2012).
[1319] Amitis Khojasteh, *Questions & Answers on the ICC and Universal Jurisdiction*, THE AMERICAN NON-GOVERNMENTAL COALITION FOR THE INTERNATIONAL CRIMINAL COURT (Jun. 27, 2007). http://www.amicc.org/docs/ICC%20True%20Criminal%20Court%20Q&A.pdf
[1320] *See supra chapter 2* text accompanying note 389.
[1321] OEIWG Rep. First Session, ¶ 88, 93 & 96.
[1322] *Id.*,¶ 94.

limitation of class actions.[1323] The OEIWG also plans to elaborate on ways of increasing pressure on governments to become more active and improve their judicial systems by more strongly monitoring the judicial performance within the UN supervisory machinery.[1324] A world court or tribunal that could receive claims, adjudicate and enforce judgments, and operate in complementarity with national and regional instruments was also suggested.[1325]

The OEIWG emphasized democratic inclusion of victims and Third World communities in the treaty process to have a say in determining which types of conduct would be considered violations under the legally binding instrument and what kind of remedies are available to them.[1326] Other suggestions included that the treaty takes a comprehensive jurisdictional approach and promotes cooperation with regard to international legal aid in the form of establishing a fund to provide victims with adequate legal representation.[1327] In addition, numerous delegates agreed that victims must be at the centre of the discussions and that the treaty should include provisions to ensure access to justice by affected communities in home and host states.[1328]

Added Value to Multi-Stakeholder Initiatives (MSIs)

As presented in Chapter 4, MSIs or private initiatives for corporate social responsibility (CSR) have been criticised by TWAIL and also feminist legal scholars for contributing to the marginalization of the concerns of Third World peoples and especially Third World women rather than reinforcing the host state's human rights governance.[1329] This is not only the case in the context of manual factory labour but also to violations of private security personnel or police officers in the extraction industry.[1330] MSIs' voluntary nature means that there is no penalty for non-compliance. E.g. Human Rights Watch has reported that since the 2013 Rana Plaza factory collapse in Bangladesh killing more than 1.100 workers and injuring more than 2.500 workers[1331], supply chains continue to be plagued by serious human rights problems. A trade unionist told Human Rights Watch in 2016 how she was beaten and received death

[1323] *Id.*,¶105.
[1324] *Id.*, ¶ 75.
[1325] *Id.*, ¶ 105, p. 20.
[1326] *Id.* ¶ 78 & 89.
[1327] *Id.*, ¶ 102.
[1328] *Id.*, ¶ 104.
[1329] *See chapter 4 supra* text accompanying note 997.
[1330] *See chapter 1 supra* text accompanying note 125.
[1331] *See chapter 1 supra* text accompanying note 15.

threats because of her union work in Bangladesh. [1332] Bangladesh has seen some concrete improvements on fire and building safety, which MSIs such as the Accord on Fire and Building Safety in Bangladesh and the Alliance for Bangladesh Worker Safety have contributed to.[1333] However, according to Human Rights Watch, business' insufficient human rights due diligence has allowed abuses to proliferate.

The treaty proposal may complement current MSIs with its aim of building on a polycentric approach involving representatives of states, business, and civil society.[1334] As discussed in the OEIWG, making human rights due diligence mandatory on an international level would complement MSIs and strengthen human rights governance by setting a binding standard because not all companies embrace voluntary standards on business and human rights.[1335] A treaty could create a level playing field rather than leaving good corporate citizens in a competitive disadvantage because non-compliant corporations would have to face consequences whereas the MSIs are voluntary. Unlike voluntary MSIs, where corporations decide themselves on a monitoring and auditing process, the treaty proposal suggests to provide human rights-holders with an obligatory monitoring and verification process through international organizations, such as the UN, and national mechanisms. [1336] To follow the existing human rights treaty bodies that carry out in-country investigations but without direct supervision of business enterprises would not be much of an advance on the existing situation. Making business enterprises subject to the supervisory mechanisms could provide an added value.

In regard to democratic inclusion of Third World peoples, it was demonstrated in the case study that especially Third World women have complained that gender issues suffer a double marginalization being treated as "soft" issues sufficiently regulated with non-binding mechanisms such as MSIs. The treaty proposal provides an added gender perspective by suggesting to require MNCs to determine the gender effects of their activities and whether

[1332] Human Rights Watch, Make Rules on Rights Binding for Businesses, (May 30, 2016), https://www.hrw.org/news/2016/05/30/make-rules-rights-binding-businesses. See also *supra*, Chapter 4 on Human Rights Watch recommendations that the 2016 International Labour Conference initiated a process for a binding convention on due diligence.
[1333] *See chapter 1 supra* text accompanying note 20-21.
[1334] John Ruggie, *Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization* 4 (Mossavar-Rahmanai Center for Business and Government, Harvard Kennedy School, Harvard University, Regulatory Policy Program Working Paper RPP-2015-04 2015).
[1335] OEIWG Rep. Second Session, ¶ 25. OEIWG Rep. First Session, ¶ 76.
[1336] OEIWG Rep. First Session, ¶ 75.

they violate or endorse womens' rights.[1337] It was also expressed widely by feminist movements at the OEIGW second session that gendered impacts of corporate human rights abuses call for a binding treaty[1338] and to include Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in the binding instrument.[1339] Working toward a binding instrument with prospects of including legal philosophies such as decolonization, feminism and general principles of equality and fairness[1340] is preferable from a TWAIL perspective, rather than leaving the concerns of Third World Peoples and women arising from negative business impact on the unregulated periphery of international law.

As for access to remedy, the CSR approach does not have legal weight and therefore cannot be upheld by human rights-holders in front of a court. The OEIWG suggested making some private initiatives obligatory, which would benefit victims. It was suggested that companies should pay into a relief fund in the country in which they are outsourcing to ensure timely redress for victims and contribute to such a fund on the basis of a proportion of their annual turnover.[1341] However, this kind of "social clause" that make commercial exchanges conditional upon the fulfilment of some non-commercial considerations have in the past been vulnerable to criticism from developing states that oppose such considerations as disguised protectionism.[1342] For that reason Third World governments might oppose such a fund but from a Third World community perspective, which is prioritized by TWAIL, a relief fund would provide more legal certainty for redress.

Added Value to the UN Guiding Principles

In regard to host state governance, the treaty proposal strengthens the UNGPs in especially four different areas by requiring states to: Adopt law for mandatory human rights due diligence on business in their jurisdiction; include human rights provisions in bilateral investment treaties, conduct human rights evaluations and ensure investor compliance with

[1337] OEIWG Rep. Second Session, at 13.
[1338] See Ana Abelenda, *Feminist and Cross Movement Support for a Binding Treaty Against Corporate Abuse is Key*, THE ASSOCIATION FOR WOMEN'S RIGHTS IN DEVELOPMENT (AWID) (Dec. 6, 2016) https://www.awid.org/news-and-analysis/feminist-and-cross-movement-support-binding-treaty-against-corporate-abuse-key.
[1339] OEIWG Rep. Second Session, at 25.
[1340] *Id.*, at 14.
[1341] OEIWG Rep. First Session, ¶ 79.
[1342] World Trade Organization, Singapore Ministerial Declaration, Adopted on 13 December 1996, WT/MIN (96)/DEC.

human rights norms.[1343] In this way, the treaty addresses the matter of the UNGPs being soft law and many communities in the Global South lacking hard law and enforcement. The TWAIL critique of the UNGPs is that they are driven by the Global North and players there[1344] while the treaty process is led and supported by countries in the Global South.[1345]

The added value of the treaty proposal has been questioned by the EU[1346] pointing out that the treaty undermines the element in the UNGPs that cover all businesses because the treaty proposal focuses on transnational corporations[1347] which is not adequate for Third World communities. The author of the UNGPs Harvard Professor John Ruggie has also criticized the treaty proposal for letting local businesses evade liability leaving foreign companies with the responsibility. He pointed out that only focusing on transnational corporations would hold foreign companies involved in the Rana Plaza disaster in Bangladesh solely responsible for the catastrophe whereas the local company behind the garment factory would not be held accountable under the treaty.[1348] Several delegations from the Global South[1349] objected to the EU's suggestion of extending the treaty to local companies because they found it amounted to a substantive amendment of resolution 26/9 and went further than the original mandate of the working group.[1350] South Africa, Ecuador, Algeria, Uruguay, Chile, and Mexico were mainly opposed to the EU's suggestion but reserved its position and required more consultation because of the elements of change it would entail to the original proposal. The South Africa delegation pointed out that local businesses must be registered and must comply with national legislation and the purpose of the OEIWG is to regulate the activities of transnational corporations under international human rights law. It would therefore be

[1343] OEIWG Rep. Second Session, at 18.
[1344] E.g. Resolution 26/22 reaffirming the normative content of the UNGPs was supported unanimously by countries of the the Global North while they voted against Resolution 26/9 on the binding treaty.
[1345] Member States of the Human Rights Council supporting the treaty process led by Ecuador include Algeria, Benin, Burkina Faso, China, Congo, Cote D'ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela, and Vietnam.
[1346] Representatives of the European Union, comment at the OEIWG (July 6, 2015) http://webtv.un.org/search/2nd-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4340279605001?term=transnational%20corporations&languages=0&languages=0&sort=date&languages=0&page=3#full-text at 0:36:36.
[1347] Human Rights Council Res. 26/9, U.N. Doc. A/26/22. June 26, 2014., at 1, footnote 1.
[1348] John Ruggie, *The Past as Prologue? A Moment of Truth for UN Business and Human Rights Treaty*, INSTITUTE FOR HUMAN RIGHTS AND BUSINESS, (July 8, 2014), https://www.ihrb.org/other/treaty-on-business-human-rights/the-past-as-prologue-a-moment-of-truth-for-un-business-and-human-rights-tre.
[1349] Representatives of Pakistan, India, Philippines, Cuba, Egypt, Venezuela, Indonesia, El Salvador, China, and Bolivia, comment at the OEIWG (July 6, 2015) http://webtv.un.org/search/2nd-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4340279605001?term=transnational%20corporations&languages=0&languages=0&sort=date&languages=0&page=3#full-text at 0:08:22.
[1350] OEIWG Rep. First Session ¶ 14; OEIWG Rep. Third Session ¶ 27.

inconceivable to equate local businesses with those MNCs who drive globalization and own a big share of the global wealth. [1351]

NGOs disagreed on whether the treaty should focus on the particular challenges posed by transnational corporations or cover all business enterprises. [1352] However, many NGOs asserted that the treaty should encompass the national companies that supply MNCs.[1353] As Earthrights International has stressed, any business and human rights treaty must start from the perspective of people whose rights are being violated. Communities in the Niger Delta need protection under international law regardless of whether the corporation that pollutes their environment is a Nigerian national oil company or Chevron.[1354] Many host states are reluctant to hold local companies liable even in host states where domestic regulation is in place. Also, the human rights standards in each state may differ and be limited to only certain human rights. The treaty could fill legal gaps where national law does not suffice in regulating local companies on human rights obligations.

In regard to strengthening human rights governance in host state conflict zones, the proposal complements UNGP 7, by suggesting to prevent and address under international law the heightened risk of business involvement in abuses in conflict situations, including situations of foreign occupation. In this context, due consideration should be given to the principles of international humanitarian law and the right to self-determination, including permanent sovereignty over natural resources, particularly in conflict zones.[1355] It was recommended that the treaty should emphasize that MNCs must exercise due diligence prior to starting operations in conflict-related areas.[1356]

It was also highlighted in the OEIWG that the UNGPs are insufficient in addressing tax evasion and that this practice diminishes public investment for development and human rights governance in Third World states. To build on the UNGPs, it was suggested that

[1351] Statement Delivered By South Africa - Open-ended Intergovernmental Working Group On The Elaboration Of An International Legally Binding Instrument On Transnational Corporations And Other Business Enterprises With Respect To Human Rights (July 6, 2015), p. 2.
[1352] OEIWG Rep. First Session, ¶¶ 60 & 61.
[1353] OEIWG Rep. Second Session, at 8 & 16; OEIWG Rep. Third Session ¶ 27.
[1354] *UN's Historic Business and Human Rights Treaty Resolution Falls Short in Providing Relief for Victims,* EARTHRIGHTS INTERNATIONAL, https://earthrights.org/media/uns-historic-business-and-human-rights-treaty-resolution-falls-short-in-providing-relief-for-victims/ (last visited Feb. 25, 2018).
[1355] OEIWG Rep. First Session, ¶ 84.
[1356] OEIWG Rep. Second Session, at 15.

country-by-country tax reporting should be mandatory[1357] and that paying their share of taxes should be part of corporations' due diligence requirement.[1358]

It was highlighted during the second session that the OHCHR "Accountability and Remedy Project" on identifying solutions to legal, practical and financial barriers could be implemented through international processes like in the OEIWG which would strengthen the Remedy Pillar III of the UNGPs.[1359]Also, it was suggested that the OEIWG could strengthen the Corporate Responsibility Pillar II of the UNGPs by replacing the term "responsibility" with "legal accountability" and "legal duty" in the treaty.[1360] Representatives of the Global South argued that the treaty, as opposed to the UNGPs, should provide legal weight to uphold human rights protection before courts and adequate remedy in relation to MNC's transnational activities.[1361] It was noted that NAPs are not a sufficient solution to ensure access to remedy because their standards are neither integrated nor uniform and companies could jump from one jurisdiction to another.[1362] Also, to be practically meaningful in complementing the UNGPs, the treaty improves victims' access to effective legal representation.[1363] In line with the UNGP 10 recommendation for states to cooperate in multilateral institutions, the binding instrument could offer an opportunity to create international cooperation for execution of the treaty especially in regard to legal and judicial cooperation.[1364] Since TWAIL claims that trade policies and lending practises of the WTO and international financial institutions result in loss of autonomy for third world states- and peoples,[1365] it is an added value to UNGPs 9 & 10 that the treaty proposal sets the stage for committing international financial- and economic institutions to integrate human rights in the economic governance of Third World States.[1366]

[1357] OEIWG Rep. Second Session ¶ 28.
[1358] *Id.*, ¶ 95.
[1359] *Id.*, at 3 & 18.
[1360] OEIWG Rep. First Session, ¶ 79.
[1361]Representatives of South Africa, comment at the OEIWG (July 6, 2015) http://webtv.un.org/search/2nd-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4340279605001?term=transnational%20corporations&languages=0&languages=0&sort=date&languages=0&page=3#full-text at 1:39:05.
[1362]*Id.*, at 1:39:30.
OEIWG Rep. First Session, ¶ 50. See also Misión Permanente del Ecuador ante la ONU y otros Organismos Internacionales Ginebra – Suiza, Primera Sesion Del Grupo De Trabajo Intergubernamental Abierto Para La Elabaoración De UN Instrumento Jurídicamente Vinculante Sobre Empresas Transnacionales y Otras Empresas En Relacion Con Los Derechos Humanos – RES. A/HRC/26/9 (July 6-10, 2015), p. 3.
[1363] OEIWG Rep. First Session, ¶ 86.
[1364] OEIWG Rep. Second Session, at ¶ 63.
[1365] *See supra chapter* 1 text accompanying note 384.
[1366] OEIWG Rep. First Session, ¶ 43; OEIWG Rep. Second Session, at 13.

Summary

Overall, the proposed treaty adds value to the current situation from a TWAIL perspective because Third World Communities request hard law and enforcement and the proposal aims to unify international binding human rights standards and hold corporations directly accountable. Moreover, it is proposed to integrate human rights in the policies of the World Bank and the International Monetary Fund to enhance Third World economic governance capacity. To contribute to democratic inclusion of Third World peoples, the OEIWG has anticipated that indigenous communities have a say in determining which types of conduct would be considered violations under the legally binding instrument and what kind of remedies are made available to them. The treaty process also aims to address legal and logistical barriers for access to justice by introducing universal civil jurisdiction. It has however been criticised from the perspective of Third World communities that the treaty is limited to enterprises with transnational character. In order to work towards reinforcement of human rights governance capacity in host states, not only MNCs but also national companies must have direct human rights obligations. Further recommendations for aligning the treaty proposal with the interests of TWAIL will be suggested below.[1367] First, it is important to consider which countries would ratify a business and human rights treaty and clarify their capacities to enforce corporate liability. [1368] The following comparative analysis will determine the prospects of adopting and enforcing a future treaty in the U.S., England and Denmark taking into account the monist[1369] and dualist[1370] approaches of the jurisdictions.

A Business & Human Rights Treaty in U.S. Law - legal status and enforcement

United States' Position on the Treaty Proposal

The U.S. was one of the 47 member states of the UN Human Rights Council in 2014 when Resolution 26/9 was adopted. The U.S. voted against the resolution and stated that it would not take part in the intergovernmental working group.[1371] The main reason the U.S. voted

[1367] *See infra* text accompanying notes 1511-90.
[1368] OEIWG Rep. Second Session, at 14.
[1369] The monist view is that international and domestic law are part of the same legal order, and that international law is automatically incorporated into each nation's legal system.
[1370] The dualist view is that international law and domestic law are distinct, and that each nation determines for itself when and to what extent international law is incorporated into its legal system.
[1371] Statement by the Delegation of the United States of America, Explanation of Vote: A/HRC/26/L.22/Rev.1 on BHR Legally-Binding Instrument (June 26, 2014), *available*

against the treaty process is because of concern that the treaty will shift the focus away from the UNGPs, hindering their implementation. On the substance of the treaty resolution proposal the U.S. stated that a one-size-fits-all instrument is not the right approach to handling the complex fabric that is regulation of business. Also, the U.S. is concerned about the rise of a host of practical questions about how an internationally binding instrument would apply to corporations and how states would implement such an instrument.[1372] Despite of these statements the SRSG John Ruggie predicts that the U.S. will eventually participate in the treaty negotiations if fundamental flaws in the proposed approach are rectified mainly its high level of abstraction.[1373] This will be discussed further below after an evaluation of whether the U.S. legal system takes a monist or dualist approach to international law which is important to determine how the treaty might fare if ratified by the U.S. Not only the approach to international law codified in treaties but also to customary international law will be evaluated. It is important to explore the extent to which the U.S. has a monist legal system because if customary international law is considered integrated by U.S. judges, the business and human rights treaty could be binding in the U.S. without ratification if it reaches customary international law over time. Also, the U.S.'s practise of universal jurisdiction will be accounted for in order to foresee whether the U.S. would facilitate jurisdiction for an international business and human rights treaty.

United States' Position on International Treaties

The U.S. legal system might appear on the outset to have monist tendencies in regards to international treaties. The U.S. Constitution Supremacy Clause explicitly stipulates that ratified treaties have direct effect in domestic courts: "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."[1374] However, under the U.S. Constitution, treaty ratification requires not just executive approval, i.e. ratification by the President acting as chief diplomat of the U.S., but also the consent of the Senate, which requires a supermajority two-thirds vote. According to the U.S. Department of State, this is why the U.S. has often pursued a practice of "compliance before ratification," in contrast to the practice of

at https://geneva.usmission.gov/2014/06/26/proposed-working-group-would-undermine-efforts-to-implement-guiding-principles-on-business-and-human-rights/

[1372] *Id.*

[1373] Ruggie, *Life in the Global*, *supra* note 50, at 4.

[1374] U.S. CONST. Art. VI, cl. 2.

"ratification before compliance" that some other nations may pursue.[1375] This is not always the case though, considering how the U.S. stance to international treaties shifts depending on the political environment. An example is the Kyoto Protocol.[1376] The U.S. signed the Protocol on 12 November 1998 during the Clinton presidency but the Bush administration opposed the Kyoto treaty on the grounds that it did not require major population centers such as India and China to make emission reductions.[1377]

Ratification of a business and human rights treaty would potentially require political support from corporations considering the corporate control over Congress (the Senate and the House of Representatives) in the past years. Recent developments have also showcased the corporate influence that has been exercised over major policy decisions of the Obama Administration. The trade agreement Trans-Pacific Partnership (TPP) is a case in point.[1378] Of the twenty-eight U.S. government appointed trade advisory committees, 85 percent of committee members represent powerful corporate interests.[1379] Another example is the human rights-based reporting requirements created under the leadership of then-Secretary of State Hilary Clinton to ensure that investment in Burma was rights-respecting.[1380] President Obama removed these reporting requirements as well as all remaining sanctions on Burma allegedly after intense lobbying from the U.S. Chamber of Commerce and other corporate interests.[1381] Also, corporations have unlimited access to fund their political campaigns according to the U.S. Supreme Court in *Citizens United v. Federal Election Commission.*[1382] In this way corporations can obtain political power through the Senate and the Senate could potentially prevent ratification of a treaty if the U.S. signed.

[1375] *Response of the United States of America to Recommendations of the United Nations Human Rights Council*, U.S. DEPARTMENT OF STATE (Nov. 9, 2010),) http://www.state.gov/s/l/releases/remarks/150677.htm.

[1376] Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997, 37 ILM 22 (1998).

[1377] David E. Sanger, *Bush Will Continue to Oppose Kyoto Pact on Global Warming*, N.Y. TIMES, June 12, 2001, at A12.

[1378] Amol Mehra, *Who's to Blame For the Gap Between Obama's Rhetoric and Reality on Human Rights? Corporations*, THE HUFFINGTON POST, (Sep. 21, 2016) http://www.huffingtonpost.com/amol-mehra/whos-to-blame-for-the-gap_b_12107222.html

[1379] Allen Brown, *You Can't Read the TPP, But These Huge Corporations Can*, THE INTERCEPT, (May 12, 2015) https://theintercept.com/2015/05/12/cant-read-tpp-heres-huge-corporations-can/

[1380] *Burma Responsible Investment Reporting Requirements*, U.S. DEPARTMENT OF STATE, http://www.humanrights.gov/wp-content/uploads/2013/05/responsible-investment-reporting-requirements-final.pdf (last visited Mar. 28, 2017).

[1381] Mehra, *supra* note 1378; Kevin Liptak, *Obama Says U.S. Prepared to Lift Myanmar Sanctions*, CNN POLITICS, (Sep. 15, 2016) http://edition.cnn.com/2016/09/13/politics/aung-san-suu-kyi-myanmar-sanctions-white-house/

[1382] Citizens United v. Federal Election Commission, 130 U.S. 876 (2010) in which a conservative lobbying group Citizens United successfully claimed the right to air a film critical of then-Senator Hillary Clinton on the basis that U.S. CONST. amend. I on free speech protects corporations and non-profits to make independent expenditures and "electioneering communications".

If the balance of corporate political power shifted and the U.S. ratified a business and human rights treaty, there would still be room for political manoeuvrings. The ratification of human rights treaties often comes with declarations of non-self-execution. [1383] This means that such treaties cannot be relied upon for certain by individuals in domestic courts unless and until Congress or state legislatures transform the treaty into U.S. law. Nonetheless, a non-self-executing international agreement may have an indirect effect in U.S. courts because there is a presumption that the courts would not permit state law or local law to force the U.S. to breach its international obligation to other countries under the agreement.[1384] However, it has been well established in existing literature[1385] that U.S. courts' application of treaties shifts at the mercy of political tendencies heavily informed by the decisions and actions of Congress and the Executive Branch. An example is the heightened focus on international law by the U.S. judiciary in "the war on terrorism" after the attacks of September 11, 2001. E.g. *Al-Bihani v. Obama*[1386] on the detention at Guantanamo Bay of an individual captured during the fighting in Afghanistan leans towards a dualist approach. It contends that "[t]he international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts". By contrast, the U.S. Supreme Court has cited foreign and international materials in some of its constitutional interpretation decisions, e.g. *Graham v. Florida*[1387] invoking international practise and treaty provisions in support of the conclusions that imposing life sentences without parole on juvenile offenders violates the prohibition in the Eight Amendment to the U.S. Constitution on cruel and unusual punishments. Therefore, applicability of the treaty in domestic legal contexts, including litigation before federal courts or state courts, depends on American foreign policy's outlook. Since it is unsure whether a treaty would be adhered to or enforced by courts, it is worth looking at the treaty's status in U.S. law if it achieved customary international law status and whether customary international law would be enforced in court.

[1383] David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Y.J.I.L. 129(1999).

[1384] Frederic L. Kirgis, *International Agreements and U.S. Law*, American Society of International Law (May 27, 1997), https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law; See also United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988) in which the Court would not enforce directions from Congress pursuant to the Anti-terrorism Act of 1987 (ATA) to close the Palestine Liberation Organisation (PLO) observer mission to the UN because it would violate United States' international obligations in the Headquarters Agreement between the United States and the UN. (U.S.-U.N., art. IV, § 11, 61 Stat. 756, 761, 11 U.N.T.S. 1676, June 26, 1947).

[1385] JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 22 (1999); CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM ix (2013). JENS DAVID OHLIN, THE ASSAULT ON INTERNATIONAL LAW 17 (2015).

[1386] Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010).

[1387] Graham v. Florida, 130 U.S. 2011, 2033 - 34 (2010).

United States' Position on Customary International Law

There is a constant process of development of customary international law, however, achieving customary international law status requires that the business and human rights treaty norms are accepted through the general practise of states and requires a considerable element of innovation. [1388] Nonetheless, as Scharf points out, although customary international law is generally presumed to develop very slowly compared to the formation of treaties, the reverse is more often the case as customary norms can sometimes ripen quite rapidly. [1389] The U.S. Supreme Court in *The Paquete Habana* case has claimed that "[i]nternational law is part of our law". [1390] Since *Paquete Habana*, it has been widely recognised that customary international law is incorporated into the American legal system as part of the common law, until the U.S. Supreme Court decision in *Erie v. Tompkins*[1391] holding that federal judges had no authority to generate their own common law. *Erie* has sparked disagreement on whether international law can still be considered part of the American legal system because the decision declared federal common law essentially dead, except in specialized areas where federal law remained supreme. On the one hand, it has been established in existing literature that international law is one specialized area where federal common law remains supreme and international law as part of federal law therefore survived the *Erie* doctrine. [1392] Also, the U.S. Supreme Court underscored this finding in *Banco Nacional de Cuba v. Sabbatino*[1393] on whether an expropriation by the Cuban government could be nullified on the grounds that it violated customary international law. The U.S. Supreme Court clearly supported international law's status as federal law and rejected the application of the *Erie* doctrine to international law.[1394]

[1388] Stefan Talmon, *Determining Customary International Law*, 26 EUR J INT LAW 417, 426 (2015).
[1389] Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 Cornell Int'l L.J. 439, 446-50 (2010). Scharf refers to ICJ ruling North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) ¶¶ 71, 73, 74 in which the ICJ contemplated a "Grotian Moment" as constituting an acceleration of the custom-formation process through states' widespread endorsement in response to violations of international law. U.S. case law and several cases of the ICJ consider the adoption of U.N. General Assembly resolutions as evidence of rapidly developing customary international law including Siderman de Blake v. Republic of Argentina, 965 F. 2d 699, 719 (9th Cir. 1992), Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 45 I.L.M. 271, 308-09, (Dec. 19, 2005), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. & Montenegro), 46 I.L.M. 188, 190, (Feb. 26, 2007).
[1390] The Paquete Habana, 175 U.S. 677, 700 (1900).
[1391] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
[1392] Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939). OHLIN, *supra* note 1385, at 17 -18.
[1393] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
[1394] *Id.* at 425.

On the other hand, the extent to which customary international law is *ipso facto* binding in U.S. courts without an independent basis for reference to it in domestic law has been questioned by American law scholars. [1395] It has been asserted that although judges play a role in applying international law in the United States, they typically do so in a manner that is heavily informed by the decisions and actions of Congress and the Executive Branch. Also, it has been claimed that academic arguments by a handful of skeptics towards international law influence how the Defense Department conducts the War on Terror, how the CIA and the NSA spy on foreigners and citizens alike, and how judges craft their opinions.[1396] The U.S. Supreme Court Justices' handling of the ATS case *Kiobel v. Royal Dutch Petroleum*[1397] has been criticized for radically changing the Court's seeming approval to apply international norms in *Sosa v. Alvarez-Machain*[1398] not to mention years of ATS litigation in lower courts. The *Kiobel* decision has been said to be highly influenced by an amicus brief filed on behalf of companies like Chevron, Dow Chemical, and Ford Motor Company, which set the stage for the territoriality argument for the Court barring application of the ATS to foreign cases.[1399] The brief argues that ATS cases violate international law principles of jurisdiction that constrain a sovereign government's exercise of jurisdiction over foreign conduct[1400] a position also taken by previous Republican presidents, including George W. Bush.[1401] Although U.S. courts must interpret statutes in accordance with the international legal obligations of the U.S. (The Rule of Interpretation),[1402] the U.S. prefers political branch control over the use of customary international law with the result that its effect in practice

[1395] Curtis Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARVARD LAW REVIEW 815, 853-854 (1997); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175(2007); ROGERS, *supra* note 1385, at 22.
[1396] OHLIN, *supra* note 1385, at 8. Ohlin names these academics "the New Realists" and calls attention to how Professor John Yoo, former Deputy Assistant Attorney General adviced the Bush Administration that it was legally permissible for interrogators to torture detainees for information to prevent future terrorist attacks contrary to the Geneva Conventions. Also Professors Jack Goldsmith and Eric Posner are pointed out as "New Realists" arguing in their joint publication *The Limits of International Law* that when self-interest conflicts with international law, states have no moral obligation to follow it.
[1397] Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013).
[1398] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[1399] Goldsmith J., *Brief for Chevron Corporation, Dole Food Company, Dow Chemical Company, Ford Motor Company, GlaxoSmithKline plc, and the Procter & Gamble Company as Amicus Curiae Supporting Respondents, Kiobel v. Royal Dutch Petroleum Co.,* CENTER FOR CONSTITUTIONAL RIGHTS 6 (Feb. 3, 2012). https://ccrjustice.org/sites/default/files/assets/2012.02%20Chevron%20Corp%20Amicus%20Brief.pdf.
[1400] *Id.* at 8.
[1401] OHLIN, *supra* note 1385, at 32. Ohlin argues that if there is *any* type of litigation where the presumption against extraterritoriality is naturally rebutted, it is precisely in the ATS context, which, by its very terms, applies *international* law in U.S. courts, *Id.* at 34.
[1402] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812). In *Palestine Liberation Organization*, 695 S.D.N.Y., the Court applied the Rule of Interpretation to decide that Congress in the ATA did not clearly intend to violate the United States – UN Headquarters Agreement to permit the PLO mission to remain in New York.

fluctuates depending on a variety of domestic legal and political considerations.[1403] The U.S. approach to international law is selective and pragmatic with dualist tendencies stemming from a notion that international law might erode some of the nation's unique values.[1404]

Hence, it seems unlikely that a business and human rights treaty will gain ground over time in the U.S. legal system through a monist approach under customary international law. Even if the treaty were to reach customary international law the U.S. may be considered a persistent objector by voting no and objecting to the treaty throughout the process of adoption.

United States' Position on Universal Jurisdiction

The U.S. Supreme Court's restriction of universal civil jurisdiction in *Kiobel* because of fear that it will trigger problems with overlapping jurisdiction and international diplomacy may indicate that an internationally agreed business and human rights treaty could compensate for the restriction of human rights litigation against corporations in ATS cases. If universal civil jurisdiction is agreed upon on the outset with other states, there will not be an issue with territoriality and state sovereignty. If a national court exercises jurisdiction over violations of international law, the court is not seeking to enforce the forum state's own law but it is acting as an agent of the international community enforcing international law.[1405]

Rather than exercising universal criminal jurisdiction over gross human rights abuses involving foreign nationals and acts that took place in foreign countries, U.S. courts have used the ATS' extraterritorial civil jurisdiction to seek civil damages for specific crimes under international law committed anywhere in the world.[1406] While the ATS no longer grants civil jurisdiction unless the claim touches and concerns U.S. territory with sufficient force[1407], it cannot be excluded that the U.S. could agree to universal jurisdiction in a business and human rights treaty on gross human rights abuses amounting to international crimes. The U.S. has statutory acknowledgement of universal criminal jurisdiction in cases of human rights abuses that amount to criminal violations.[1408] However, American law lacks

[1403] BRADLEY, *supra* note note 1383, at ix. See also United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988). Although the President had signed the ATA, the Executive Branch decided not to appeal the Court's decision overriding Congress' passing of the ATA demanding the PLO closed. The Executive Branch had consistently opposed closing PLO in accordance with the United States' international obligations, cf. *PLO*, 695 F. Supp. at 1466-67.
[1404] BRADLEY, *supra* note 1385, at xiii.
[1405] Attorney-General of the Government of Israel v. Eichmann, Int'l L. Rep., vol. 36, p. 277, (1968) (Isr.)
[1406] See *supra* chapter 3.
[1407] Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013).
[1408] RESTATEMENT (THIRD), § 404.

any examples of classical universalist criminal prosecutions[1409] even though the U.S. is a state party to treaties invoking universal criminal jurisdiction such as the 1984 Torture Convention[1410] which requires states to criminalize the relevant conduct in national law and to prosecute or extradite individuals accused of such conduct.[1411] In the U.S. the paradigm case of legitimate universal criminal jurisdiction is piracy[1412] although virtually all the Marshall Court's cases under the piracy statute[1413] involved American nationals.[1414] The U.S. approach to universal criminal jurisdiction and political tensions are more generally reflected in its decision to withdraw its ratification of the International Criminal Court (ICC)[1415] in 2002. The Clinton Administration signed the Rome Statute[1416] in 2000 but did not submit it for Senate ratification. When the Bush Administration came into power, it decided that it would not join the ICC on the basis of lack of due process and incompatibility to the U.S. constitution.[1417] This means that Americans cannot be sued before the ICC. The Obama Administration did not state an intention to submit the Rome Statute to Senate ratification but committed to cooperating with the ICC on prosecution of certain matters.[1418] At the first-ever Review Conference on the Rome Statute of the ICC in Kampala, Uganda in 2010, the Obama Administration sent a large delegation that pledged to assist the ICC in its investigation and prosecution of crimes committed by leaders of the Lord's Resistance Army (LRA), a rebel group originating from Uganda accused of widespread human rights violations.[1419] It is possible with the restriction of the ATS that universal jurisdiction in a business and human rights treaty on gross human rights abuses could be accepted as a start to open the way for

[1409] Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public Litigation after Kiobel*, 64 DUKE LAW JOURNAL 1023, 1038 (2015).
[1410] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Art. 7 (1), 23 I.L.J. 1027 (1985).
[1411] Mahmoud Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39 (Stephen Macedo ed. 2005).
[1412] United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820) states that pirates "are proper objects for the penal code of al nations".
[1413] 18 U.S.C. 1651.
[1414] See cases United States v. Shibin, 722 F.3d 233, 236, 239–40 (4th Cir. 2013) (attack on German and American vessels); United States v. Dire, 680 F.3d 446, 449, 469 (4th Cir. 2012) (attack on a U.S. navy vessel).
[1415] ICC's jurisdiction over international crimes is codified in the Rome Statute, art. 25, Jul. 17, 1998, UN Doc A/CONF.183/9.
[1416] Rome Statute, Jul. 17, 1998, UN Doc A/CONF.183/9.
[1417] *Press Statement, Under Secretary of State for Arms Control and International Security John R. Bolton,* U.S. DEPARTMENT OF STATE TO UN SECRETARY GENERAL KOFI ANNAN (May 6, 2002) http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm
[1418] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (2010) http://nssarchive.us/NSSR/2010.pdf.
[1419] *Press Statement, Legal Advisor U.S. Department of State Harold Hongju Ko & Ambassador-at-Large- for War Crime Issues, Stephen J. Rapp,* U.S. DEPARTMENT OF STATE (Jun. 15, 2010) https://2009-2017.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.

comprehensive universal jurisdiction over human rights. The U.S. government has already pronounced its dedication to participate in the expert consultation process on domestic remedies for gross human rights abuses led by the OHCHR.[1420] The U.S. stance on prosecuting serious international crimes may however change again according to the political environment after President Trump has taken office.

Summary

If the U.S. were to sign and ratify a business and human rights treaty without declarations of non-self-execution, it is possible that U.S. courts would invoke the treaty without it being implemented in U.S. law. However, in light of previous case law, this would also depend on political tendencies in Congress and the Executive Branch. If corporate influence continues on to the new U.S. government, the ratification of a business and human rights treaty would potentially require political support from corporations to pass through the Senate. The American academy's perspective on international law has changed from accepting that customary international law survived the *Erie* decision as part of federal law, to becoming predominantly dualist and preferring political branch control over international law's role in the United States. Therefore, the prospects of enforcing a business and human rights treaty in U.S. courts if it reaches customary international law status over time seem unsure and the U.S. could claim to be a persistent objector. The U.S. Supreme Court's jurisdictional limitation of the ATS in *Kiobel* perhaps indicates a call for a multilateral agreement with universal civil jurisdiction. It is likely that the U.S. would at least accept universal jurisdiction over gross human rights abuses since the U.S. already accepts universal criminal jurisdiction and supports the OHCHR consultation on remedies for gross human rights abuses.

A Business & Human Rights Treaty in English Law - legal status and enforcement

United Kingdom's Position on the Treaty Proposal

The U.K. is one of the 47 member states of the UN Human Rights Council and was also a member in 2014 when Resolution 26/9 was adopted. The U.K. voted against the resolution because of a fundamental belief that the issue is one of a national rule of law within individual states. The U.K. also expressed concern that the resolution is posited on an inherent and inexorable divide between businesses on the one hand and citizens on the other

[1420] *Bureau of Democracy, Human Rights & Labor - Dept. of State, USA*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, (last visited Mar. 28, 2017) https://business-humanrights.org/en/usa?keywords=&filtertype=government&governments[]=3638&governments[]=3549.

and that this discourages countries from thriving economically. Also, the U.K. believes that the UNGPs offer the best way forward to deal with the issues in a way that takes into account the needs of citizens but also ensuring that countries and their citizens can benefit from economic development.[1421] In addition, the U.K has stated more generally what obstacles the government faces to take further action on business and human rights. A significant factor is lack of understanding or awareness of business & human rights in government. Minor factors are coordination across government departments, lack of resources for enforcement, monitoring and prosecution, opposition or lack of consensus within government, political limitations imposed by foreign governments or multilateral institutions, and concern about deterring foreign investment. The U.K. does not consider opposition by economic interest groups or business associations or other opposition by influential people or groups outside government as factors against government action.[1422] In the same way that the U.S. approach to international law was examined above, the U.K.'s position on international law will also be considered in order to determine how a business and human rights treaty might fare under U.K. law.

United Kingdom's Position on International Treaties

In English law, treaties historically have had domestic effect only after being implemented by Parliament, an approach still followed in the U.K. today.[1423] There are no legislative provisions or regulations that call for the application of international law, in a generic sense, in the British legal system. This was established in *J.H. Rayner (Mincing Lane) Ltd. Appellants v. Department of Trade and Industry*[1424] and related cases[1425] finding that contracts made with the International Tin Council (I.T.C.), an international organisation

[1421] United Kingdom of Great Britain and Northern Ireland, Karen Pierce, Vote on Draft Resolution A/HRC/26/L.22/Rev.1 - "Elaboration of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights" at 37th Meeting 26th Regular Session Human Rights Council (Jun. 26, 2014).
http://webtv.un.org/watch/ahrc26l.22rev.1-vote-item3-37th-meeting-26th-regular-session-human-rights-council/3643474571001

[1422] *Foreign & Commonwealth Office, United Kingdom*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTRE, https://business-humanrights.org/en/united-kingdom?keywords=&filtertype=government&governments[]=3638 (last visited Mar. 28, 2017).

[1423] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45 (2008).

[1424] J.H. Rayner (Mincing Lane) Ltd. Appellants v. Department of Trade and Industry [1989] 3 W.L.R. 969 (Eng.)

[1425] Maclaine Watson & Co. Ltd. Appellants v. Department of Trade and Industry Respondents, Maclaine Watson & Co. Ltd. Appellants v. International Tin Council Respondents [1990] 2 A.C. 418 (Eng.). "Treaties […] are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated by legislation."

established by treaty, do not impose any obligations enforceable under domestic law on the member states party to the agreement constituting the council.

Even if treaties have not been incorporated into British law, they might nonetheless exert a certain influence over the courts. In the field of human rights the U.K. was one of the initial signatories to the European Convention on Human Rights and Fundamental Freedoms[1426] (ECHR) in 1950. Although the U.K. recognised the power of the European Commission on Human Rights to hear complaints from individual U.K. citizens and the authority of the European Court of Human Rights (ECtHR) to adjudicate in such matters in 1966, it did not incorporate the ECHR into U.K. law at that time.[1427] Consequently the ECHR could not be directly enforced in English courts. However, many members of the judiciary, including the late Lord Chief Justice Lord Bingham, were in favour of incorporation, not merely on general moral grounds, but equally on the ground that they resented having to make decisions in line with U.K. law which they knew full well would be overturned on appeal to the ECtHR.[1428] Therefore the ECtHR has been said to have exerted a 'persuasive and pervasive influence on judicial decision-making (…), affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law.'[1429] In a similar way, if the U.K. signed the business and human rights treaty it could have influence on the judicial decision-making of English courts even if it is not yet incorporated and eventually be incorporated over time.

United Kingdom's Position on Customary International Law

As explained above[1430], it is worth considering the position on customary international law since case law has established that customary international law can develop quite rapidly to keep up with the pace of other developments, e.g. MNCs' human rights obligations. It has been established in *Trendtex Trading Corp v Central Bank of Nigeria that* customary international law is accepted as being part of English common law.[1431] It is therefore possible to make claims of breaches of custom in an English court. E.g. a civil claim for torture was made against the Government of Kuwait in *Al-Adsani v Government of Kuwait* [1432], though

[1426] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
[1427] Incorporation of the ECHR into U.K. law resulted in the Human Rights Act 1998, c. 42 (Eng.).
[1428] GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 46 (2015).
[1429] Regina v. Lyons [2002] UKHL 44, para. 13 (Eng.).
[1430] *See supra* text accompanying notes 1388-89.
[1431] Trendtex Trading Corp v Central Bank of Nigeria, [1977] 2 WLR 356 (Eng.): "it follows […] inexorably that the rules of international law, as existing from time to time, do form part of our English law."
[1432] Al-Adsani v. Government of Kuwait and others, [1996] 107 I.L.R. 536 (Eng.).

the claim was dismissed due to the defendant's sovereign immunity. Although international law prohibits torture, the English Court of Appeal held that no express or implied exception to state immunity existed in cases of torture. Norms of customary international law rank equally with other norms of British common law. In the event of a clash between them, the more recent in time prevails. Though, norms of common law and of customary international law are both capable of being overridden by statute. If an unincorporated treaty conflicts with a statute or common law, then the domestic law will prevail. In most customary human rights claims against a corporation, except in the case of genocide, breaches of customary human rights law require an element of state action. However, if the business and human rights treaty obtains customary international law status over time, it would apply in the U.K. to corporations unless the U.K. claims an exemption under the persistent objector principle.[1433]

United Kingdom's Position on Universal Jurisdiction

British courts exercise universal criminal jurisdiction for a number of grave violations. The most longstanding of these is piracy, which has, in effect, been treated as qualifying for universal jurisdiction since the Middle Ages.[1434] Other, and more recent, exercises of universal jurisdiction have been provided for by statutes that were enacted pursuant to treaty obligations into which the U.K. had entered including grave violations of the Geneva Conventions[1435], hostage-taking[1436] and torture.[1437] In addition, universal jurisdiction has been instituted regarding a number of terrorist and terrorist-related activities including airline hijacking[1438], the hijacking of and violence against ships at sea[1439], and financial support for terrorism.[1440] The British branch of the International Law Association investigated the prospects for universal civil jurisdiction in the English courts over human rights violations committed abroad.[1441] The report concluded that under current English law, the hurdles facing claimants would bar suit in most, though not necessarily all, cases. Such hurdles include immunities under public international law and obstacles to jurisdiction under private

[1433] Stephen C. Neff, *United Kingdom*, *in* INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION 620, 629 (Dinah Shelton ed. 2011).
[1434] Re Piracy Jure Gentium [1934] AC 586 (Eng.)
[1435] Geneva Conventions Act 1957.
[1436] Taking of Hostages Act 1982.
[1437] Criminal Justice Act 1988.
[1438] Aviation Security Act 1982.
[1439] Aviation and Maritime Security Act 1990.
[1440] Terrorism Act 2000.
[1441] Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, EUR. HUM. RTS. L. REV. 129, 131 (2001).

international law.[1442] *AI-Adsani v. Kuwait*[1443] on torture against a dual British/Kuwaiti national by the government of Kuwait and three individuals has been seen as a potential bridge to exercise universal civil jurisdiction. However, it was not clear that the court purported to rest on universal civil jurisdiction.[1444] In *Jones v. Saudi Arabia*[1445] four persons of British nationality brought a torture claim against the Saudi Ministry of the Interior and named Saudi officials. The Court allowed the claim against the state officials to proceed,[1446] however, on appeal, the House of Lords rejected exercise of universal civil jurisdiction because the officers were protected by state immunity.[1447] Given the lack of case law of British courts applying universal jurisdiction in the civil realm such as civil tort actions for wrongs committed abroad, it is more likely that the U.K. would accept universal jurisdiction in a gross human rights abuse treaty than in a comprehensive one covering all human rights.

Summary

International law has significant implications for the way in which the U.K.'s domestic law is interpreted and formed. Nonetheless, the U.K's approach to international law is dualist so that treaties do not have direct effect and are non-justiciable in the courts of England unless transformed into domestic law by Parliament. Even if the U.K. does not incorporate a business and human rights treaty, the treaty could have an influence on judicial decision-making considering previous practise on the ECHR. It is possible that the treaty could have direct effect in English courts if it reaches customary international law status over time, unless the U.K. claims to be a persistent objector to the treaty. For the U.K. to agree with the treaty, it would have to be adjusted to point out how it could promote economic development in addition to providing greater social and environmental protections for citizens. Presumably, it is more likely that the U.K. could agree to universal jurisdiction in a business and human rights treaty on human rights abuses amounting to international crimes than agreeing to universal jurisdiction in a treaty covering all human rights.

[1442] *Id.* at 164.
[1443] Al-Adsani v. Government of Kuwait and others, [1994] 100 I.L.R. 465 (Eng.).
[1444] Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142(2006).
[1445] Jones v. Saudi Arabia, [2004] EWCA (Civ) 1394 (Eng.)
[1446] Id. ¶ 99.
[1447] Jones v. Saudi Arabia [2006] UKHL 26 (Eng.)

A Business & Human Rights Treaty in Danish Law – legal status and enforcement

Denmark's Position on the Treaty Proposal

Denmark was not a member of the UN Human Rights Council at the time when Resolution 26/9 was adopted so Denmark did not vote. Reportedly, Denmark has been critical about the process and the need for a treaty until there is more experience with the implementation of the UNGPs.[1448] This is in line with the opinion of the EU. Denmark has not participated in any of the sessions of the OEIGW. Generally, the Danish Ministry of Foreign Affairs has stated that Denmark engages actively in the initiatives of the Human Rights Council of specific interest to but correspondingly, Denmark opposes initiatives it believes risk diluting human rights, weaken rights that have already been accomplished and overburden the Human Rights Council and the OHCHR with inane mandates. Since Denmark is not opposing the OEIGW's sessions it could mean that Denmark is not against the treaty proposal but critical and expectant to the development of the proposal in line with the EU. Moreover, Denmark has pronounced that it considers political limitations imposed by foreign governments or multilateral institutions as a significant impediment to the government's ability to take further action on business and human rights. [1449] In the same way that the U.S. and U.K. approach to international law was examined above, Denmark's position on international law will also be considered in order to determine how a business and human rights treaty might fare under Danish law.

Denmark's Position on International Treaties

By contrast to the EU, Denmark has traditionally followed the dualist approach so that international law is a separate legal system to the Danish and not directly applicable in Danish courts. The dualist principle is clearly shown by the wording of Article 19 of the Danish Constitution which provides that Parliament must approve international acts of government which require action by Parliament in order to be implemented, for example by new domestic legislation. In most cases Danish courts interpret domestic law so as to comply with the country's international obligations, but on a few occasions the principled dualist approach has been upheld by the courts. For instance, even though Denmark has joined the ICC, Denmark has been insufficient in prosecuting war criminals. Denmark has signed and

[1448] E-mail correspondance with Lene Wendland, Adviser on Business and Human Rights, Human Rights and Economic and Social Issues Section, Research and Right to Development Division, Office of the United Nations High Commissioner for Human Rights, Geneva (May 6., 2016).
[1449] *Danish Business Authority, Ministry of Business and Growth, Denmark*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, https://business-humanrights.org/en/denmark.

ratified the UN Torture Convention[1450], but the Danish Eastern High Court in *Public Prosecutor v. Captain Annemette Hommel and others*[1451] acquitted a number of Danish officers from allegations of torture, even though they had committed torture in Iraq. The argument was that the military criminal law that only concerns torture during a war was not applicable. At the same time, the Torture Convention has not been implemented in Danish law. Thus the Court gave the seal of approval to the use of torture in time of peace contrary to the Torture Convention. The government at the time was the same, which lead Denmark in participating in the war in Iraq so Danish courts may be influenced by the political situation when taking into account international law that has not been incorporated, similar to U.S. courts. By contrast in *Public Prosecutor v. Refik Sarić*[1452] explained in more detail below,[1453] the Danish Supreme Court sentenced Bosnian Refik Sarić, a former detention camp guard in Bosnia and Herzegovina, for grave breaches of the Third and Fourth Geneva Conventions, cf. Section 8 (5) of the Penal Code. The opposite outcomes of the cases could be explained by the fact that Denmark has incorporated the Geneva Conventions while the UN Torture Convention is not incorporated in Danish law. Another example of the dualist approach is in the field of labour law. Due to a preference for collective bargaining over statutory regulation,[1454] the Danish Parliamentary legislators have been somewhat reluctant to fulfil international obligations fully in the field of labour law. Until 1996, it was for example still arguable that Danish private employers under domestic Danish law were legally free to take racist employment decisions, though Denmark ratified the United Nations Convention on the Elimination of All Forms of Racial Discrimination in 1971.

By contrast, case law has shown that Danish courts go a long way to fulfil Denmark's obligations pursuant to the ECHR, following its ratification and before its incorporation in Danish law. An example of this is the *Hauschildt v. Denmark*[1455] case. In this case, the Court decided that Denmark had violated Article 6 of the ECHR by letting unbiased judges take part in the trial. This decision led to a change in the Danish Administration of Justice Act even before the incorporation of the ECHR in Danish law, which happened in 1992. After incorporation, Danish courts have been willing to go a long way to ensure Denmark meets its

[1450] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.
[1451] Ugeskrift for Retsvæsen [UfR] [Supreme- and High Court Reports] 2006 p. 2927 Ø (Den.)
[1452] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 1995 p. 838 H (Den.)
[1453] *See infra* text accompanying note 1467.
[1454] BOEL FLODGREN ET AL., THE NORDIC LABOUR RELATIONS MODEL: LABOUR LAWS AND THE TRADE UNIONS IN THE NORDIC COUNTRIES – TODAY AND TOMORROW 159 (1992).
[1455] Hauschildt v. Denmark, 154/1989, (1990) 12 EHRR 266.

international obligations. In recent years, the Danish Foreigners Act has been amended several times making it easier to expel foreigners with a criminal record. The practical effect of some of the amendments has been that persons who had lived almost their entire life in Denmark and had most of their family here were expelled because they had not acquired Danish citizenship. The courts have not been willing to follow the directions of Parliament in this area, as the expulsions have in most of these cases been considered as violations of Article 8's right to a family life. This example shows that the courts are in fact willing to go against the explicit will of the political majority if they are convinced that the majority violates the ECHR.

The traditional dualist theory in Denmark seems to be softening and a more mixed monist and dualist approach is being developed.[1456] It has been well established in existing literature that in cases where there might be a discrepancy between Danish law and international law, the discrepancy is avoided by interpretation to fulfil the international obligations of Denmark.[1457] Although the theoretical starting point for a discussion of the relationship between Danish and international law is thus the dualist approach, the reality of legal life is what some legal scholars have termed *practical monism.*[1458] Since Denmark traditionally has a dualist approach, a business and human rights treaty would need to be incorporated to be part of Danish law. However, the dualist approach is no longer incisive in Danish law so the business and human rights treaty could have an influence on Danish court decisions even though Denmark has only signed the treaty but not incorporated it.

Denmark's Position on Customary International Law

As explained above[1459], it is worth considering the position on customary international law since case law has established that customary international law can develop quite rapidly to keep up with the pace of other developments, e.g. MNCs' human rights obligations. Customary international law applies in Danish law regardless of whether it is incorporated.[1460] It has a greater impact in Danish law than other sources of international law and there is a presumption that national law must be interpreted with such reservations and/or

[1456] Ruth Nielsen, *'The Impact of EU Law on Scandinavian Law in Matters of Gender Equality'*, in SCANDINAVIAN WOMEN'S LAW IN THE 21ST CENTURY 63, 87 (Ruth Nielsen & Christina D. Tvarnø eds., 2012).
[1457] Jørgen Albæk Jensen, *Human Rights in Danish Law*, 7 EUROPEAN PUBLIC LAW 1, 2 (2001).
[1458] See *id.* on the three interpretative principles used to construe Danish domestic rules: *principle of interpretation, rule of presumption and rule of instruction*; See also Nielsen & Tvarnø, *supra* note 82, at 161.
[1459] *See supra* text accompanying notes 1388-89.
[1460] OLE SPIERMANN, MODERNE FOLKERET 154 (2006).

additions in accordance with customary international law.[1461] There are several examples in Danish case law of the application of customary international law. In *UfR 1924.64 H*[1462] a dispute between Germany and Denmark on recognition of a lease to a farm that had been passed on to Denmark, in connection with South Jutland's transfer to the allies, was decided on the basis of customary international law on State succession instead of Danish or German lease rules. *UfR 1925.940 H*[1463] regarded a dispute between the government of Denmark and the government of communist Soviet Union to property rights of the Russian-orthodox Alexander Newsky church which was previously owned by the imperial Russian government. The Danish Supreme Court decided the case on the basis of a combination of domestic law and international customary law arguments taking into account, on the one hand, the Danish government's recognition of the Soviet Union as carrying on the Russian state and on the other hand the rejection of the Soviet Union to meet the obligations which the previous government had undertaken. In a later decision, The Danish Supreme Court has also collated domestic law on property rights with customary international law as basis for its ruling.[1464] Since customary international law is directly applied by Danish courts, it is possible that the business and human rights treaty could be legally binding if it gains customary international law status over time. Since Denmark has not voted against the treaty it is less likely to invoke the persistent objector principle than the U.S. or the U.K.

Denmark's Position on Universal Jurisdiction

Denmark does not have a national law properly conferring universal civil jurisdiction. The only option that comes close is that Denmark permits its courts to entertain civil claims in an *action civile* in criminal cases, which are based on universal criminal jurisdiction.[1465] Denmark is obliged to have universal criminal jurisdiction over war crimes and other serious crimes under international law and has been committed to opening criminal investigations or prosecuted cases involving criminal universal jurisdiction.[1466] E.g. in *Public Prosecutor v. Refik Sarić*[1467] the Danish Supreme Court in Copenhagen exercised universal jurisdiction over Refik Sarić for grave breaches of the Third and Fourth Geneva Conventions, cf. Section

[1461] ALF ROSS, LÆREBOG I FOLKERET 75 (1942).
[1462] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] UfR 1924 p. 64 H (Den.)
[1463] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] UfR 1925 p. 940 H (Den.)
[1464] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] UfR 1948 p. 837 H (Den.)
[1465] AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE SCOPE OF CIVIL UNIVERSAL JURISDICTION 5 (2007).
[1466] AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION - A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD 10 (2012).
[1467] *UfR 1995.838 H*, *supra* note 1453 .

8 (5) of the Penal Code including ordinary crimes of assault and aggravated assault of detainees while working as a guard in a detention camp in Bosnia and Herzegovina and sentenced him to eight years of imprisonment. Considering that Denmark has history of exercising universal criminal jurisdiction while universal civil jurisdiction is not exercised, unless collated with criminal jurisdiction, a gross human rights abuse treaty with universal jurisdiction is more likely to be accepted than a comprehensive one covering all human rights.

Summary

Although Denmark has traditionally followed a strict dualist approach to international law and still does in some cases, there are tendencies towards a monist stance. The Danish courts have traditionally been characterized by a considerable degree of judicial restraint, but in recent years they have signaled that they would be willing to play a more active role in the area of human rights. Therefore it may be expected that a business and human rights treaty could have an influence on Danish court decisions even if was not incorporated but only signed. If achieving customary international law status, the treaty would be directly applicable in Danish courts and Denmark may not claim to be a persistent objector considering that it was not part of the UN Human Rights Council to cast a vote when the resolution was adopted. Since Denmark has met its obligations to exercise universal criminal jurisdiction but there is not proper legislation on universal civil jurisdiction, it appears more likely that universal jurisdiction in a business and human rights treaty on gross human rights abuses could be accepted as a starting point than an all-encompassing one.

Treaty Recommendations from a Global North Perspective

Considering the observations above, some recommendations may be suggested to enhance the prospects of the U.S., U.K., and Denmark entering a treaty that generates corporate accountability for human rights wrongs. The U.S., U.K., and Denmark are against the UN Business & Human Rights Treaty Proposal Resolution 26/9 namely because they are concerned that the adoption of the treaty will shift the focus away from the UNGPs and hinder their implementation.[1468] In addition, the U.S. is concerned about applying an international instrument on human rights directly to corporations and criticises the all-encompassing approach of the treaty proposal. The U.K. is worried about regulating corporate accountability for human rights violations outside national law and that the

[1468] *See supra* text accompanying notes 1371, 1421 & 1448.

proposal will polarize businesses and citizens and impede economic development. Denmark was not part of the UN Human Rights Council but is taking a critical stance to the treaty proposal in line with the EU.[1469] Even though the U.K. voted against the proposal, it participated in sessions of the OEIWG established by the UN Human Rights Council in Geneva to elaborate on the international legally binding instrument. The EU initially refused to participate in treaty negotiations and only participated in part of the first OEIWG session but attended throughout the second and the third sessions.[1470] The U.S. and Denmark have not attended the meetings of the OEIWG. The following recommendations are based on the perspectives of the U.S., U.K., and Denmark discussing the U.K. and Denmark together because they share the position of the EU.

United States

In order to increase the likeliness of the U.S. adhering to a business and human rights treaty, the high level of abstraction of the proposed approach,[1471] which the U.S. has criticized, must be addressed. It is not straight-forward regulating business and human rights because, as the SRSG John Ruggie points out, it is not so "discrete an issue-area as to lend itself to a single set of detailed treaty obligations" [1472] and "a general business and human rights treaty would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places." [1473] Therefore, introducing specialized treaty proposals over time covering different areas of human rights rather than having one all-encompassing treaty could provide more clarity and assurance about the kinds of obligations states assume and address the criticism of the U.S.

Just as the UN started codifying states' human rights obligations in the International Bill of Human Rights [1474] resulting in subsequent adoption of separate core international human rights treaties[1475] with separate committees monitoring their compliance, it would make sense to have specialized treaties on businesses' human rights obligations. A gradual introduction of specialized treaties would also address the common concern of the Global North that the

[1469] The EU is concerned that the treaty interferes with implementing the UNGPs and only addresses MNCs and not domestic enterprises.
[1470] Civil society organisations have criticised the EU for attempting to terminate funds for the continuation of the OEIWG at the UN Fifth Committee's budget allocation meeting in December 2017, however, the proposed resolution was eventually withdrawn, Treaty Alliance (@TreatyAlliance), TWITTER (Dec. 22, 2017), https://twitter.com/TreatyAlliance/status/944280275621765120.
[1471] Chairmanship of the OEIWG, *supra* note 1280, at 2.
[1472] Ruggie, *Incorporating Human Rights*, *supra* note 90, at 66.
[1473] Ruggie, *Life in the Global*, *supra* note 50, at 5.
[1474] International Bill of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[1475] *See supra* text accompanying notes 196-99.

treaty proposal would interfere with the UNGPs implementation. The UNGPs cover business and human rights broadly providing guidance for businesses and states to meet their human rights obligations while binding treaties would gradually complement the UNGPs with specified binding obligations.

An example of a specialized approach developing over time through discussion and consultation resulting in an international treaty is CEDAW. For decades the international community resisted the development of a Women's convention on the basis that the existing international human rights framework was sufficiently generic to ensure protection of women's rights. It was through the development of reasoned principles and arguments that the international community finally agreed that the human rights violations experienced by women at the hands of states and non-state actors was both similar to and different from the experience of men and therefore there was a need for specification of such violations which resulted in CEDAW.[1476] Although not all states have ratified all international human rights instruments and not all human rights are recognized in all jurisdictions, CEDAW demonstrates that significant movement toward increased implementation is possible. Even though 187 states have ratified CEDAW, some states have some reservations entered against some articles of CEDAW. However, many states have also entered objections against the reservations of other state parties. A UNICEF study of CEDAW suggests that the entry of reservations can provide opportunities for meaningful dialogue on key issues. Ultimately, the dialogues have resulted in increased implementation of the Convention's equality norms and a number of States parties have withdrawn all or part of their reservations.[1477] A similar norm development can be perceived to specify international law principles directly addressing human rights violations committed by corporations.

It has been argued that since international human rights principles provide that human rights are universal and inalienable; indivisible; interdependent and interrelated,[1478] excluding some human rights and including others could run counter to these international legal

[1476] Bonita Meyersfeld, Director of the Centre for Applied Legal Studies, Professor at University of Witwatersrand, Johannesburg University, Panel Speech at the OEIWG (July 6, 2015) http://webtv.un.org/search/2nd-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4340279605001?term=transnational%20corporations&languages=0&languages=0&sort=date&languages=0&page=3#full-text at 1:13:34.

[1477] MARSHA A. FREEMAN, UNICEF, RESERVATIONS TO CEDAW: AN ANALYSIS FOR UNICEF 6, 23 (2009) https://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf

[1478] UDHR, *supra* note 197. Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF.157/23 (1993); 32 ILM 1661 (1993), I.5.

principles.[1479] However, it is not the case that no human rights can be fully realized without fully realizing all other human rights.[1480] Most developing countries prioritise some rights over others in light of available resources and are not in a position to fully implement human rights for everyone all at once.[1481] Implementing some rights before others does not mean that developing countries are completely outside the realm of human rights. High quality implementation sometimes involves giving rights more adequate scopes. In this way, a right may be extended to more people and provide for effective legal and political institutions that work well in protecting and enforcing the right.[1482] A high quality implemented human right may also yield stronger supportive relations to other human rights than no implementation or low-quality implementation of every human right.[1483] Moreover, the fact that some rights are *jus cogens* and that some rights qualify for the protection of the International Criminal Court also suggest that there is priority variation among human rights.[1484]

In the treaty debate, Ruggie has advocated for "precision tools" that cover corporate involvement in "gross abuses" that may rise to the level of international crimes and prohibited under customary international law such as genocide, extrajudicial killings, slavery, as well as forced labour.[1485] However, gross human rights abuses also cover other categories of human rights[1486] depending on the manner in which the violation has been committed or its severity.[1487] In regard to natural persons, broad consensus between states exists on these prohibitions as demonstrated with the consensus within the world community to adopt the Universal Declaration of Human Rights and establishing the United Nations following the atrocities committed during World War II. Also, prohibition on gross human rights abuses enjoy greater extraterritorial application in practice than other human rights standards because prosecution would amount to exercising extraterritorial criminal jurisdiction rather

[1479] McCorquodale, *supra* note 1295, at 1:21:50; OEIWG Rep. First Session, ¶ 47.
[1480] James W. Nickel, *Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights* 30 HUMAN RIGHTS QUARTERLY 984 (2008).
[1481] *Id.* at 998.
[1482] *Id.* at 993.
[1483] *Id.* at 997.
[1484] IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW: THE HUMAN RIGHTS DIMENSION 52 (2001).
[1485] John Ruggie, *Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises*, *in* BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING 46 (Cesar Rodriguez-Garavito ed., 2017).
[1486] Torture, cruel inhuman and degreading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger, and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women, and lack of the rule of law, cf. Vienna Declaration, *supra* note 1478, ¶ 30.
[1487] Report of the Independent Expert on the Right to Restitution, *Compensation and Rehabilition for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, Mahmoud Cherif Bassiouni, submitted pursuant to UN Commission on Human Rights Resolution 1998/43, ¶ 85.

than extraterritorial civil jurisdiction, which was restricted by the U.S. Supreme Court in *Kiobel.*[1488]

It would be difficult for the U.S. to reject a similar international consensus for legal persons on gross human rights abuses. The fact that the U.S. Supreme Court changed the question in *Kiobel* from corporate accountability under customary international law to ATS extraterritoriality indicates that granting corporations immunity for gross human rights violations may be a bridge too far. The U.S. has an interest in restoring its human rights reputation on the international scene and steps have been taken by the previous President towards this end. Although the U.S. has not ratified the ICC, because of rejection from the Bush administration, the Obama administration agreed to cooperate with the ICC on investigating and prosecution of crimes and widespread human rights violations committed by the Lord's Resistance Army (LRA). The U.S. Department of State has also pronounced that the Obama Administration worked to obtain Senate advice and consent to a number of human rights treaties particularly CEDAW and the CRPD.[1489] The conventions have been signed by the U.S. but not yet ratified.

It is true that the U.S. Government has been accused of gross human rights abuses in the U.S. detention facility at Guantanamo Bay. However, President Obama released a final plan to Congress to close Guantanamo Bay and Hillary Clinton urged Obama to intensify efforts at transferring detainees out of Guantánamo in her final days in office as secretary of state. [1490] Although the Obama Administration reversed the Bush era policy, these changes are in the process of rolling back with President Donald Trump's skepticism toward international organisations. It is not yet clear what his policy is on regulating corporations in regards to human rights abuses, however, he has been criticized heavily on his statements on women, Muslims, immigrants, refugees, and interrogation methods such as waterboarding in regards to the war on terror.[1491] Moreover, President Trump has opposed strongly the Foreign

[1488] *See supra* text accompanying note 555.
[1489] U.S. DEPARTMENT OF STATE, REPORT OF THE UNITED STATES OF AMERICA SUBMITTED TO THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS IN CONJUNCTION WITH THE UNIVERSAL PERIODIC REVIEW 42 (2015). https://www.state.gov/documents/organization/237460.pdf
[1490] Spencer Ackerman, *Guantánamo Bay: Obama Reiterates Call to Close Prison in Final Plan to Congress*, THE GUARDIAN. (Feb. 23, 2016), https://www.theguardian.com/us-news/2016/feb/23/obama-guantanamo-bay-closure-plan-congress
[1491] See Editorial Board, *Trump's Election Threatens Human Rights Around the World*, THE WASHINGTON POST (Nov. 10, 2016) https://www.washingtonpost.com/opinions/global-opinions/trumps-election-threatens-human-rights-around-the-world/2016/11/10/71f59228-a6b3-11e6-8fc0-7be8f848c492_story.html; Hayley Chapman & Sian Lea, *What a Trump Presidency Could Mean For Human Rights*, RIGHTSINFO (Nov. 9, 2016) http://rightsinfo.org/will-us-president-trump-human-rights/.

Corrupt Practices Act (FCPA). The FCPA[1492] applies abroad and makes it a criminal offence for an American company to bribe or have others bribe on its behalf, foreign officials in an effort to win or retain business. President Trump has strongly criticized the U.S.' prosecution of Wal-Mart's alleged FCPA violations in Mexico and China and stated that FCPA puts U.S. business at a "huge disadvantage." [1493] The American NGO International Corporate Accountability Roundtable stated shortly after the result of the Presidential election: "there are indications that the future leadership of the institutions that make up the fabric of our democracy are being challenged, many of which were key means of accountability over corporations".[1494]

In order to achieve meaningful progress in developing an international legal instrument a certain degree of consensus between states is required by starting with an area of human rights that all states agree on and then extend to other areas. Negotiations should follow on subsequent business and human rights treaties including the core internationally recognized human rights treaties mentioned in the UNGP 12, i.e. the Universal Declaration of Human Rights (UDHR),[1495] the International Covenant on Civil and Political Rights (ICCPR),[1496] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1497] and the ILO Declaration on Fundamental Principles and Rights at Work.[1498] Eventually a business and human rights framework should also include treaties that are not included in the UNGPs.[1499]

The limitations raised by *Kiobel* and *Jesner* for U.S. courts to exercise unilateral civil jurisdiction over foreign nationals would be addressed with a business and human rights treaty providing universal civil jurisdiction over legal persons. The SRSG John Ruggie commissioned a study on extraterritorial jurisdiction in anti-corruption, securities law, antitrust, environmental regulation, as well as criminal and civil jurisdiction in general. Main conclusions were that multilateral measures are likely to be more acceptable than unilateral measures which indicates a call for universal jurisdiction on the basis of a treaty.[1500] U.S.

[1492] *See supra* text accompanying notes 363-64.
[1493] *CNBC: Trump: Dimon's Woes & Zuckerberg's Prenuptial* (CNBC Broadcast, May 15, 2012) http://video.cnbc.com/gallery/?video=3000089630&play=1 (beginning at the 14 min mark).
[1494] Amol Mehra, *Progressives, Unite*, THE HUFFINGTON POST (Nov. 12, 2016) http://www.huffingtonpost.com/entry/58271263e4b0852d9ec216fd?timestamp=1478956652743.
[1495] UDHR, *supra* note 197.
[1496] ICCPR, *supra*, note 198.
[1497] ICESCR, *supra*, note 199.
[1498] ILO Declaration, *supra*, note 206.
[1499] E.g. Convention on the Rights of the Child (CRC), Nov. 20, 1989, G.A. Res. 44/25, UN Doc. A/44/49, CEDAW, and CRPD.
[1500] RUGGIE, *supra* note 186, at 141.

consent to universal jurisdiction in a treaty would require demonstration of specific benefits for corporations since powerful corporations are based in the U.S. and represented by politicians, even more so after the outcome of the presidential election. Such benefits could be that multilateral agreement on universal jurisdiction would result in less expenses to corporations than transnational human rights litigation. The high costs connected with litigating *forum non conveniens* motions, non-enforcement actions and parallel proceedings when the same case is litigated in multiple forums would be eliminated. E.g. Chevron's legal costs defending against the Ecuadorian claims have been estimated to exceed a billion dollars.[1501] Corporations would likely gain from common treaty rules building a vastly more efficient system over time and producing coherent precedence and predictability to foreign investors. Also integrating an option for evaluative mediation that facilitates early settlement could be a strategy likely to appeal to potential corporate defendants.[1502]

United Kingdom and Denmark

Although the EU previously emphasized their preference to focus on implementation of the UNGPs[1503], the European Parliament expressed in the recent OEIWG session that there needs to be a binding business and human rights instrument.[1504] The U.K. especially expressed concerns about regulating corporate accountability for human rights violations outside national law, however, businesses do not reject binding regulation on the international level altogether. During the OEIWG First Session, it was noted that according to a poll from the UN Global Compact, businesses are not opposed to global regulation but want "smart regulation" that balances human rights and foreign direct investment and shores up soft law with hard law, especially "hardening" the UNGPs and NAPs.[1505] Introducing binding obligations in a more precise manner and over time as presented above[1506] is less likely to cause polarization in the debate about international legalization than aiming for consensus to a single treaty instrument for resolving complex areas across the full range of human rights. A specialized approach for obligations on human rights due diligence would benefit

[1501] Maya Steinitz & Paul Gowder , *Transnational Litigation as Prisoners Dilemma* 94 NORTH CAROLINA L. REV. 751, 760 (2016).
[1502] Under evaluative mediation, the mediator provides a non-binding assessment or evaluation of the dispute, which the parties are then free to accept or reject as the settlement of the dispute.
[1503] OEIWG Rep. First Session ¶ 39.
[1504] OEIWG Rep. Third Session ¶ 37.
[1505] OEIWG Rep. First Session ¶ 41. Chip Pitts, Professor, Stanford University Law School, Panel Speech at the OEIWG (July 6, 2015) http://webtv.un.org/search/2nd-meeting-1st-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4340279605001?term=transnational%20corporations&languages=0&languages=0&sort=date&languages=0&page=3#full-text at 1:00:09 and 1:01:16.
[1506] *See supra* text accompanying notes 1471-99.

businesses and promote economic development by providing specific guidelines and eliminating unfair competition between companies that voluntarily invest resources in respecting human rights and companies that do not in lack of legal repercussions. An article from Harvard Business School shows that if the quality of businesses' work and reporting on social responsibility increases, the trust from investors also increases.[1507]

In order to respond to the U.K.'s concerns that the business and human rights proposal will polarize businesses and citizens, it is necessary to demonstrate that international binding obligations would be economically advantageous for the country. Middle states like Denmark or the U.K. might push the treaty to counter the economic threat of large states that do not comply with human rights or do not regulate their corporations to comply. Also, there would be an economic incentive in adhering to the treaty in regard to winning foreign direct investment bids from host countries. E.g. if a host state invites bids to foreign direct investment, the home state could allow their corporations to be sued as a bargaining tool. The home state may have a competitive advantage in terms of having a better chance to win concessions for foreign direct investment in the host country than a country that does not provide access to justice for victims of the host country.[1508]

In regard to enforcement, Denmark is likely to support universal jurisdiction in a business and human rights treaty considering the Danish NAP's view that enforcement of companies' violation of human rights should be addressed on the international level.[1509] On the other side of the coin, it could give rise to resistance from the U.K. that expressed overall reluctance to regulate corporations on the international level as stated in the Human Rights Council upon the voting of the treaty proposal. However, considering the above findings that the U.K. and Denmark have both ratified the ICC and exercise universal criminal jurisdiction while there is a lack of cases on universal civil jurisdiction, it is likely they would at least consent to jurisdiction over corporations in regard to gross human rights abuses. This is especially the case when the claimant would otherwise face a denial of justice by being unable to bring the case in another domestic court.[1510] Moreover, the close relationship between criminal sanctions and civil remedies is confirmed by the *action civile* recognised in Denmark among

[1507] Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARVARD BUSINESS REVIEW (December 2006).
[1508] Interview with Clinical Professor of Law Tyler Giannini, co-counsel in Alien Tort Statute lawsuits representing victims of human rights abuse, Harvard Law School, International Human Rights Clinic, in Cambridge Mass. (January 27, 2017)
[1509] *See supra* chapter 5.
[1510] Donovan & Roberts, *supra* note 1444, at 147.

many civil law states as presented above. Also, the U.K. and the EU are now participating in the OEIGW sessions which indicates a more positive stance for business and human rights regulation on the international level than at the first OEIGW session.

Treaty Recommendations from a TWAIL Perspective

From a TWAIL perspective, a normative framework for meaningful legal action against business-related human rights harm would provide 1) Reinforcement of human rights governance capacity over MNCs in host states 2) Democratic inclusion that gives voice to host state local communities 3) Access for Third World communities to enforce the measures.

1) Reinforcement of human rights governance capacity over MNCs in host states.

In order to work towards reinforcement of human rights governance capacity over MNCs in host states, not only states but also non-state actors must have direct international human rights obligations. TWAIL advocates for institutionalization of transnational responsibility so that international law holds the violator, whether it be a state, corporation or institution, responsible when its acts results in the human rights violations of citizens of other states.[1511]

Nothing prevents states from imposing international legal responsibilities for human rights directly on non-state actors.[1512] The U.S. Nuremberg Military Tribunals after World War II have affirmed that legal entities have obligations under customary international law.[1513] Corporations and international financial- and economic organisations are also involved as international legal personalities in international economic law, international trade law, and international financial law. As discussed above, a treaty framework starting with a specialized treaty on gross human rights violations has a chance of achieving support from the Global North. On the face of it, focus on gross human rights abuses may not correspond with TWAIL that advocates for greater attention to socio-economic rights so they are fulfilled on equal footing with civil and political rights.[1514] However, although gross human rights abuses are generally perceived as linked to civil and political rights, a treaty aimed at corporations on gross human rights abuses may also cover economic and social rights violations if they are grave and systematic, e.g. violations taking place on a large scale or

[1511] Chimni, *An Outline of a Marxist*, *supra* note 158, at 27.
[1512] UNGPs 2, Commentary, at 7.
[1513] United States v. Krauch (the IG Farben Case), 15 AD 668, 673 - 676 (U.S. Nuremberg Military Tribunal July 29, 1948); See *supra* chapter 2 text accompanying note 247.
[1514] *See infra* text accompanying note 1551.

targeted at particular population groups. [1515] Case examples analysed above [1516] of such violations, including the Dalit women subjected to the Sumangali scheme's forced- and bonded labour; the workers from poverty-stricken rural areas subjected to forced labour and mass killings in Rana Plaza; the indigenous Amazon rainforest communities subjected to toxic waste contamination of their land and water; the Ogoni tribe subjected to polluting oil-leaks and extrajudicial killings, and the Porgera community subjected to brutal sexual and physical assaults and forced displacement, constitute gross violations of the right to life, development, health, food and clean water exacerbating poverty and hunger.[1517] Subsequent specialized treaties may extend to other areas of economic and social rights and civil and political rights.

Direct corporate obligations in a business and human rights framework from a TWAIL perspective may prescribe that corporations must (a) prevent committing human rights violations by performing due diligence, impact assessments, and adjusting policies and practices providing special attention to the subaltern and vulnerable groups, including women, children, disabled people, indigenous peoples, and migrant workers (b) protect human rights against violations by third parties including governments, multilateral institutions, business partners, suppliers and other non-state actors providing special attention to operations in states with weak human rights governance (c) provide mechanisms for redress for human rights violations they have caused or contributed to giving special attention to accessibility for affected communities.

In regard to (a) the treaty may include the proposal of the OEIWG that MNCs must adopt and implement internal policies, risk identification, and review mechanisms to respect internationally recognised human rights throughout their supply chains.[1518] A corporation might have to establish suitable facilities to avoid violating local communities' areas, e.g. a treatment facility rather than dumping pollutants. An obligation to prevent committing human rights violations therefore implies not simply a negative act of refraining but also a positive activity that may cost the company resources. Representatives of third world communities[1519]

[1515] UN OHCHR, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 6 (2012) http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.
[1516] *See supra* chapter 1 (Porgera), chapter 1 & 3 (Rana Plaza), chapter 3 (Amazon & Ogoni)), chapter 4 (Dalit).
[1517] UN OHCHR, THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 6 (2012) http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf.
[1518] Chairmanship of the OEIWG, *supra* note 1280, at 6.
[1519] *UN's Historic Business and Human Rights Treaty Resolution Falls Short in Providing Relief for Victims,* EARTHRIGHTS INTERNATIONAL, https://earthrights.org/media/uns-historic-business-and-human-rights-treaty-resolution-falls-short-in-providing-relief-for-victims/ (last visited Feb. 25, 2018).

and the EU[1520] take the stance that an international binding instrument cannot be limited to transnational corporations as many abuses are committed by domestic companies. In response, Global South states argue that companies at the domestic level are already regulated under domestic law.[1521] As discussed above, many host states are reluctant to hold local companies liable even in host states where domestic regulation is in place and therefore the treaty must fill legal gaps where national law does not suffice. Otherwise, local and state-owned companies as well as the global supply chain of MNCs including their subcontractors and financiers would be free to act with impunity. However, the proposal must focus more on balancing equally the power of the Global North and the Global South in trade and between large and small corporations to agree with TWAIL. Large MNCs may be at an advantage for implementing treaty provisions in their business operations because they perhaps have more resources than small companies. Therefore, it is necessary to balance requirements, e.g. compulsory due diligence, in proportion to a company's size and turnover. A due diligence requirement could for example be limited to larger businesses that have, as defined by the OECD: more than 250 employees and an annual turnover exceeding EUR 50 million and/or a balance-sheet valuation exceeding EUR 43 million in total assets so as to not impose a disproportionate burden on smaller businesses.[1522]

In respect to obligations under (b), taking into account Shell Nigeria[1523], Chiquita[1524], Barrick Gold Mine[1525] and the power of MNCs, a treaty may include a positive obligation for businesses to help protect human rights against violations by third parties. Not taking action may incur the concept of complicity occurring in different forms where the company knowingly contributed to another's violation of human rights.[1526] The UN Global Compact has assigned direct complicity[1527] to a situation where a business' goods or services are used to carry out human rights violations[1528] or where the business assists in forced relocation of

[1520] OEIWG Rep. First Session, ¶ 13.
[1521] OEIWG Rep. Third Session ¶ 27.
[1522] OECD, *Small and Medium-sized Enterprises: Local Strenght, Global Reach*, Policy Brief (June 2000), at 2.
[1523] *See supra* text accompanying note 545.
[1524] *See supra* text accompanying note 582.
[1525] *See supra* text accompanying note 125.
[1526] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, UNHRC, 8th Sess, UN Doc A/HRC/8/16 (2008), at 9 [hereinafter *Clarifying Complicity*].
[1527] *Principle 2: Human Rights*, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2 (last visited Apr. 24, 2018).
[1528] See for example In Re South African Apartheid Litigation, 56 F. Supp.3d 331 (S.D.N.Y. 2014); United States v. Krauch (the IG Farben Case), 15 AD 668 (U.S. Nuremberg Military Tribunal July 29, 1948).

people to carry out business activity.[1529] Another form is beneficial complicity where the company is enriched by third party violations, e.g. extrajudicial killings and rape committed by government military and –police to crush down opposition to business' operation or violation of safety- and building regulations to cut costs in a supplier factory leading to fatal accidents. The most controversial type of complicity[1530] is silent complicity which has been listed as a form of aiding and abetting liability[1531] constituted by omitting to fulfil an actual positive obligation to come to the victims' help and assistance, e.g. neglecting to put pressure on abusive governments when systematic and continuous human rights violations are carried out where the business operates.[1532] Such obligation goes beyond merely the negative duty to do no harm.

Accordingly, a binding business and human rights framework may establish a positive duty for corporations to speak out publicly and intervene with the appropriate state authorities to try and prevent and stop the violation. Also, when corporations hire private security companies to protect corporate property, it could be considered to establish an obligation for the security personnel to protect corporate stakeholders, e.g. communities in vicinity of the business, against third party violations. A corporation may have a positive duty to take action against third parties where there are specific links connecting the corporation to the human rights violation. In determining whether there is a sufficient link, it is necessary to look at connections of the passive kind as Wettstein [1533] suggests referring to the UN High Commissioner for Human Rights' choice of causation test: "A company is complicit in human rights abuses if it authorises, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it."[1534] Directly or indirectly benefitting from the human rights abuse or a special relationship between the company and either the victims or the perpetrator may suffice to constitute an association. E.g. a host government may perpetrate human rights in order to protect a company's continuation of its operations.[1535]

[1529] *Clarifying Complicity*, *supra* note 1526, at 18.
[1530] Florian Wettstein, *Silence as Complicity: Elements of a Corporate Duty to Speak out against the Violation of Human Rights, in* BUSINESS AND HUMAN RIGHTS 105, 107 (Wesley Cragg ed., 2012).
[1531] *Clarifying Complicity*, *supra* note 1526, at 12.
[1532] According to Amnesty, the UK High Commissioner had warned Shell's Brian Anderson that "the [Nigerian] government will make sure that he [Ken Saro-Wiwa] is found guilty", cf. *One Woman vs. Shell, supra* note 830.
[1533] Wettstein, *supra* note 1530, at 114.
[1534] UN GLOBAL COMPACT OFFICE & OHCHR, EMBEDDING HUMAN RIGHTS IN BUSINESS PRACTICE 19 (2004). The UN OHCHR refers to the ATS case John Doe et al. v. Unocal Corp, 395 F.3d 932 (9th Cir. 2002) where the federal court of appeals applied the causation test.
[1535] Wettstein, *supra* note 1530, at 121.

Corporate obligations under (c) in a treaty framework, will be discussed in section 3) below.[1536]

For direct institutional obligations, TWAIL envisages a change in regard to the conditions that IFIs set to borrowing states on following neo-liberal economic policies to the advantage of corporations in the Global North.[1537] The power imbalance in the international economic system could be addressed by including provisions in the treaty aimed at international financial and economic institutions to implement human rights in lending practices and trade- and investment policies.[1538] For example, it would support development and human rights governance in third world states if IFIs were under an obligation to only finance states or businesses if their operations and activities comply with environmental and social standards. For that purpose the model of the International Finance Corporation (IFC), the private sector arm of the World Bank Group, could be adopted by other IFIs. [1539] The model features an environmental and social policy framework with eight Performance Standards covering risk management, labor standards, pollution prevention and biodiversity conservation, community health and safety, and cultural heritage.[1540] The IFC commits itself to conduct a social and environmental review of a business project as part of its overall due diligence, including the commitment and capacity of the client to manage expected impacts and ability to identify third party risks, e.g. a government agency in a regulator capacity or contract party.[1541] A similar model could be implemented in a business and human rights treaty making these social and environmental policies mandatory for all IFIs in order to anticipate and avoid, or minimize and compensate for, adverse impacts on workers, communities, and the environment.

[1536] *See infra* text accompanying notes 1589-90.

[1537] Chimni, *International Financial Institutions and International Law*, *supra* note 1188, at 31 – 63.

[1538] The OEIWG also advocated for applying the binding instrument to international financial institutions, *see supra* text accompanying note 1279.

[1539] INTERNATIONAL FINANCE CORPORATION, IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2 (2012), http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards

[1540] The model's achievements have been commended by the independent Compliance Advisor/Ombudsman finding "pockets of excellence from which lessons can be drawn" but also flaws because the effectiveness of the soft law standards depends on IFC's incentive support and client company commitment, cf. COMPLIANCE ADVISOR OMBUDSMAN, REVIEW OF IFC'S POLICY AND PERFORMANCE STANDARDS ON SOCIAL AND ENVIRONMENTAL SUSTAINABILITY AND POLICY ON DISCLOSURE OF INFORMATION V & 2 (2010) http://www.cao-ombudsman.org/documents/CAOAdvisoryNoteforIFCPolicyReview_May2010.pdf

[1541] INTERNATIONAL FINANCE CORPORATION, POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 5 (2012), https://www.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES

In respect to state obligations, it would support host states if all states were obligated to adopt measures to ensure businesses under their jurisdiction respect human rights throughout their supply chains.[1542] In this way home states could be required to ensure that MNCs adopt human rights and environmental impact asessments as well as periodical reporting to prevent and avoid human rights violations throughout their supply chains. Civil and criminal liability could be established for a company's failure to act with due diligence. Also it could be a requirement for states to ensure that human rights are considered when entering public procurement contracts and other contractual engagements with businesses.[1543] States may also be required to address TWAIL's concern that international trade- and investment law is biased against third world countries. Such requirement could entail assessing possible human rights impacts before setting terms in international investment agreements by "hardening" certain relevant soft law provisions in the UNGPs and OECD Guidelines. In alignment with UNGP 9 it could be required that terms of an international investment agreement may not constrain states from implementing new human rights legislation or put them at risk of binding international arbitration if they do so. In reference to the OECD Guidelines[1544], a business and human rights treaty could also require states to refrain from handing out exemptions to businesses from regulation related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues. Another way to address the power imbalance between host state and investors would be for the treaty to prescribe a model of legally binding human rights obligations that respond to development goals of host communities to include in international investment treaties. It could be a requirement in the treaty for home states entering investment agreements that they must provide technical or financial assistance to host states on implementing, monitoring and enforcing the model.[1545] In addition, investment jurisprudence[1546] produced by tribunals including the ICSID and UNICITRAL has been accused of being pro-investor, and neglecting the environmental and human rights concerns of Third World peoples.[1547] A business and human rights treaty could

[1542] UNGPs 2, Commentary, at 7; Chairmanship of the OEIWG, *supra* note 1280, at 5-6.
[1543] Chairmanship of the OEIWG, *supra* note 1280, at 6.
[1544] OECD GUIDELINES, *supra* note 3, at Chapter II, General Policies, Paragraph 5; Commentary on General Policies, Paragraph 6.
[1545] Such a suggestion was made by former SRSG Ruggie but as a non-binding encouragement to states that have significant trade and investment between them, see Report of the UN Human Rights Council, *supra* note 1126, at ¶¶ 44-45.
[1546] *See supra* chapter 2.
[1547] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 271-72 (2017); UNCTAD, TRADE AND DEVELOPMENT REPORT XIV (2017).

include a provision aimed at arbitral institutions, to actively intervene to ensure that frivolous litigation on the basis of expansionary claims is not brought against developing states.[1548]

States' may also be obligated to address the loss of policy space restricted by WTO agreements to fulfill the visions of TWAIL. TWAIL criticizes that in particular, agricultural markets are dominated by elimination of farm subsidies, reduction of export subsidies, tarification, and reduction of tariffs on agricultural products placing the livelihoods of local farmers at risk. At the same time, MNCs mainly from industrialized states benefit from protected subsidies allowing them to sell on the world market at below-production costs and undercut the price of Third World agricultural products. As a result, many Third World states are unable to compete on the global markets with their exports.[1549] In alignment with UNGP 10, which is aimed at the WTO among other multilateral institutions, and the views expressed by some developing countries,[1550] a business and human rights treaty could commit states to refrain from adopting measures in trade considered harmful to the development of host developing states. Also TWAIL has observed that the UN, Western NGOs, and NGOs in the South funded by Western foundations have given priority to civil-political rights over socio-economic ones in Third World states.[1551] The treaty must emphasize the responsibility of states to retain adequate policy space to protect economic and social rights, including the right to food, when adopting trade- and investment agreements and entering contracts with businesses.

2) Democratic inclusion that gives voice to host state local communities

From a TWAIL point of view, international treaty negotiations must consider their impact on certain groups in social life in particular workers, women, children, and indigenous peoples.[1552] E.g., although the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) [1553] is not a legally binding instrument under international law, a treaty could codify businesses' human rights obligations in regard to indigenous peoples by referring to the UNDRIP. Also, Mutua advocates for a victim-centered process for standard setting in

[1548] MUTHUCUMARASWAMY SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 408-09 (2015).
[1549] Simons, *supra* note 1110, at 102.
[1550] Communication from China, Cuba, India, Kenya, Pakistan, and Zimbabwe to the WTO Working Group on the Relationship between Trade and Investment, WTO Doc. WT/WGTI/W/152 (Nov. 19, 2002). file:///C:/Users/TEMP/Downloads/W152.pdf.
[1551] Chimni, *International Institutions*, *supra* note 103, at 11-12. Makau Mutua, *Standard Setting*, *supra* note 1131, at 593.
[1552] Chimni, *An Outline of a Marxist*, *supra* note 158, at 13.
[1553] G.A. Res. 61/295, annex, UN Declaration on the Rights of Indigenous Peoples (Sep.13, 2007).

human rights. He emphasizes TWAIL's project of subalternity in which those who do not fit the frames of Eurocentrism and modernity can be heard and become full participants in their governance.[1554] TWAIL finds that marginalized groups from developing countries tend to be highly underrepresented while the growing significance of greater civil society participation in international organisations is dominated by well-organised and well-funded NGOs. Chimni and Mutua observe the negative connotations for the pursuit of the interests of poor and marginal groups in the developing world when human rights standard setting is owned by diplomats and non-state actors of means.[1555] Paradoxically, it is rarely the victims that own the standards relevant to their plight.[1556] Mutua recommends a human rights standard setting to be based on the widest possible coalitions and consultations from formulation to implementation so the most diverse communities can claim ownership.[1557] E.g. UNDRIP was made possible and drafted by indigenous peoples that benefitted of the instrument but it also experienced long delays in adoption. Mutua suggests that indigenous peoples' NGOs did not adequately ally themselves with key states. To expedite negotiations, the adoption of the Declaration of Human Rights Defenders supported by Norway shows that a partnership between NGOs and one or more states can be indispensable and lead other states to support an international accountability instrument.[1558]

Chimni shares Mutuas understanding that consent to a treaty must be provided not only by the state but also the people that constitute it. Chimni suggests participatory democracy and calls for the greater representation of subaltern classes in the negotiation teams sent by states in international negotiations. He agrees with Johnston's advocacy for keeping legal norms "in balance with institutional and political realities"[1559] and emphasizes the introduction of a people-based social impact assessment system. Such an assessment would require that a treaty be negotiated and ratified with the consultation and consent of the elected representatives of the people so as to promote transparency and allow for dissent and challenge the existing distribution of power.[1560] As argued by Pollis and Schwab, only one interpretation of human rights based on Western political philosophy may not be successfully

[1554] Mutua, *What Is TWAIL? supra* note 104, at 502-503. Otto, *supra* note 841, at 348 – 359.
[1555] Mutua, *What Is TWAIL? supra* note 104, at 578. Chimni, *International Organizations 1945 – Present*, *supra* note 1115, at 125.
[1556] Mutua, *Standard Setting*, *supra* note 1131, at 578.
[1557] *Id.*, at 584.
[1558] *Id.*, at 597-98.
[1559] Douglas M. Johnston, Consent and Commitment in the World Community: The Classification and Analysis of International Instruments 58 (1997).
[1560] Chimni, *An Outline of a Marxist*, *supra* note 158, at 13.

applicable to non-Western areas.[1561] Chimni advocates for treaty implementation through the national deference principle which provides states with autonomy to implement their obligations with greater deference to national interpretations.[1562] Such flexibility would allow the people of the South to put pressure on their governments to adopt interpretations that safeguard their interests. To this end, Chimni recommends that the *rebus sic stantibus* doctrine must be integral to a treaty so that the invocation of the clause would draw on international human rights law and depend on both the social consequences of implementing a treaty rule and on the collective resistance to it by affected peoples.[1563]

According to Mutua, the democratic deficit within treaty negotiations is enhanced by IGOs favouring the more resourceful powerful international NGOs over the poorer and relatively under-resourced Southern NGOs that are more likely to be connected to the people. For the voice of the South to become more effective and influential in advocating for their position in the UN, Mutua recommends third world states to involve their local NGOs and academics in official delegations. Civil societies and universities often have well-established contacts with their counterparts in the North and are increasingly becoming more adept at lobbying in the UN which could strenghten the voice of the state in human rights norm setting.[1564]

3) Access for Third World communities to enforce the measures

As discussed above, an international framework provides a chance to prescribe accountability mechanisms directly accessible to victims and affected communities. Currently, obstacles to legal remedy include corruption, fear of persecution, lack of resources and legal standing, procedural and financial barriers to litigation including *forum non conveniens* motions, non-enforcement actions and prohibition on conditional fee agreements for legal aid. If consensus to solve these issues in a treaty could be reached, the member states would offer equally attractive forums applying the same procedural and substantive legal framework. A long term goal may be to offer access to remedy for Third World communities in the shape of an international civil court[1565] with jurisdiction over international human rights violations and

[1561] Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, *in* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES 1 (Adamantia Pollis et al. eds., 1979).
[1562] Bhupinder Chimni, *India and the Ongoing Review of the WTO Dispute Settlement System: A Perspective*, ECONOMIC AND POLITICAL WEEKLY, Jan. 30, 1999, at 264. E.g. the U.S. has incorporated the national deference principle into the WTO Anti-Dumping Agreement, art. 17.6.
[1563] Chimni, *An Outline of a Marxist*, *supra* note 158, at 14-15.
[1564] Mutua, *Standard Setting*, *supra* note 1131, at 605-07.
[1565] Martin Scheinin, *International Organizations and Transnational Corporations at a World Court of Human Rights*, 3 GLOBAL POLICY JOURNAL 488 (2012); Maya Steinitz, *The Case For An International Court of Civil Justice*, 67 Stan. L. Rev. 75 (2014).

equal representation from the Global North and the Global South. However, such an establishment may take decades considering other experiences where states have submitted their own individuals to binding international judicial scrutiny, namely the International Criminal Court initially suggested at the Paris Peace Conference in 1919 and ultimately began functioning in 2002.[1566] If nations were to give an international tribunal the power to review domestic court decisions, domestic courts would have to comport with the principles underlying international decisions in order to avoid reversal. E.g., in the context of the EU, member nations have agreed that national high courts must certify questions on the interpretation of European Union law to the Court of Justice of the European Union. There is nothing like this relation between U.S. courts and any international tribunal. In particular, the International Court of Justice, and its predecessor have always been limited in their jurisdiction to disputes between nations, and for that reason alone could never accept an appeal from cases of almost any type decided by the U.S. Supreme Court.[1567]

The treaty could point to the domestic remedies of the jurisdiction where the corporate defendant or corporate defendants is or are seated as a principal rule. Resources could be used to strengthen and expedite national courts that deal with these cases and better educate national judges and prosecutors about the jurisprudence of a treaty body and state obligations.[1568] If the victim is compelled to service out of jurisdiction anyway,[1569] a specialized gateway could be included in the treaty so suit can be filed in any other member state of the treaty. Such an arrangement would require the chosen court to exercise universal jurisdiction. Universal jurisdiction is based solely on the nature of the violation, regardless of where the crime was committed, the nationality of the perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction. Then there may be a case of the Western courts deciding the majority of disputes which could be perceived by the Third World as another example of imperialism, however for TWAIL, assurance of access to justice is the main priority.[1570] The experience with the American ATS shows friction with other nations when U.S. federal courts subject companies and indviduals around the world to

[1566] Rome Statute, Jul. 17, 1998, UN Doc A/CONF.183/9.
[1567] ROGERS, *supra* note 1385, at 32.
[1568] The legal aftermaths of the Rana Plaza disaster demonstrate barriers to civil justice in Bangladesh such as stalling in court bureaucracy leading the victims to file suits in Canada and the U.S. *See supra chapter 3* text accompanying note 413.
[1569] In *Kiobel v. Royal Dutch Petroleum*, filing suit in Nigeria would not have been an option for the Nigerian plaintiffs, Esther Kiobel et. al.. against the Nigerian, Dutch, and British Shell corporations. Esther Kiobel had been subject to political persecution, threats of kidnapping and execution from the Nigerian government and ultimately obtained asylum status in the U.S. and became a U.S. citizen. *See supra* text accompanying note 830.
[1570] *See supra* text accompanying notes 838-40.

U.S. jurisdiction without their knowledge or consent. However, if universal jurisdiction is mutually agreed from the outset, subject to conditions and only envoked as a last resort, it is more likely to be endorsed by states. As demonstrated above[1571] several states have already signed conventions, conducted investigations, commenced prosecutions and completed trials based on universal jurisdiction.

Also, TWAIL endorses universal jurisdiction as long as it is controlled in its application and promotes access to justice in international legal processes. Controlling its application means to prevent producing conflicts of jurisdiction, subjecting persons to multiple persecutions for the same conduct, politically motivated harassment, and denial of justice.[1572] It may be specified in the treaty that universal jurisdiction is applicable to gross corporate human rights abuses which may cover civil and political rights as well as socio-economic rights.[1573] The Princeton Project on Universal Jurisdiction developed a set of Principles[1574] drafted and revised by a TWAIL scholar[1575] that provide solutions for governing responsible use of universal jurisdiction in an international convention. The Princeton Principles have had success on the international level including endorsement by the former UN High Commissioner for Human Rights, Mary Robinson[1576], and transmitted in a Note Verbale as a document of the UN General Assembly in connection with the establishment of the International Criminal Court.[1577] Some of these principles may be adopted in a business and human rights framework for an effective administration and enforcement of universal jurisdiction. In terms of international cooperation, the court exercising universal jurisdiction may have a possibility to seek judicial assistance to seize and freeze assets located in another jurisdiction as well as exchange of information for the prompt identification, prosecution and enforcement of relevant judicial orders. International due process norms must be followed when exercising universal jurisdiction including the rights of the accused and victims, the fairness of the proceedings and the independence and impartiality of the judge.[1578] The treaty must also specify a resolution for competing national jurisdictions and prevention of multiple

[1571] For the U.S., U.K. and Denmark *see supra* text accompanying notes 1408 & 1441 & 1466. Other nations include Australia, Belgium, Canada, Finland, France, Germany, Ireland, Israel, Malaysia, Senegal, and Spain.
[1572] Mahmoud Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VIRGINIA JOURNAL OF INTERNATIONAL LAW 82, 154-5 (2001).
[1573] *See supra* text accompanying note 1516 for examples.
[1574] PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), https://lapa.princeton.edu/hosteddocs/unive_jur.pdf [*hereinafter the Princeton Principles*].
[1575] *Id.*, at 11 (Professor M. Cherif Bassiouni).
[1576] Princeton Principles, at 15.
[1577] U.N. GAOR, 56th Sess., Agenda item 164, U.N. Doc A/56/677 (Dec. 4, 2001).
[1578] Princeton Principles, principle 4.

prosecutions.[1579] In the event that a corporation is exposed to multiple proceedings for the same conduct, the court with the closest territorial connection should be accorded priority. If there is no territorial connection, the question should be dealt with as one of conflict of jurisdiction and determine the appropriate forum using an aggregate weighing of factors. As a last resort a dispute arising out of the exercise of universal jurisdiction may be submitted to the International Court of Justice.[1580] To avoid negative outcomes, a member state court's denial to exercise universal jurisdiction could be submitted by the plaintiff to final decision by a business and human rights treaty body committee with equal representation of Western and Third World states. The committee would not have authority to decide a case but to ensure that jurisdiction is not rejected contrary to the treaty and that a victim has access to one member state court within the limits of the treaty.

Also such a treaty body committee may function as a supervisory mechanisms to monitor compliance with investigation powers such as what the Committee on Enforced Disappearances (CED) and the Committee on the Elimination of Discrimination against Women (CEDAW Committee) have [1581] as well as competence to examine individual complaints in the lines of the Human Rights Committee of the ICCPR. Procedures in regard to the treaty could be provided in an Optional Protocol including an inquiry procedure as well as a complaints procedure accessible to victims and well linked to civil society. E.g. the CEDAW optional protocol enables the CEDAW Committee to conduct inquiries into serious and systematic violations of the convention as well as receiving complaints from individuals and groups.[1582] The CEDAW optional protocol enabling the CEDAW Committee to conduct inquiries and receive complaints has achieved substantive state participation with a total of 109 ratifications and 13 UN Member states who have signed but not ratified the protocol.[1583] A treaty committee could collaborate with national human rights institutions and ombudspersons as well as NGOs to help monitor the treaty and ensure victims'participation. According to Mutua, the involvement of NGOs is essential to ensure an "effective,

[1579] *Id*., principles 8 & 9.
[1580] *Id*., principle 14.
[1581] McCorquodale, *supra* note 1295, at 1:28:20.
[1582] *What is an Optional Protocol,* UNITED NATIONS WOMEN http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm (last visited Feb. 26, 2018).
[1583] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,* UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en (last visited Feb. 26, 2018).

innovative, aggressive, and open committee" [1584] overseeing a strong instrument. For instance, the Convention on the Rights of the Child, standing out as being almost entirely the product of NGOs, has been accentuated as a successful example of an ambitious instrument coupled with a strong treaty body exceeding the expectations of its sponsors. [1585] One committee alone monitoring compliance with a business and human rights framework may not be effective considering that there are around 80.000 MNCs worldwide, with ten times that number of subsidiaries, and millions of national firms. As SRSG Ruggie points out, existing treaty bodies struggle to keep up with monitoring the limited number of states even dealing only with a specific set of rights or one affected group. [1586]

In order to meet this challenge, companies may be required to report on compliance with the treaties as well as carrying out human rights due diligence. States may have an obligation to uphold these requirements for companies. A due diligence requirement would also benefit corporations as a defense that it complies with the treaties. It may also be considered to require MNCs to contribute financially to the work of the treaty supervisory body since adequate staff with expert-knowledge would be necessary to establish and strengthen the treaty body. [1587] Also, the UN has already established trust funds for access to justice, e.g. the UN Voluntary Fund for Victims of Torture (UNVFVT). The trust fund has operated for nearly 40 years and has successfully helped victims of torture with access to justice before courts in Belgium, Switzerland, the U.S. and the U.K. Among the donors are 20 UN Member States with the U.S., Denmark, and Germany providing the highest contributions and Denmark increasing its contribution in 2018. [1588] Considering that several cases of transnational human rights litigation have involved torture, seeking funding from the UNVFVT could be an option for a business and human rights treaty body. Adequate funding is crucial for follow-up and oversight with states, webcasting, webresources and promotion of the decisions and the activities so that they are accessible to states that want to comply and to civil society that help states comply. Fact finding and site visits could be an authority of the body but such missions would need funding for transport, lodgings, recording, translation, and witness per diems. Inside negotiations for friendly settlement is a good way for bringing

[1584] Mutua, *Standard Setting, supra* note 1131, at 619.
[1585] Interview by Makau Mutua with David Johnson, Office of the High Commissioner for Human Rights, Geneva, Switzerland (Nov. 4, 2002).
[1586] John Ruggie, *A Business and Human Rights Treaty Update*, HARVARD KENNEDY SCHOOL, (May 1, 2014) https://business-humanrights.org/sites/default/files/media/un_business_and_human_rights_treaty_update.pdf
[1587] McCorquodale, *supra* note 1295, at 1:28:40.
[1588] *Access to justice is a form of rehabilitation for torture victims,* UN OHCHR (May 24, 2013), http://www.ohchr.org/EN/NewsEvents/Pages/RehabilitationForTortureVictims.aspx.

out change but requires resources. It would also require additional resources to provide for translation of key decisions of the treaty body into different languages to better engage with local authorities in order for the national judges to be able to apply the treaty in the different disputes.

In addition, a treaty framework could require the establishment by corporations of an operational-level grievance mechanism enabling remediation such as what the SRSG recommends in UNGP 22. For instance, such mechanism was established by Barrick Gold in Papua New Guinea to remedy brutal physical and sexual assaults conducted by mining security guards while patrolling on or near mine property against men and women of the Porgera community. However it has been evaluated as having serious design and implementation flaws.[1589] From a TWAIL perspective, a company-level remedial mechanism must address inherent structural power imbalances between the company and rights-holders. It has been documented that unequal bargaining power left unaddressed, may result in the company offering rights-holders an inadequate "take it or leave it" remedy package which they may feel unable to influence or contest.[1590] Therefore, a company-level mechanism must center rights-holders and communities at each step in the process.

Subconclusion

The final goal for regulating business and human rights is an international human rights framework because it would improve the current situation for states, corporations and third world communities. The substantive suggestions presented above for the treaty proposal address equally the concerns of Global North states and the business community as well as the point of view of TWAIL including Global South states and the communities whose rights are being violated. States would benefit from mutually agreed legislation and jurisdiction rather than facing infringement of sovereignty. Also, a treaty could help compliant states counter the economic threat of non-compliant states. U.S. adherence depends largely on the political situation pointing to a need for political support from corporations especially following the last presidential election. This support could be developed considering the benefits an international treaty would offer corporations including lowering legal costs with an international forum and eliminating unfair competition with common human rights obligations for private actors. Considering that the U.K. and Denmark have shown steady

[1589] THE HUMAN RIGHTS CLINIC AT COLUMBIA LAW SCHOOL & THE INTERNATIONAL HUMAN RIGHTS CLINIC AT HARVARD LAW SCHOOL, RIGHTING WRONGS? BARRICK GOLD'S REMEDY MECHANISM FOR SEXUAL VIOLENCE IN PAPUA NEW GUINEA 22 (2015).
[1590] *Id.*, at 3.

commitment to apply human rights law even before incorporation and there has been less controversy over international law than in the U.S., a business and human rights treaty may fare better in Denmark or the U.K than in the U.S. Also, the European Parliament has pronounced that there needs to be a binding business and human rights instrument. Ultimately, entering a business and human rights treaty is a matter of a cost or risk benefit analysis for the states between maximization of national self-interest vs. the consequences of isolationism from a world of legal institutions such as damage to reputation and possible disempowerment of international institutions in their ability to constrain other states.

Chapter 7 – Conclusion

Summary of arguments

The aim of this thesis has been to assess the effectiveness of the current options for transnational corporate liability in regard to human rights comparing the United States, England, and Denmark using a critical perspective of Third World Approaches to International Law (TWAIL). Furthermore the thesis aimed to suggest a sustainable solution to the diminished governance capacity of host states, inclusive of Third World communities by development of international law norms and its institutions. The research question was explored in a number of subset research questions presented in the introduction.[1591]

For each chapter, I have identified different actors holding corporations accountable for human rights obligations including states, human rights advocates, victims of human rights violations, labour unions, trade organisations, IGO, NGOs, and companies regulating themselves. The issue has evolved because corporations increasingly face human rights challenges in a competitive global business environment across different industries, including the textile sector, the extractive industry, and the oil industry to name a few examples.

It was discovered that postmodern polycentricity is the most expedient theoretical approach to business and human rights regulation because there is a need for a multiplicity of legal orders in national and international communities to address the issue. Using TWAIL as a normative framework throughout the thesis helped to place the interests of Third World communities in the centre of meaningful legal action against business-related human rights harm. TWAIL perspectives on women's rights also identified the ways in which the global economy perpetuates poverty by resting on the exploitation of the Third World including a cheap unregulated workforce of which the majority are women. Moreover, it was established that TWAIL and feminist legal theory share concepts such as critiquing the exclusion by international law and its reinforcement of a patriarchal and/or colonial legal system. TWAIL and feminist legal theory hereby expose that especially Third World peoples and -women experience human rights abuses without access to justice.

From a legal accountability point of view, it was demonstrated that the current binding international, regional, and domestic human rights frameworks which only bind states to

[1591] *See supra* chapter 1, Research Questions.

protect against corporate abuses does not take into account the reality of certain Third World states' need to attract foreign direct investment by keeping their labour costs low and their regulatory systems powerless. The TWAIL benchmarks added a critical lens to the current corporate human rights obligations and identified their insufficiencies in reinforcing Third World states' governance capacity over MNCs. The assessment of democratic inclusion of host state communities permitted to notice an empowerment of social forces by international human rights law and organizations as well as the presence of a marked domination of the human rights agenda by the transnational capital class (TCC). A democracy deficit sustained by powerful states in the international community prevents the voices of developing states and Third World communities from being heard. In regard to remedy for Third World communities, transnational corporate liability for human rights violations is sidelined in international and regional human rights enforcement mechanisms. While the domestic comparative analysis demonstrated that U.S. and English common law tradition has been more progressive in its case law practise of veil-piercing especially in more recent decisions than Danish civil law tradition, it is clear that the corporate veil poses major obstacles and limitations in pursuing parent company liability through a domestic doctrine in U.S., England, and Denmark. On the domestic level in the host state, claimants often face a denial of justice.

From a judicial accountability point of view, further options for corporations' human rights accountability in the U.S., England, and Denmark were compared. It was demonstrated that in the 1980s, U.S. litigation built a platform that triggered the corporate accountability movement worldwide, however, the more recent U.S. Supreme Court's *Kiobel*[1592] decision significantly restricted jurisdiction under the Alien Tort Statute (ATS) to claims that "touch and concern" U.S. territory. Subsequently, lower courts have been split on the extent to which a tort sufficiently "touches and concerns" U.S. territory and the U.S. Supreme Court closed the option to sue foreign corporations in *Jesner*[1593] especially citing foreign policy concerns. Ordinary tort-based claims could be pursued in place of ATS claims but the increasingly strict interpretation in *Goodyear*[1594] *and Daimler*[1595] to personal jurisdiction must be factored in for foreign corporations. Also, the ATS has the unique advantage of applying international customary norms which is more suitable for human rights claims.

[1592] Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013).
[1593] Jesner v. Arab Bank PLC, No. 16-499 (U.S. Apr. 24, 2018).
[1594] Goodyear Dunlop Tires Operations, S. A. v. Brown 131 U.S. 2846 (2011).
[1595] Daimler AG v. Bauman 134 U.S. 746 (2014).

Contrary to some predictions in existing legal literature, it was demonstrated that human rights advocates have continued ATS claims subsequent *Kiobel* in some cases with success. ATS claims may still continue against U.S. corporations subsequent *Jesner* provided that the "touch and concern" requirement is fulfilled by demonstrating a U.S. focus and relevant conduct in the U.S. In both England and Denmark, jurisdiction is less complicated than in the U.S. because it is determined by the Brussels I Regulation[1596] granting jurisdiction where the corporation or its branches or subsidiaries are founded or running their principal place of business. Also, by contrast to U.S. courts, European courts can no longer apply the doctrine of *forum non conveniens.* However, the domestic *Chandler* [1597] case and more recent preliminary substantive findings in the transnational *Lungowe*[1598] and *Okpabi*[1599] show that establishing jurisdiction in England also requires the presence of a duty of care to the claimants for the acts of its supplier or subsidiary.[1600] Controlling influence over the business carrying out the human rights harm outside the EU[1601] may suffice for a duty of care while the issuance by the parent company of a human rights policy to the subsidiary does not activate a duty of care[1602] unless the parent explicitly has taken responsibility to oversee its subsidiaries in its human rights policy.[1603] By contrast, jurisdiction has been granted in Denmark even though it could not be proven that the defendant company was liable under the principle of fault.[1604] If the corporation being sued is non-EU based, plaintiffs have better chance of jurisdiction before Danish courts due to the possibility of the exorbitant *quasi-in-rem* jurisdiction.

In regard to choice-of-law, it was established that the English *lex loci damni* approach is less beneficial for plaintiffs than the American or Danish contacts approach. *Lex loci damni* points to the law of the host country while the contacts approach allows courts a discretionary, flexible and policy-oriented approach leaving a better chance to apply the law of the home state. As regards the substantive outcome of cases in the U.S., it was considered more likely for plaintiffs to recover for negligence when the defendant is the parent of a fully

[1596] Regulation (EU) No 1215/2012 of the European Parliament and of The Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (COM (2012) 1215 final (12 December 2012)). Art. 4 (1) and art. 63.
[1597] Chandler v Cape plc., [2012] EWCA Civ 525 (Eng.).
[1598] Lungowe and others v. Vedanta and KCM [2017] EWCA Civ 1528 (Eng.).
[1599] HRH Emere Godwin Bebe Okpabi and others v. Royal Dutch Shell Plc and another [2018] EWCA Civ 191 (Eng.).
[1600] *Okpabi*, EWHC 89 (Eng.);
[1601] *Young*, EWCA Civ 1130 (Eng.); *Vava and others*, EWHC 2131 (Eng.).
[1602] *Okpabi*, EWHC 89 (Eng.).
[1603] *Lungowe*, EWHC Civ. 1528.
[1604] Ugeskrift for Retsvæsen (UfR) [Supreme- and High Court Reports] 2010 p. 2717 V (Den.).

owned subsidiary rather than connected by buyer-supplier contract because of the supervision and control in the corporate constellation. Cases in England where a preliminary substantive outcome has been reached do not provide examples of buyer-supplier relationships, however, in a corporate constellation the defendant company must have had a degree of control over the management or supervision of the company where the injury occurred similar to the U.S. Denmark has not yet had a transnational human rights case parallel to the U.S. or the U.K., however, there is some useful precedent from the principles of a similar case, *U 2010.2717 V*. To be liable under the principle of fault the defendant company must have had a degree of control such as taking part in the management or supervision of the company where the injury occurred. It may be more likely to establish such an influence in a parent-subsidiary constellation than in a buyer-supplier constellation.

The comparative analysis demonstrated that jurisdiction for a transnational human rights lawsuit is more likely to be obtained in England or Denmark, regardless of nationality of the corporate defendant, than in the U.S. Furthermore, Denmark and the U.S. are more flexible toward applying the law of their own jurisdiction than England pointing to the law of the host state. Therefore, taking both jurisdiction and choice of law into account of the U.S., England, and Denmark, it appears that Denmark offers a plaintiff the best prospects of access to remedy in a transnational human rights law suit. Applying the TWAIL benchmarks showed on the one hand criticism toward the unilateral application of Western concepts of law for by-passing host state sovereignty and excluding the democratic influence of the Third World on the process. On the other hand TWAIL scholars oppose the use of *forum non conveniens* as to deprive Third World peoples remedy in Western courts because the justice and welfare of Third World communities is a priority from a TWAIL perspective rather than consideration to the sovereignty interests of the Third World ruling elite. TWAIL scholars do not seem to rely on the application of host state law because of the deregulation foreign direct investment has induced. TWAIL primarily appeals to "writing resistance into international law" by including the voices of Third World communities as well as providing coherence, precedence and equal justice for Third World victims regardless of the jurisdiction.

The theoretical framework and the comparative analysis of options of public legal and judicial accountability accentuated the need to explore further solutions for corporations' human rights accountability. Therefore, the second part of the thesis contributed by providing a full picture of the global business and human rights frameworks by assessing private approaches and soft law. The multi-stakeholder initiative (MSI) case study demonstrated on

the basis of interviews and MSI literature efficacy criteria that the TNMS Program has appropriate and relevant standards planned for improving women's human rights. However, criticism from an independent evaluator as well as trade unions suggests that the requirements to the corporations and supply chain partners are not implemented sufficiently. The criticism refers to the hygiene awareness strategy as flawed and lacking progress in enforcement of fair wages, contracts, a workplace free of abuse, and supply chains transparency. The ETI responded that the health-based approach has been successful as an entry point to the spinning mills and that the program has resulted in some workers receiving pay increments and the establishment of work place committees.

The assessment of the joint efforts of ETI and ILO showed that it is a long-term goal to address all the broad systemic problems across the industry several steps upstream the supply chain. Over the course of 2012-2017, the program has reached around 30 out of 1,600 mills in Tamil Nadu. The ILO's support to eradicate the Sumangali scheme since 2012 has resulted in a union complaint in 2016 awaiting response from the ILO Committee and the Indian government. The strategy of the ILO teaming up with other stakeholders, including ETI and brands has proven to intensify the dialogue with the industry associations to change their mind-set on sustainability and social responsibility. H&M recommends doing audits in the spinning mills and reports that the company is currently able to trace back 60% of the yarn to make sure that the suppliers produce fabric made under decent working standards. According to the Danish sourcing house BRICpro that works on production and sustainability with textile factories in India, an important strategy for Western brands is to use economic arguments, e.g. offering greater orders to suppliers that raise standards in production. Also BRICpro recommends establishing a long-term collaboration and being present at the factories and establishing a face-to-face dialogue with managers and owners about codes of conduct. ILO's experience working in garments in India compared to Bangladesh, Pakistan, Cambodia, Vietnam, Jordan, and Lesotho, shows that the governments' willingness to collaborate with MSIs depends on the country's trade policy and their view on labour standards as a competitive advantage. Also, there is more willingness to drive a partnership with the ILO if the government has entered a trade agreement implementing ILO technical standards. A future conclusion of the EU-India FTA may open a window for the ILO to work with India if the EU persists with insistence on labour clauses.

The TWAIL analysis highlighted that the TNMS program and the ILO have not yet resulted in policy-change on the national government level to reinforce India's human rights

governance. However, ILO Better Work has succeeded in collaborating with the Bangladeshi government to amend their labour laws but only after the factory collapse that crushed thousands of workers to death. In terms of democratic inclusion, it was observed that the TNMS Program includes local communities and the ILO has included an Indian trade union. However, there is reluctance to accept such intervention at the governmental level. The TWAIL critique of private regulatory schemes, such as MSIs, shares the views of feminist scholars that gender issues suffer a double marginalization as demonstrated in the case study: they are seen as "soft" issues of human rights and are developed through "soft" approaches to law-making that minimizes states' legal commitments and leave especially Third World women in the unregulated periphery. TWAIL opposes that texts adopted in the non-governmental world cannot be authoritatively and legally applied but relies on voluntary compliance. The case study shows that communities feel disempowered to enforce their rights in spite of MSI community outreach.

The case study underscored the necessity of many different stakeholders working collaboratively across different industries and instigated further examination of soft regulation. It was established on the basis of TWAIL scholarship that a number of the UN Guiding Principles on Business and Human Rights target the international legal system's structural problems that TWAIL points out. However, Global South members of the Human Rights Council and NGOs on behalf of Third World communities have expressed disappointment with the inadequacy of non-binding standards and lack of oversight mechanisms in the UNGPs. Also, TWAIL has expressed profound discontent with reliance on the private sector and the UNGPs relying on businesses to perform due diligence without a legal duty to do so and voluntary state implementation. Considering the interests of TWAIL and the expectations to states in the UNGPs commentary and the book "Just Business"[1605] for implementing the principles, it was concluded that the initiatives taken in the Danish NAP are the best aligned compared to the U.S. and U.K. NAPs. In support of host state governance, Denmark actively contributes to advancing human rights in the World Bank's policies and projects as well as supporting human rights suspension clauses in EU's bilateral free trade agreements. For democratic inclusion of Third World communities, Denmark has provided a platform in the statute-based Mediation and Complaints-Handling Institution as well as the CSR Compass. For access to remedy, the Danish NAP also includes specific plans to look into an extraterritorial civil law remedy mechanism for gross human rights abuses while

[1605] RUGGIE, *supra* note 186.

emphasizing that business and human rights is best addressed on the international level. These considerations correspond with TWAIL's interest in binding enforcement mechanisms and the "transformative potential" TWAIL sees in international law to reconstruct a just legal order for Third World peoples.

However, the Danish NAP is less explicit about including Third World communities in the NAP process compared to the U.S. and the U.K. Similar to Denmark, the U.S. funds human rights policies in World Bank operations thereby contributing to reinforcement of host state human rights governance. By contrast, the U.K. NAP does not mention the World Bank but contributes to host state governance in specific sectors with a soft law land investment due diligence framework. Also, both the U.S. and the U.K. express ambitions of strengthening access to remedy in host states' judicial systems. However, the U.S. NAP appears to have more specific measures planned on enforcement aimed at Third World Communities than the U.K. NAP, including encouraging access to remedy through intergovernmental process and reducing language barriers in the USNCP for the OECD Guidelines. It is however not in the interest of TWAIL that it comes at the cost of home state jurisdiction. Both the U.S. and U.K. NAPs state support of extraterritorial legislation in certain instances but lack concrete measures to break down barriers to transnational human rights litigation. So far, the progress on the NAPs lacks regulation beyond reporting requirements for home state companies operating in Third World states and further steps need to be taken to move the UNGPs from soft law instruments to hard law that addresses business conduct abroad.

TWAIL perspectives on soft law such as MSIs and the UNGPs helped to demonstrate that soft law initiatives can be useful to protect human rights in the near future compared to the process of pursuing a binding treaty. However, from the perspective of Third World women working in global supply chains, soft and voluntary forms of regulation are not satisfactory to counteract the patriarchal and colonial international legal system. According to mainstream international legal scholarship "soft law" is "not law" and TWAIL and feminist scholars helped to demonstrate the gendered consequences of international law's sharp distinction between binding and non-binding obligations. In order to counter the power imbalances, it was concluded that MSIs and UNGPs do not suffice on their own and rights of powerful corporate actors must be mutually matched with enforceable human rights obligations allowing for influence of Third World communities. Therefore, the third part of the thesis explored the potential for regulating business and human rights on the international level using the UN Business and Human Rights Treaty proposal as a point of departure.

The added value of the treaty proposal compared to the current methods of addressing business and human rights was reviewed from a TWAIL perspective. It was observed that setting out obligations with respect to corporations' conduct in an international legal framework may provide more legal certainty and predictability for rights-holders compared to the current situation with scattered legal systems focusing on state human rights obligations and excluding non-state actor accountability. Also, discussions during treaty negotiations indicate strong advocacy for the protection of women and indigenous peoples and enhancing their access to remedy in a treaty. In regard to transnational human rights litigation it was argued that an international treaty could help victims with solving the complications with extraterritorial jurisdiction by breaking down procedural barriers as well as addressing the issue of transposition of Western Law to Third World states which is considered colonial from a TWAIL perspective. For TWAIL, much like feminist legal theory, the corporate social responsibility (CSR) approach would benefit from an additional international legal process adding to the voluntary MSIs' work by providing human rights-holders with an obligatory supervision and verification process through international organisations, such as the UN, and national mechanisms. A treaty creating a level playing field would also benefit good corporate citizens that otherwise suffer competitive disadvantage from non-compliant corporations undermining human rights in order to cut costs. The proposal's suggestion of mandatory contributions to relief funds by corporations would ensure timely redress for victims rather than the past experience with voluntary underfunded compensation trusts.[1606]

Similarly, the treaty proposal addresses Third World communities' concern of the UNGPs being soft law driven by the Global North while many communities in the Global South want hard law and enforcement. As pointed out in the proposal, international obligations would be an advancement from the UNGP's implementation in NAPs since their standards are not uniform and companies could jump from one jurisdiction to another. Since TWAIL advocates for the advancement of socio-economic rights including development in the Third World, the treaty's proposal of mandatory country-by-country tax reporting and making tax payments part of corporations' due diligence requirement would be an added value to the UNGPs. While a treaty should not replace the UNGPs and NAPs, it can contribute with lifting Third World peoples out of the periphery of international law, e.g. by its proposal of "hardening"

[1606] *See supra* text accompanying note 27.

the UNGPs' recommendations on human rights due diligence [1607] and committing the international trade- and investment regime's[1608] and IFIs'[1609] to integration of human rights in the economic governance of Third World States. However, as pointed out by the EU and Third World community representatives, in order for the treaty to not revert the advances of the UNGPs applying to all corporations, the proposal must be extended to local businesses. In this way local communities can rely on international law protection regardless of whether the violator is a local company or an MNC. By focusing only on business on the international level, the treaty exonerates host countries for protecting their citizens from human rights violations.

The comparative analysis of the U.S., England, and Denmark's international law approach demonstrated that if ratified but not incorporated, the treaty may be applied by U.S. courts and Danish courts anyway depending on the political situation. English courts'approach is strictly dualist and indicates that treaties only have domestic effect if incorporated. One exception is the experience with the ECHR showing that English and Danish courts go a long way to fulfil their human rights obligations even while the convention was only signed but not incorporated. Although it was argued on the basis of ICJ and U.S. case law that customary international norms can ripen quite rapidly, it was considered unlikely that business and human rights treaty norms will apply as customary international law in the near future in the U.S. and the U.K. because of the persistent objector doctrine and political branch control in the U.S. By contrast, Denmark is less likely to claim persistent objector not having voted against the treaty and customary international law is applied directly in Danish courts.

In order to increase the likelihood of support from the U.S, England and Denmark to the treaty process, it was suggested dividing the comprehensive treaty proposal into several concrete treaties each covering different fields ranging from gross human rights abuses to civil, political, social, economic, and cultural human rights rather than having one abstract approach. This is in particular because the three countries have expressed concern that an all-encompassing treaty would obstruct the focus and progress on implementing the UNGPs. The negotiation process could start with a treaty on gross human rights abuses followed by negotiations on additional instruments in specific areas on a continuous basis. Moreover, it was illustrated with business and human rights case

[1607] UNGP 15.
[1608] UNGP 9.
[1609] UNGP 10.

examples that such an approach would be compatible with TWAIL because gross human rights abuses may also cover grave violations of socio-economic human rights and not only civil and political rights. The experience with the International Bill of Human Rights shows that despite its all-encompassing approach, separate core international human rights treaties with separate committees were subsequently adopted. Also, as pointed out by the treaty working group, some international legally binding instruments, e.g. CEDAW, were first opposed but eventually important support was reached because of the need to develop specialized international law principles in the area.[1610] The comparative review of the three countries' approaches to universal jurisdiction showed that U.S. courts have already exercised ATS jurisdiction over human rights abuses amounting to criminal violations and the U.K. and Denmark have met their international obligations to exercise universal criminal jurisdiction, which indicates that they are likely to adhere to a treaty covering human rights abuses amounting to international crimes. Another reason why countries with powerful corporations may support the treaty is the economic advantage of adhering to the treaty for states and their corporations. Contrary to the U.K.'s argument that the treaty proposal discourage countries from thriving economically, smaller states like the U.K and Denmark could use the treaty to counter the economic threat of larger states that do not comply with human rights or do not regulate their corporations to comply. For a large state like the U.S., improving access to justice for victims by allowing American corporations to be sued under the treaty could provide the U.S. with a competitive advantage vis-à-vis other large states in terms of winning concessions for foreign direct investment in the host country. Host state governments have an incentive to enter bilateral trade agreements with home states that provide access to remedy, otherwise host states are left to deal with the financial repercussions of uncompensated victims of corporate human rights violations, e.g. following the Rana Plaza tragedy.[1611] For corporations, it has been proven that if the quality of businesses' work and reporting on social responsibility increases, the trust from investors also increases.[1612]

[1610] Human Rights Council, Rep. on the Work of Its Thirty-First session, U.N. Doc. A/31/50, (Feb. 5, 2016), ¶ 42.

[1611] A robust national employment injury insurance scheme is not established in Bangladesh and the Bangladeshi government was not able to pay adequate compensation to the victims without external fundraising over several years. *Rana Plaza victims' compensation scheme secures funds needed to make final payments*, INTERNATIONAL LABOUR ORGANIZATION (June 8, 2015) http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_374239/lang--en/index.htm.

[1612] Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARVARD BUSINESS REVIEW (December 2006).

It was recommended that in prescribing direct corporate obligations, the business and human rights treaty must start from the point of view of TWAIL representing the people whose rights are being violated. This includes a legal obligation to a) take measures to prevent committing human rights violations by performing due diligence, impact assessments and adjusting policies and practises with special attention to subaltern and vulnerable groups, b) protect human rights against violations by third parties with special attention to operations in states with weak human rights governance, and c) provide mechanisms for redress with special attention to accessibility for affected communities.

In agreement with TWAIL, it was suggested that in order to not exclude local companies from the treaty scope and to not impose a disproportionate burden on smaller businesses with fewer resources, the due diligence requirement should be limited to larger businesses. Also, it was emphasized that not taking action against third party violations may result in complicity, e.g. when the company's goods or services are used to carry out human rights violations, when the company is benefitting from third party violations, or when the company neglects to speak out and intervene when a third party violation is carried out where the business operates.

For a treaty to be informed by TWAIL, it was argued that it must also address on some level the power imbalance in the international economic system by establishing obligations for international financial institutions (IFIs). In particular, to ensure that IFIs only finance states or businesses if their activities and operations comply with human rights, an obligation to carry out a social and environmental review of projects prior to funding, e.g. using the model of the International Finance Corporation (IFC) with Performance Standards was recommended.

States may be required to regulate businesses under their jurisdiction to ensure compliance with the treaty throughout corporate supply chains including requirements of impact assessments and periodical reporting. When placing obligations upon ratifying states in a treaty, it was especially recommended from a TWAIL perspective to commit states to ensure that terms of international trade- and investment agreements do not restrict freedom to regulate economic activities to comply with human rights especially socio-economic rights. Arbitral tribunals may be obligated to actively intervene in groundless litigation based on expansionary claims against developing states. Moreover, it was suggested to obligate home states to provide technical assistance to implementation of a model in investment agreements

of binding human rights obligations responding to development goals of host state communities. In order to target the concerns of TWAIL that WTO agreements place the livelihoods of local farmers at risk by eliminating farm subsidies and reducing export subsidies and tariffs, it was suggested that states commit to refraining from adopting measures in trade considered harmful to the development of host developing states.

To ensure democratic inclusion of Third World communities in the treaty process, including on which types of conduct constitute violations and types of remedies, it was recommended representing marginalized groups from developing countries in coalitions and consultations. Participatory democracy using a people-based social impact assessment promoting transparency and dissent from the existing distribution of power was suggested from formulation to implementation of a treaty. In particular, poorer and relatively under-resourced Southern NGOs are likely to be connected to the people and advocate in IGO negotiations for the voice of the South. TWAIL recommends that Third World states involve their civil societies and academics in official delegations because their connections with counterparts in the North could strengthen the voice of the state in human rights norm setting. To expedite negotiations, it was suggested that Third World peoples' NGOs ally themselves with key states considering past experience with the Declaration of Human Rights Defenders. Integrating *rebus sic stantibus* into the treaty may ensure flexibility for governments to take into account both the social consequences of implementing a treaty rule and collective resistance to it by affected peoples.

To promote access to remedy for Third World communities, it was suggested to spend resources on strengthening, expediting, and breaking down barriers to national courts so as to enforce the treaty where the corporate defendant is seated as a principal rule. In the event that the victim is compelled to service out of jurisdiction e.g. because of political persecution, it was recommended resolving to universal jurisdiction. TWAIL endorses universal jurisdiction provided that it is governed responsibly. In particular, The Princeton Principles on Universal Jurisdiction drafted by a TWAIL scholar provide some solutions that could be applied to a business and human rights framework. These include international judicial cooperation, international due process norms, resolution for competing national jurisdictions and preventing multiple prosecutions. In order to ensure access to at least one court of a member state to the treaty, it was recommended that denial to exercise universal jurisdiction may be submitted by the plaintiff to final decision by a treaty body committee with equal representation of the Global North and the Global South. An Optional Protocol could enable

such a treaty body to also function as a supervisory mechanism with investigation powers to receive complaints from individuals and groups. MNCs may also be required to provide an access to remedy by establishing an operational-level grievance mechanism. A long term goal may be to resolve to an international civil court, which would benefit states by incurring less expenses to corporations on procedural matters having a specialized body and over time coherent precedence to solve cases.

Main Conclusions of the Research Findings

The results of the research findings can be summarized in the following six conclusions[1613]:

- There is agreement in existing legal literature that a polycentric governance approach encompassing national, international, and private and public legal orders is necessary to address transnational corporate conduct in regard to human rights. Moreover, TWAIL scholars agree that acute human rights governance gaps upheld by IFIs and the international economic legal system remain unaddressed. I argue that these challenges call for a development of international law norms.

- It is agreed in existing legal literature that current ways of regulating and enforcing business and human rights are insufficient. I contribute with a contemporary comprehensive review of the international, regional and domestic regulation pointing out novel initiatives including under international criminal law, international investment law, African regional human rights law, and EU law. However, victims still face the want of direct and enforceable transnational corporate obligations on a global scale. My assessment from a TWAIL perspective enriches the thesis' argument that the exclusion of corporate accountability for human rights upholds the inability of Third World states to reclaim economic governance and undertake social reform.

- From a judicial point of view, there is already a great deal of literature on the U.S. *Kiobel* case and to some extent the U.K. case *Chandler* while findings on Danish case law pertaining to corporate human rights violations are rare. However, I contribute with an assessment of the more recent *Jesner*, *Lungowe* and *Okpabi* case law as well as a unique examination of applicable principles in Danish cases. The comparison clarifies further the prospects for victims pursuing transnational human rights litigation and concludes that English and especially Danish jurisdiction over EU- as

[1613] The conclusions answer the subset research questions *supra* chapter 1, Research Questions.

well as foreign corporate defendants is more favourable than U.S. ATS- and ordinary jurisdiction. However, by contrast to some predictions in existing legal literature, I demonstrate that human rights advocates may continue ATS claims successfully subsequent *Kiobel* and *Jesner* against U.S. corporations for conduct abroad since the "touch and concern" requirement is fulfilled upon demonstration of a U.S. focus and relevant conduct in the U.S. It can be generally assumed for the three jurisdictions that the defendant company must have had a degree of control in the management or supervision of the company where the injury occurred whether it is a corporate constellation or a buyer-supplier relationship. TWAIL endorses access to remedy for Third World victims in Western courts but appeals to additional multilateral efforts allowing for Third World community influence, coherence, precedent and equal justice.

- Previous studies have been made of private regulatory systems but I add a new empirical component with a case study on MSIs promoting human rights of female workers in the garment industry in South India. I demonstrate with telephone- and face-to-face interviews as well as MSI- and corporate reports that human rights violations in the garment industry fall disproportionately on women and that international brands' leverage to create change in MSIs is limited when they are several steps away from the human rights issues in their supply chain. It is a long process to change the mind-set of the local industry, requiring a collaborative approach, a close dialogue with industry associations and each situation must be taken on a case-by-case basis. Political will of the host country to take part is necessary but challenging to achieve because of the stakes in foreign direct investment. TWAIL's critique on MSIs accentuates the feminist view that by allowing states and businesses to condone soft and voluntary forms of regulation for business and human rights, women's human rights are marginalised to the periphery of international law. The study accentuates a need to ensure the influence of women in Third World communities in developing an enforceable business and human rights framework under international law.

- Legal literature has examined the UN Guiding Principles (UNGPs) but their implementation in National Action Plans (NAPs) is rarely discussed. My review of the UNGPs contributes with a TWAIL critique to selected principles that address essential concerns for Third World states and a comparative assessment of their

implementation in the National Action Plans (NAPs) of the U.S., England, and Denmark. The comparison helps to discover states' commitment to "harden" soft law and finds that Denmark is the frontrunner in implementing the UNGPs to address TWAIL concerns. The Danish NAP looks into an extraterritorial civil law remedy mechanism for gross human rights abuses while supporting regulation of business and human rights on the international level. The U.K. NAP mainly presents reporting requirements and voluntary due diligence while the U.S. NAP also mainly focuses on non-legal procedures but encourages intergovernmental collaboration for access to remedy. While some of the UNGPs address TWAIL's concerns, the TWAIL analysis demonstrates a profound discontent with reliance on the private sector and voluntary state implementation of soft law instruments because the NAPs largely lack regulation beyond reporting requirements.

- My review of the UN Business and Human Rights Treaty Proposal provides a unique TWAIL assessment of the added value of a multilateral solution and finds that it has more potential of reinforcing legal certainty, greater democratic influence and access to justice for Third World human rights-holders than the existing solutions presented in the previous chapters. My comparative analysis between the U.S., England, and Denmark enriches our understanding of the likeliness of a ratification and court enforcement of the treaty by countries with powerful MNCs and exposed the need for further adjustments. My suggestions for adjusting the treaty proposal contribute toward an agreement taking into account the interests of businesses, TWAIL and Western coalitions. These include economic incentives, a specialized treaty approach, inclusion of socio-economic rights, reform of corporate-, state-, and IFIs' human rights obligations and empowering the judicial system with mechanisms for transnational enforcement.

Concluding Comments and Perspectives

It has been demonstrated in this thesis that there is no 'silver bullet'[1614] or quick fix to solve the legal gap of transnational corporate accountability faced by victims of human rights abuses. Preventing and remedying negative corporate impact on human rights requires

[1614] RUGGIE, *supra* note 186, at 37.

polycentric governance involving collaboration of stakeholders including vulnerable local communities, civil society, corporations, states, international organisations and IFIs.[1615]

The polycentric governance approach already in place is very important and has made a real difference for some individuals and communities seeking protection and remedy from corporate human rights abuses. The various mechanisms must be seen as complementary, each having strengths and weaknesses. These systems include public law, although mostly soft law such as the UNGPs, which have been implemented to some extent by states in NAPs; civil society governance such as advocacy campaigns and transnational human rights litigation; and corporate governance such as corporate codes of conduct, human rights due diligence and work on the ground in MSIs.

The existing ways to ensure corporate accountability lack a coherent answer to the complexity of transnational challenges. However, extraterritorial application of domestic human rights standards, MSIs, and the UNGPs and their continuous implementation in NAPs may be considered part of a continuous norm development in business and human rights in the pursuit of a binding instrument. The research agenda going forward should clarify theories of liability including the standard of care for complicity, a parent company's responsibility for its subsidiary's acts and the duty on corporations to protect against third party violations to the extent that they can control or direct third party impact in a meaningful way.

The United Kingdom EU membership referendum and the result of the latest Presidential election in the U.S. indicate that political tendencies can shift abruptly leaving the prospects of reaching multilateral consensus in the business and human rights field increasingly unpredictable. Executive orders for major roll-back of regulations protecting the environment and workers' rights against corporate abuses have occurred in the U.S.[1616] along with an isolationist and protectionist approach to the international society which is growing in other countries too.[1617] However, it is still possible that a business and human rights treaty may

[1615] Polycentric governance is also acknowledged by the author of the UNGPs and Harvard Professor John Ruggie, see Ruggie, *Life in the Global*, *supra* note 50, at 2.

[1616] E.g., the Cardin-Lugar transparency provision requiring U.S.-listed extractive companies to publish details of the billions of dollars they pay to governments across the world in return for rights to natural resources; and the Dodd Frank Act Section 1502 that prohibits U.S. companies from funding conflict or human rights abuses through conflict minerals in the Democratic Republic of Congo and surrounding countries.

[1617] Max Fischer, *Trump Prepares Orders Aiming at Global Funding and Treaties*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html?_r=0#whats-next; Patrick Gillespie, *NAFTA, What It Is and Why Trump Hates It*, CNN MONEY (Nov. 15, 2016),

pass through the U.S. Senate and the U.K. Parliament considering how it could promote economic development by strengthening the countries in the competition for international investment bids, in addition to providing greater social and environmental protections for citizens. Denmark supports addressing business and human rights at the international level but has also expressed concern about opposition by economic interest groups or business association and deterrence of foreign investment if taking further international action. However, with Denmark being a smaller economy it is even more necessary adhering to the treaty to counter the economic threat of states that do not regulate their corporations to comply with human rights. The economic argument also serves the interests of TWAIL. By not constraining the disproportionate distribution of power, the international economic system sustains Third World poverty by resting on the exploitation of a cheap unregulated workforce of which the majority are Third World women. A multilateral framework may strengthen Third World states' bargaining power in their capacity as host states in pursuit of social reform. With a treaty framework as focal point, host states may condition bids for foreign direct investment on home states' adherence to provide jurisdiction over their corporate citizens in case of involvement in human rights violations.

Major multinational corporations, e.g. Unilever, have already recognised that prioritization of short-term returns for shareholders inhibits companies from fully respecting human rights throughout their operations. Unilever's analysis of its supply chain in Vietnam concluded that the best results come from factories with good conditions and empowered workers. However, its business model does not fully reflect this. Competitive advantage is still, in practice, pursued through downward pressure on labour costs, which pushes costs and risks onto workers.[1618] Unilever's recognition of empowering workers for better results and concern that its business model limits their ability to ensure a living wage through their supply chains indicate that there is a business case for incentivising companies to implement a human rights policy. On this background, companies would possibly support adherence to international regulation setting mandatory standards for companies' human rights compliance. This could incentivise companies without a social and environmental sustainability policy to do human rights due diligence rather than putting companies that have made serious human rights commitments, such as paying a living wage, in competitive disadvantage.

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http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/. James M. Dorsey, *Quatari Backtracking on Labour Rights and Cooperation with Russia Reflects New World Order*, INTERNATIONAL POLICY DIGEST (Jan. 16, 2017), https://intpolicydigest.org/2017/01/16/qatari-backtracking-labour-rights-cooperation-russia-reflects-new-world-order/.

[1618] OXFAM, LABOUR RIGHTS IN UNILEVER'S SUPPLY CHAIN (2013).

Lessons should be learned to draft measures in a manner that addresses the structural imbalances between companies and host states in order to integrate human rights in the economic governance of Third World States. An international human rights regime applying to corporations informed by TWAIL would encourage advocacy efforts of locally affected communities by engaging in a process inclusive of those who will be directly affected by it. From a TWAIL point of view protections of international law should also apply to local communities if their human rights are violated by a national company. Therefore the treaty framework must go beyond covering only transnational corporations. Otherwise, it would exonerate host countries from protecting and providing remedy to their own people.

From a TWAIL perspective, a multilateral process must also address IFIs and states in their role as negotiators of trade-and investment agreements. Comprehensive regulation of international financial- and economic institutions such as the World Bank, IMF, and WTO would not fit into a business and human rights treaty. However, some provisions could require IFIs to stop promoting regulations or place conditionality on loans that can result in human rights violations. On trade and investment, the treaty should reaffirm the sovereignty of states and their duty to respect human rights in the interest of citizens.

A business and human rights treaty cannot change the entire economic system but it can avoid replicating the dominant/submissive binary of colonialism by being inclusive of the political goals of Third World locally affected communities. The rights of powerful corporate actors must be mutually matched with multilateral consensus on coherent enforceable international human rights obligations informed by Third World communities.

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