

Accountability Criteria and Remedies under Tort Law for Victims of Human Rights Abuses

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Abstract

The primary aim of this thesis is to identify a coherent legal principle to establish a novel duty of care for corporate human rights violations and environmental damages. This research will examine whether tort and civil law offer better accountability and remedies for victims of corporate human rights abuses. Over the course of the doctoral studies, this study has attempted to carry out an in-depth and critical analysis of the concept of corporate accountability. Moreover, a fundamental part of this research is devoted to examining the extent to which international criminal law influences international human rights law in its use of tort law and civil law remedies. Finally, this study attempts to set out a theoretical mechanism for duty of care as well as a proposal for the establishment of a Hybrid International Transnational Corporation Court that would have the potential to effectively interpret the concept of the corporate duty of care under tort law.

Declaration

I hereby declare that except where specific reference is made to the work of others, the contents of this doctoral thesis are original and have not been submitted in whole or in part for consideration for any other degree or qualification in this, or any other University. This doctoral thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration, except where specifically indicated in the text. This thesis contains more than 80,000 words including abbreviation, bibliography, footnotes, appendix, figures, table, and diagram and has less than eight figures.

Emmanuel Kojo NARTEY, 11 March 2018

[Status]

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Abbreviations

ATS – Alien Tort Statute

ATS – Alien Tort Statute

CCL – Control Council Law

ECHR – European Convention on Human Rights

HITNCCC – Hybrid International Transnational Corporation Claim Court

ICC – International Criminal Court

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

ICT – International Criminal Tribunal

ICTR- International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IFOR – Implementation Force

ILC – International Law Commission

ILO – International Labour Organisation

IMT- International Military Tribunal

JCE – Joint Criminal Enterprise

MNCs – Multi-National Corporations

NATO – North Atlantic Treaty Organisation

NGO – Non-Governmental Organisation

OECD – Organisation for Economic Co-operation and Development

PICC – Permanent International Criminal Court

RICO – Racketeer Influenced and Corrupt Organisations Act

SA – Standard on Auditing

SFOR – Stabilisation Force

TVPA – Torture Victims Prevention Act

UJ – Universal Jurisdiction

UK – United Kingdom

UN – United Nations

UNDHR 1948 – Universal Declaration of Human Rights 1948

UNGA – UN General Assembly

UNGPs – United Nations Guiding Principles

UNSC- UN Security Council

UNSG – Secretary-General of the United Nations

US – United State

WCHR- World Court of Human Rights

WWII – World War II

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0.1. Research Methodology

Recent decades have witnessed the raising concerns about human rights violations. Some of them are coming from the multinational corporations (MNCs)¹, which are argued to have no international obligations and duties, due to the fact that state governments are unwilling to grant them international legal standing². The common disorder characterised by ineffectiveness of the national state legislation to regulate MNCs and provide an adequate mechanism for litigation against them has changed focus to the level of tort law, international law and treaties. This doctoral thesis aims to examine whether tort law could be a more effective mechanism against human rights violation and environmental damage caused by MNCs activities.

The key questions to address on are the following:

- What are the current mechanisms to bring litigation against MNCs for human rights violation? Are they effective and successful? If yes or no, then why?; and
- Can international law, international criminal law, human rights law, multilateral treaty and tort law be an effective mechanism to bring a successful litigation against MNCs without infringing the sovereignty right of the state?

As it will be explained in the section entitled "Justification of Research Methodology," the research methodology utilised is mainly represented by a doctrinal legal research on the above-mentioned legal questions. This kind of research consists of an analysis of the relevant legal doctrine and of the way in which it has been developed and applied. In particular, such a methodology, which focuses on the systematic presentation and explanation of relevant legal doctrines, has been selected because of the important role it plays in the development of new legal concepts through the publication of conventional legal treatises, articles and textbooks. The research will be conducted using techniques of qualitative analysis, which entail the analysis and manipulation of theoretical concepts and are aimed at formulating innovative legal tenets. Moreover, the doctrinal analysis will be carried out taking into consideration all the relevant external factors so to examine all the legal questions at stake in its proper historical or social context. Finally, due to the inherent transitional nature of corporations, the research will be carried out using a comparative approach. In addition, having highlighted the limitation of the research methodology below, it is argued in this thesis that combining doctrinal legal

¹ Nicolás Zambrana Tévar, 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' (2012) 4 (2) *Cuadernos de Derecho Transnacional* 97, 410.

² Antonio Cassese, *International Law in a Divided World* (Oxford University College 1986).

research, socio-legal research and comparative research method, will enable the study to resolve the limitation and deficiency in these research methods and the research findings.

This thesis is composed of in-depth analysis of advantages and disadvantages of international law, international criminal law, human rights law, soft law and MNCs operation, its effect on livelihood and environment of indigenous people along with review of United Nations and Non-governmental organisations data of MNCs human rights violations and legal arguments in selected litigation and dispute settlement cases, including the Alien Tort Act, *Kiobel v Royal Dutch Petroleum Co.* case³.

0.2. Research Gap

In the light of findings regarding MNCs' economic activities to pursue profit maximisation, it is extremely difficult to ignore the existence of MNCs human rights violations. Arguably, these unjustifiable violations are attributed to two failing factors in international law. The first factor is the orthodox approach to international law "sovereignty of state", which views international human rights law as a tool, developed to protect individuals from indiscriminate use of a state power. However, this approach does not consider private entities such as MNCs.⁴ A key issue of this doctrine and a major drawback in establishing an effective mechanism to regulate the conduct of MNCs is that international law does not recognise nor does embrace a non-state actor 'by imposing accountability directly on a state only for the direct violation of human rights, including corporations'.⁵

This view has been adopted decades ago because the fundamental principle of a treaty in conjunction with a state sovereignty is to impose human rights obligations on a state to ensure that it upholds human rights obligations within its jurisdiction. The increasing number of MNCs human rights violations has demonstrated that the orthodox approach to international law is invalid in contemporary international community and does not give adequate protection for human rights and the environment.

³ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct.1659 (2013) <http://www.supremecourt.gov/opinions/12pdf/10-1491_I6gn.pdf> accessed 22 February 2015.

⁴ David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 (4) *Virginia Journal of International Law* 931 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923360> accessed 9 June 2015.

⁵ Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2000) 24 *Hastings International & Comparative Law Review* 339.

This view could be further supported by Suter's notion,⁶ which explains an important indication of the end of the so-called Westphalian system that has been the backbone of international legal philosophy. These changes have signified the destruction of national sovereignty and the reduction of national government power to MNCs and other international institutions. These changes also show that the world has moved from the orthodox approach and the Westphalian system, which view state as a core aspect of international law, to a world, where national borders are less significant in terms of exercising national interest in an economic concept.

The second factor is that international legal system (in this thesis international law consists of the rules and principles of general application dealing with the conduct of States and of international organisations in their international relations with one another and with private individuals, minority groups and transnational companies)⁷ and legal scholars understand "corporate law as a custom that has been practically and completely a domestic affair".⁸ Consequently, human rights obligations of corporations under the so-called domestic law are not usually contained in corporate or commercial law themselves, except in most areas, such as anti-discrimination, workplace health and safety, and labour. However, even though it could be contested that these rights are enshrined in some domestic commercial law, its effectiveness is still unclear and the evidence of its enforcement is yet to be seen. In this view, one could conclude that this incorporation could be best described as ineffectual due to the fact that these rights do not exist in a state, where MNCs' conduct violates rights of the local people on a larger scale, for example, in developing countries.⁹ Another problem in the literature on international law and human rights, which has been mostly ignored by legal scholars and judges, is the phrase 'human dignity' in the preamble of the UDHR 1948. It has asserted that 'whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.¹⁰ Thus, if a 'human dignity' is given a broader interpretation, then accountability of MNCs human rights violations under international law could arise under it, regardless of the

⁶ Keith Suter, 'Globalization and the New World Order' (2006) 288 (1683) *Contemporary Review* 420.

⁷ Martti Koskenniemi, 'What is International Law For?' (2003) 3 *International Law* 32-57.

⁸ David Kinley and Adam McBeth, 'Human Rights, Trade and Multinational Corporations' in R. Sullivan (ed), *Business and Human Rights: Dilemmas and Solutions* (Greenleaf 2003) 52, 68.

⁹ <<http://www.thehindubusinessline.com/opinion/columns/c-gopinath/mncs-accountability-a-burning-issue/article4304725.ece>> accessed 10 June 2015.

¹⁰ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA res 217 A (III) (UDHR) <<http://www.un.org/en/documents/udhr/>> accessed 10 June 2015.

requirements of customary international law, as it does so in the preamble by including everyone to respect and uphold human dignity.

One more problem is the theoretical concept of sovereignty, it has created two distinctive problems in regulating MNCs: the regulatory approach of MNCs at international level and the establishment of international forum with jurisdiction that can be enforced and binding at national level.

Also, the doctrine of sovereignty was developed in two distinctive scopes, internal sovereignty and external sovereignty.¹¹ The legal concept behind the doctrine establishes that a person or political organisation can have sovereignty over a particular society or nation within its territory. However, this rigid and outdated approach in determining matters beyond state jurisdictions has brought this legal concept into disrepute that serves as an impediment to impose human rights accountability on MNCs. As illustrated above, together these four defects create accountability gap because many legal mechanisms, scholars, and judges have failed to recognise that MNCs are capable of bearing some sort of legal liability that arises through the development of globalisation, MNCs economic and political power. The rise in MNCs power and the lack of an effective mechanism to hold them accountable for human rights violations linked to their operations have exposed the failure of the current approach to corporate accountability and remedy.

The nature of MNCs accountability and remedy remains unclear, leaving victims with no remedy and a long term protection under both domestic and international law. This indicates a need to understand the various perceptions of MNCs accountability concept that exist among the current voluntary legal mechanism. This will help to counterbalance the two fundamental gap in accountability between state and non-state actors human rights liability, environmental obligation and the gap between the ability for investment capital to flow freely across border and the constraints on state enforcement of human rights obligations that follow those investment.

The existing notion of MNCs legal accountability fails to resolve the contradiction between state and non-state actor obligation under international law. It has also failed to elaborate and extended human rights accountability to cover the whole range of economic actors, states as well as non-state actors but rather enforce the original notion and design of the international human rights system that placed the primary duty on states to protect human

¹¹ David Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in Held D and McGrew A (eds), *The Global Transformation Reader: an Introduction to the Globalization Debate* (Polity Press 2003).

rights, but not corporation, such as the Guiding Principle.¹² Such approaches, however, have failed to address any of the issues regarding accountability and remedy for victims of human rights violations by MNCs, hence the aim of this research through the fundamental questions is to attempt to address human rights impact of MNCs through tort and civil law system.

0.3. Literature Review

This section briefly reviews the existing literature concerning international law, human rights law, MNCs and their economic activities to provide the academic background for further analysis to examine the chosen issue on corporate accountability for human rights violations and environmental damages. In considering legal options to establishing the liability of a parent company, the study uses an innovative legal doctrine: “duty of care,” to determining factor in assigning liability; how to define control; and, whether it must be proven or can be assumed in court. Even though the notion of duty of care is an old legal principle under Common Law, this innovative approach will allow victims and advocates to establish liability for MNCs human rights violations and environmental damages. This innovative approach will fill the existing gap in corporate accountability at both national and international level. It will also resolve the deficiency in the literature and books, on the concept of corporate accountability and the mechanism require to establish liability for both parent corporation and subsidiary.

Although extensive research carried out on MNCs economic activities have shown a gigantic growth by overcoming many social and economic obstacles, economic inequality and injustice in the world have increased substantially in the last century¹³. MNCs behaviour, lack of international enforcement of human rights and bad governance at national level led to a ‘venomous circle of poverty’, a self-enforcing process of social destitution that a state can hardly overcome by itself¹⁴. The question is how to address MNCs human rights violations and protect rights of indigenous people and the environment for future generations, while rewarding MNCs for their investments.

In the history of MNCs development and human right violations, there has been an inconclusive argument and a litigation strategy that gives appropriate redress to the victims of human rights violations. Hence, as observed in the previous section above, MNCs have the power to control humans or violate their rights, to monitor natural and financial resources more

¹² John Gerard Ruggie, ‘Business and Human Rights: the Evolving International Agenda’ (2007) 101(4) *American Journal of International Law* 819, 40 <http://www.jstor.org/stable/40006320?seq=1#page_scan_tab_contents> accessed 13 August 2016.

¹³ <<http://openpolitics.ca/tiki-index.php?page=economic+injustice>> accessed 22 February 2015.

¹⁴ Partha Dasgupta, *An Inquiry into Well-being and Destitution* (Oxford Clarendon Press 1993).

than some of the host states.¹⁵ This can be seen as the example of a national state inability to exercise and regulate its national resources under the principle of Permanent Sovereignty of National Resources.¹⁶

Past evidence such as Guatemala suggests that this power and influence is an attempt to manipulate or overthrow host governments.¹⁷ Thus, environmental damages cases, such as *the Exxon*,¹⁸ *the Prestige*¹⁹, *the Bhopal case*²⁰ and *the Doe v Unocal*²¹ are just a few examples. As noted above, MNCs do violate human rights in various ways, directly by aiding in violation, failing to stop violations, remaining still in violations for their own benefits, operating in environment with a documented human rights violations,²² murder, torture, rape, environmental damages, compulsory relocation of communities, forced labour, health risk.²³ Yet, they may go unpunished and the victims are left without adequate redress, if the ultimate offender is just an abstract legal personality, whose headquarters' location and the real owners or the directors are nowhere to be found. The rise of these violations is a link to the current approach of regulating MNCs, which, however, has failed to address the issue of human rights violations by MNCs (soft law).

Ever since the 1970s, several intergovernmental organisations have developed voluntary guidelines, declarations and corporation code of conduct to regulate MNCs. Among them are the OECD (the Guidelines for Multinational Enterprises, 1976), the ILO (the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy) and the UN (UN Global Compact). Even though one could see this as a major step in the right

¹⁵ Brad J Kieserman, 'Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act' (1999) 48 (3) *Catholic University Law Review* 881.

¹⁶ UNGA, Permanent Sovereignty over Natural Resources (adopted 17 December 1973) A/RES/3171 <<http://www.refworld.org/docid/3b00f1c64.html>> accessed 21 July 2015. See also Petra Gumplová, 'Restraining Permanent Sovereignty over Natural Resources' (2014) 53 *Enrahonar: Quaderns de Filosofia* 93.

¹⁷ Peter T Muchlinski, *Multinational Enterprises & the Law* (2nd edn, OUP 2007).

¹⁸ *Exxon Shipping Company v Grant Baker*, 554 U.S. 471 (2008). <<http://www.supremecourt.gov/opinions/07pdf/07-219.pdf>> accessed 23 June 2015.

¹⁹ Fanch Cabioch, 'Erika vs Prestige: Two Similar Accidents, Two Different Responses. The French Case' (2005) 1 *International Oil Spill Conference Proceedings* 1055, 1061.

²⁰ *Union Carbide Corporation v Union of India etc* [1989] SCC (2) 540. <<http://www.cseindia.org/userfiles/scbhopal4.pdf>> accessed 23 June 2015.

²¹ *Doe II v Unocal Corp* 395 F.3d 932 (9th Cir 2002) 942 <<https://www.escri-net.org/docs/i/1054008>> accessed 23 June 2015.

²² Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2000) 24 *Hastings International & Comparative Law Review* 339 <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/hasint24&div=20&id=&page>> accessed 23 June 2015.

²³ Sukanya Pillay, 'And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections' (2004) 81 *University of Detroit Mercy Law Review* 489. <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/udetmr81&div=46&id=&page=>>> accessed 23 June 2015.

direction, the main limitation of the soft law is that these guiding principles are directed not at corporations themselves but at national governments, whose duty is to implement them on corporations. Nonetheless, the ILO principles are the only guidelines that include applicable instruments precisely to scrutinise corporate behaviour.²⁴

The OECD's 1976 Guidelines for Multinational Enterprises are endorsements addressed by national governments to MNCs, working in or from the 33 observing states.²⁵ The Guidelines offer a voluntary principles and standards to regulate business activities that contain applicable law. Their objectives are to affirm that the activities of these enterprises are synchronised with governmental policies, to reinforce the foundation of shared assurance between corporations and communities in which they work, improvement of FDI and contribution to a sustainable development by MNCs.²⁶ Thus, it was (as reviewed in 2002) submitted that an enterprise must "respect the human rights of those affected by their conduct constant with the host state government's international obligations and commitments".²⁷ The point to note here is the word "constant" in the guidelines, which means that national governments are obliged to implement laws to regulate the conduct of MNCs.

Baade clarifies that the follow up procedures of the guidelines establish the mandatory of state practice because of the monitoring body, the Communities on International Investment and Multinational Enterprise (CIIME) that consists of representatives from member states.²⁸ Contrary, judgement from the CIIME is ignored by member states.²⁹

Furthermore, the guidelines propose that an enterprise contributes to policies of non-discrimination with regards to work, to the effective prohibition of child labour, and the eradication of all forms of forced or compulsory labour. Likewise, the commentary to the guidelines illustrates that observing domestic law is a primary duty for corporations. Conversely, the guidelines are complementary principles expressing standard of behaviour for a non-legal personality.³⁰ Firstly, it is a major problem with the guidelines apart from its non-binding nature. Secondly, the OECD's adopts the view that the national laws of a host state are

²⁴ International Council on Human Rights Policy, 'Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies. Summary' (2002) 74
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553201> accessed 24 June 2015.

²⁵ <<http://www.oecd.org/daf/inv/mne/2011update.htm>> accessed 24 June 2015.

²⁶ Guidelines for Multinational Enterprise (2011)
<<http://www.oecd.org/investment/mne/roundtableoncorporateresponsibilitytheoecdguidelinesformultinationalenterprisesanddevelopingcountries-buildingtrust.htm>> accessed 24 June 2015.

²⁷ *Ibid.*

²⁸ Hans W Baade, 'The Legal Effects of Codes of Conduct' (1980) in Norbert Horn (ed), *Legal Problems of Codes of Conduct for Multinational Enterprises* (1980) 4.

²⁹ *Ibid.*

³⁰ *Ibid.*

adequate to regulate the conduct of MNCs, which in reality is ineffectual. The guidelines' principles have followed the orthodox doctrine of international law to impose international legal obligations on a state, thus, based on these defects, it can be concluded that not only the voluntary nature of the principle is problematic, but it also fails to acknowledge difficulties a host state faces to regulate the conduct of MNCs. These guidelines have no enforcement mechanism nor do they illustrate procedures that national governments must take to apply them to corporations, and they have also failed to offer appropriate channels for compensation victims of corporate human rights violations and environmental damage. Considering voluntary nature and lack of enforcement, these guidelines are just another inefficacious principles, a contributory attempt to move the debate from enforcement regulatory principle to self-regulatory approach.

The ILO's 1977 Tripartite Declaration of Principle Concerning Multinational Enterprise and Social Policy is addressed to governments of member states, employers and workers, organisations, and corporations (including multinational corporations) working in their communities. The Declaration urges members to obey the UDHR 1948, the international convents and the different core of labour-related rights.³¹ The Declaration was enhanced in 2002 when it included ILO Declaration on Fundamental Principles and Right at Work.³² This declaration provides protection for freedom of associations, the right to collective bargaining, and abolished discriminations, forced labour, and child labour. On the other hand, it does suffer on many grounds and its impact on corporations' behaviour is yet to be seen or documented. Hence, from a critical analytical interpretation of the OCED Guidelines and ILO Declaration can barely be considered as meddling on states or corporations. Also in addition to its non-binding nature, the observing institutes do not work as judicial or *quasi*-judicial institutes rather their characters are restricted to the explanation of the instruments.

Their observations do not amount to exact conclusions of corporations' wrongdoings and their identities are held private, which means they protect them from public examination and humiliation.³³ Likewise, although the Guidelines and the Declaration encourage MNCs to respect internationally recognised human rights customs, they instantly uphold the supremacy on national government. Accordingly, they can do nothing to stop host nation from

³¹ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977) 8 <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm> accessed 25 June 2015.

³² ILO Declaration on Fundamental Principles and Right at Work (1998) 2 <<http://www.ilo.org/declaration/lang--en/index.htm>> accessed 26 June 2015.

implementing a flexible labour law and environmental standards, and MNCs cannot be held accountable for taking advantages of such standards. Based on this statement, the thesis shall argue that these principles are just another flaws created by the orthodox legal scholars, without any fundamental objectives and conclusions, to shift the burden of legal accountability of corporation to states.

Drawing on an extensive range of sources, the UN Global Compact is another soft law instrument focused at MNCs. Even though it is observed as a rigorous code of conduct, its aim is to encourage corporations to “embrace and enact” 10 core principles linked to respect for human rights, anti-corruption, labour rights, and protection of the environment, together through their specific business operations and assisting complementary public policy inventiveness. These Principles are derivatives from the UDHR 1948, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN Convention against Corruption.

Now, even though there are 8,320 companies, 170 countries and 30,736 public reports³⁴ so far, the lack of independent monitoring and enforcement mechanisms with appropriate redress and punishment for the wrongdoer has limited the ambition of the Global Compact and its effectiveness of protecting communities against human rights violations. On the other hand, it is true that the UN explicitly recognises that it does not have the mandate or the ability to observe and examine corporations’ operations,³⁵ yet the question is if it is so, then why does the UN push forward this agenda? As one of the concerns of the Global Compact is that corporations can and do continue to violate human rights while still being members of the Global Compact,³⁶ such as *Shell Dutch*, *Rio Tinto*, *Nike* and many others. The basic objective of the Global Compact is inconclusive and weak. Another problem with the UN Global Compact is that corporations can or do use it for PR purposes while in reality it never implements nor does not take any measure to uphold human rights or any international norms. The perfect example of this is *Kasky v Nike*,³⁷ when it was established that *Nike* made a false statement about its corporate code of conduct in an advertisement.

³⁴ *Ibid.*

³⁵ Joshua Karliner and Kenny Bruno, ‘The United Nations Sits in Suspicious Company’ (2000) *International Herald Tribune* 10.

³⁶ Lawyers Committee for Human Rights, ‘United Nations Global Compact on Corporate Accountability’ (2003) <<http://business-humanrights.org/en/united-nations-global-compact-on-corporate-accountability>> accessed 28 June 2015.

³⁷ *Kasky v Nike* 539 U.S. 654 (2003) <<https://www.law.cornell.edu/supct/html/02-575.ZC.html>> accessed 28 June 2015.

Contrary to the drawback of this concept, supporters of the Global Compact have argued that it is more than just an instrument of speechmaking. Thus, it has raised the awareness of the problem within corporate world and the UN organisation, which they submitted as a vital step forward but it is nothing more than that.³⁸ Even though supporters have made a valid argument for the Global Compact, the key problem with it is that it failed to monitor and examine corporation's compliance. Therefore, this thesis asserts that, the Global Compact is similar to other voluntary guidelines and has no significant bearing on corporations or behaviour change in corporations but rather it has opened the floodgate for corporate double standards and avenue for new PR business.³⁹

A good example of this is *Shell's* statement of general business principle,⁴⁰ which was acknowledged in the 1976 and reviewed in 1997 in line with public interest in human rights and the notion of a sustainable development. Whereas *Shell* perceives this responsibility to society as incorporating a precise support to the basic human rights in relation with the authentic character of its business and to provide a proper mechanism for health, safety and the environment in consistent with its pledge to back sustainable business practice.⁴¹ However, in the heart of this principle lies *Shell's* biggest flaw in corporate code of conduct, as it was investigated in 2003 *Kiobel Case*. It was acknowledged in the confidential report as part of *Shell's* determination to assist in developing peace and security strategy in the Niger Delta, *Shell* fed violence in the area and it did that continuously till 2009.⁴² *Shell* is just a tip of the iceberg, there are numerous corporate codes of conduct in conjunction with the new rapidly developing corporate social responsibility, which so far has proved to be another way to make money and PR opportunity for business. Hence, it is very difficult to see how corporate guidelines without any international or external enforcing mechanism, effective monitoring, and binding obligations can be effective instruments for ensuring corporate uphold to human rights and international norm.

Analysing the soft law mechanisms, such as the Guidelines for Multinational Enterprises, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the Global Compact and corporate codes of conduct, it is perfectly adequate to

³⁸ Andrew Fenton Cooper, John English, and Ramesh Chandra Thakur (eds), *Enhancing Global Governance: Towards a New Diplomacy* (UN University Press 2002).

³⁹ <<http://www.corporatewatch.org/content/whats-wrong-corporate-social-responsibility-arguments-against-csr>> accessed 29 June 2015.

⁴⁰ Shell's Statement of General Principle <<http://s05.static-shell.com/content/dam/shell-new/local/global-content-packages/corporate/sgbp-english.pdf>> accessed 28 June 2015.

⁴¹ *Ibid.*

⁴² Mark Tran, 'Shell May Have to Leave Nigeria' (2004) *Guardian Unlimited*.

conclude that in reality they have achieved diminutive substance, partially due to their non-binding nature and the absence of a meaningful enforcement and implementation mechanisms, redress mechanisms for victims and sanctions for a substantial violations. There is no doubt that they have increased awareness of MNCs human rights violations but as the validity, impact and the implementation on corporations are crucial to their existence, it shall be concluded here that the guidelines are ineffective.

In 2005, after the UN has failed to support the initiative of the UN sub-Commission on the Promotion and Protection of Human Rights, which was called Norms of the Responsibilities of Transnational Corporations and other Business Enterprise with Regards to Human Rights norms,⁴³ the UN Commission on Human Rights adopted resolution 2005/69, seeking the Secretary General to nominate a Special Representative on the issue of human rights and transnational corporations and other business enterprises for the first two years.⁴⁴ The following year Kofi Annan appointed Professor John Ruggie to develop a concept to address MNCs and human rights violations, when the UNHRC was formed in 2006. Ruggie developed the responsibility to protect framework that was based on the UN concept of Responsibility to Protect.⁴⁵ The concept presents three pillars for examining the respective obligations and responsibilities of individuals with regard to human rights.⁴⁶

Undoubtedly, Ruggie's Guiding Principles have not only clarified MNCs and human rights duties but also highlighted some important issues regarding corporations and human rights. However, the author's view on human rights abuses lacks on a substantial grounds. Firstly, it does not provide clear mechanisms for cases when national states are reluctant or incapable to protect citizen from human rights violations by MNCs. Secondly, the major concern is the endorsement of corporations' own assessment of human rights violations and its impact on the communities they operate. This view is inconclusive and also the fact that corporations must assess their own human right abuses highlights a significant lack of direction and the willingness to create an instrument that can conduct independent corporation assessment or auditing corporate human rights abuses.

⁴³ UN Sub-Commission on the Promotion and Protection of Human Rights, 'Norms of the Responsibilities of Transnational Corporations and other Business Enterprises with Regards to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2.

⁴⁴ UNCHR 'Human Rights and Transnational Corporations and Other Business Enterprises' (15 April 2005) UN Doc E/CN.4/2005/L.87 para 1.

⁴⁵ UNGA '2005 World Summit Outcomes' (24 October 2005) UN Doc A/RES/60/1.

⁴⁶ John J Ruggie, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) A/HRC/8/5 7.

Finally, while the majority of the international community has welcomed the Protect, Respect Protect and Remedy Framework, it has not offered more than its predecessors have. Its voluntary nature remains questionable and it lacks legal mandatory or legal mechanism to address the issue raised in the concept itself making one to doubt the fundamental objective of the principle. Therefore, this study shall reject these guiding principles based on failures highlighted above but it does acknowledge that the guiding principles have created an environment where legal enforcement or future international regulation is debatable. Also, it provides significant explanations and recommendations for how states should work together to avert human rights abuses.

The U.S. ATCA 1789 is a classic example of a domestic law with extraterritorial jurisdiction that is capable of holding MNCs liable for human rights violations in a foreign country.⁴⁷ The Act permits US District court to hear civil proceedings of foreign citizens for damages caused by MNCs' business operations "in violations of the law of nations or a treaty of the US".⁴⁸ In the US, there are other federal acts that allow proceedings in the US court for the violations of human rights in foreign country, such as RICO⁴⁹ and the TVPA,⁵⁰ which offer some extraterritorial capability in regards to human rights violations but only indirectly with regards to RICO.⁵¹ Likewise, in Australia extraterritorial legislation passed to prevent sex tourism, such as Part IIIA of the Australia Crime Act 1914 (Cth).

Furthermore, it could be noted here that a suggestion for the enactment of law dealing directly with corporate activities in a foreign country is enshrined in common law jurisdiction in Australia, the U.S and since recently in the UK, but none of these laws are yet to make it in the status books and the reason for that is still not clear. Likewise, it could be seen that developed country's refuse to allow its national courts to be a new platform to bring litigation proceeding against corporations. Adding to the discussion, it was observed in Belgium that courts have the capability to hear cases of human rights violations by anyone or against

⁴⁷ Alien Tort Claim Act 28 USC § 1350

https://www.law.cornell.edu/uscode/pdf/uscode28/lii_usc_TI_28_PA_IV_CH_85_SE_1350.pdf
accessed on 29 June 2015.

⁴⁸ Beth Stephens et al (eds), *International Human Rights Litigation in US Courts* (2nd edn, Martinus Nijhoff 2008).

⁴⁹ Racketeer Influenced and Corrupt Organizations Act, Title IX of Organised Crime Control Act (1970) Pub L No 91-452, 84 Stat 922.

⁵⁰ Torture Victim Protection Act of 1991 Pub L No 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)).

⁵¹ Katie W Wood, 'Racketeer Influenced and Corrupt Organizations Act-Private Cause of Action-No Injury Required Beyond Those Caused by Predicate Offenses for Section 1964 (c) Claim' (1985) 55 *Mississippi Law Journal* 167
<http://heinonline.org/HOL/LandingPage?handle=hein.journals/mislj55&div=16&id=&page=>>
accessed on 29 June 2015.

anybody, anywhere in the world,⁵² but this concept has come under constant attack in previous years about its scope and application. Together these defects highlight that corporations have power and ability to lobby home state government to amend judicial jurisdiction and international politics and international relations.

It is very important to note that the ATCA offers an anachronistic jurisdiction of human rights violations by MNCs. However, the increasing caseload of ATCA proceedings demonstrates that it is likely to depict violations of human rights by MNCs to the consistent examination and eventually to wider public criticism. It can be noted that its jurisprudence is fragmented, lacks consistency and is too ambiguous. Nonetheless, no case has been decided on its merit and the US Supreme Court has not determined the scope of ATCA and its practical content and the reason for this is yet to be clear but rather created an uncertainty in ATCA application. In addition, Earthrights International has observed that Bush administration and some members of Congress planned to restrict the application of ATCA on corporations.⁵³ Based on this evidence, it can be submitted that the ATCA is the only legal mechanism that is able to hold corporations accountable for human rights violations and offers appropriate redress for victims, if the national court permits it.

Nonetheless, the ATCA's aim to hold corporations accountable for human rights abuses abroad does suffer from a number of technical and practical limitations. Firstly, the act was never designed to hold corporations accountable for human rights abuses since it was enacted 200 years ago. Secondly, it is common that all national courts work in an extraterritorial manner, although it is less substantial for the operation of ATCA, the cost is also a limitation factor. The third restriction on the ATCA is that courts adopt a narrow interpretation of human rights violations that falls within its jurisdiction. Thus, human rights standards that establish *jus cogens* norms would qualify, as well as all customary international law.⁵⁴ However, Joseph stresses that while some egregious human rights abuses fall within the realm of legislation such as torture, summary executions, sexual assault, war crimes and crime against humanity, forced labour, and slavery, others are included only if they are methodical, and some are not included, such as environmental damage, forced prison labour, expropriation of private property and restriction of freedom of speech.⁵⁵ This means that application of *jus cogens* or customary

⁵² <<http://www.economist.com/node/1880202>> accessed on 29 June 2015.

⁵³ Earthrights International, 'Executive Order 13303, Instituting Immunity' (2003) <<http://www.earthrights.org/campaigns/executive-order-13303-instituting-immunity>> accessed 29 June 2015.

⁵⁴ Terry Collingsworth, 'Key Human Rights Challenge: Developing Enforcement Mechanisms (2002) *Harvard Law School Human Rights Journal* 183.

⁵⁵ Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar

international norms does not have a similar significant effect on ATCA as other national and international laws.

In addition, ATCA is restricted by state action requirements. Thus, a none-state action can only be accountable under ATCA, if they act in accordance with the state official or with significant state assistance.⁵⁶ This is a significant setback for ATCA, as the establishment of state action requirement and state assistant is problematic in most ATCA cases. The final limitation of the ATCA is the court ability to establish jurisdiction over a foreign perpetrator as with all courts. The US courts have authority to decide whether or not there is a sufficient link between the foreign corporations against which the ATCA case is brought and even that majorities of cases have been dismissed for the lack of close relationship between the parent company, the home state and subsidiaries.

The research shall conclude that the ATCA does suffer from many flaws and it is subject to political and international relations between states government, but it does offer some good on the merit of the fact. At the same time, ATCA does not offer a comprehensive solution for human right violations by MNCs on a broader concept, especially when there is the likelihood of the defendant to raise *forum non conveniens*, as a defence mechanism. Hence, this thesis shall assert here that following all the previous arguments, none of the mechanisms does offer adequate redress and process of bringing litigation against MNCs comparing to the ATCA.

Also, the international collective binding legal mechanism being discussed in this thesis could be noted in Resolution of the 26th session of the UN Human Rights Council in Geneva.⁵⁷ The resolution's first draft was aimed to establish an intergovernmental working group with obligation to intricate an international legally binding mechanism on MNCs and other business enterprises with respect to human rights, while the second draft had an aim to assess the benefits and limitations on legally binding mechanisms on MNCs.

Observing the treaty, it will help to address some of the dilemmas that victims face in gaining access to legal remedy for human rights violations by MNCs. The treaty can do so in two possible routes,⁵⁸ a possible philosophy that can be drawn from the UN Convention against

2010) 149.

⁵⁶ *Ibid.*

⁵⁷ UNHR 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' UN Doc A/HRC/RES/26/9 (adopted 24 June 2014) <<http://business-humanrights.org/en/binding-treaty>> accessed on 18 August 2015.

⁵⁸ International Commission of Jurists, 'Needs and Options for a New International Instrument in the Field of Business and Human Rights' (2014) <http://icj.wpengine.netdnacdn.com/wpcontent/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelevers.compressed.pdf> accessed 1 September 2015.

corruption (UNCAC).⁵⁹ The first methodology could be observed whereby states commit themselves to enact appropriate laws to ensure offenders found guilty of corruption are prosecuted for a crime committed at home state and the host state.⁶⁰ This approach also ensures that state commit to work together in investigating and solving technical issues to enable successful prosecution of offenders.⁶¹ Thus, it could be observed that such approach could assist in addressing the problematic aspect of human rights violations by MNCs by adopting a collective action at both national and international stages. Hence by doing so, all states shall commit to enact a law with extraterritorial effect and it shall also help in addressing the technical difficulties that arise with extraterritorial jurisdiction in a way that will encourage co-operation. The second approach is creating an international mechanism or court that could hear both civil and criminal claims against MNCs where it has been found that they violate the basic human rights. This approach could be in the form of an international forum that could have jurisdiction over MNCs operating in other jurisdiction or where the judicial system is very poor.⁶² This fundamental legal approach follows the theoretical concept the thesis is attempting to develop.

Following these trends, one could argue that the Business and Human Rights Treaty could provide a mechanism that will assist in a collective and binding approach to human rights violations by MNCs. In the context of enforcing legal obligation on MNCs, it shall also be contested here that the Treaty can provide the perfect platform for addressing human rights violations by MNCs.

Thus, without a doubt, the proposed Business and Human Right Treaty is a major step forward to address human rights violations by MNCs. However, it could be argued that its ratification and implementation could face many obstacles due to the current approach to international legal system philosophy regarding state sovereignty. Also, it is imperative to note here that, the current human rights courts or tribunals are incompetent to hear these cases, because their complex nature is beyond the scope of the current human rights courts and therefore, the Treaty could offer an appropriate solution for such cases.

⁵⁹ David Bilchitz, 'The Moral and Legal Necessity for a Business and Human Rights Treaty' (2014) <<http://business-humanrights.org/sites/default/files/documents/The%20Moral%20and%20Legal%20Necessity%20for%20a%20Business%20and%20Human%20Rights%20Treaty%20February%202015%20FINAL%20FINAL.pdf>> accessed 1 September 2015.

⁶⁰ Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013).

⁶¹ *Ibid.*

⁶² *Ibid.*

Contrary to the debate, it could be observed that the flaw in the Treaty is that other business enterprises are all defined in the context of transnational element in the economic activities but it does not take into account local businesses registered under domestic law.⁶³ The question is does it mean that local businesses do not or cannot break human rights laws? What about the role they play as subsidiaries? This position is not clear in the Treaty and requires further clarification. In a broader concept, this research shall submit that even though this view is valid, the Treaty does offer appropriate mechanisms for human rights violations.

Another argument raised against the treaty by Ruggie is the scope of any business and human rights treaties. He condemns the resolution for being restrictive by focusing only on MNCs. Ruggie also argues against the definition of the business enterprises, which, in his word, renders the term redundant and purely rhetorical.⁶⁴ Even though there is an element of truth in Ruggie's argument, one needs to acknowledge the reason why international law might dedicate explicit attention to MNCs. Another point to note is that, Ruggie acknowledges that an increasing number of domestic companies conduct business operations abroad, thus, they have an element of MNCs.⁶⁵ However, Ruggie's argument contradicts some of his earlier objections against the Treaty. Likewise, there are ongoing discussions and debates surrounding the Treaty but this research shall not give a detailed analysis of it but shall conclude that Ruggie's view in conjunction of the development of his Guiding Principle is a fundamental failure of international legal system approach to solving human rights violations by corporations. To sum up, this study supports the Treaty and considers it as the first step towards a meaningful solution for imposing human rights on MNCs, however argue in favour of corporate accountability under tort and civil law.

0.4. Primary Legal Sources

To fulfil the goals of the research it is necessary to the analyse legal documents, such as: UN Universal Declaration of Human Rights (1948)⁶⁶, Draft Principles On Human Rights And The Environment⁶⁷, Protocol to the African Charter on Human and Peoples' on the Rights

63 UNHR 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' UN Doc A/HRC/RES/26/9 (adopted 24 June 2014).

64 John G Ruggie Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors (9 September 2014) <<http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html>> accessed on 19 August 2015.

65 *Ibid.*

66 <<http://www.un.org/en/documents/udhr/>> accessed 8 March 2015.

67 E/CN.4/Sub.2/1994/9, Annex I (1994).

of Women in Africa⁶⁸, Rio Declaration on Environment and Development (1992)⁶⁹, UN General Assembly Resolution 3281⁷⁰, International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷¹, and the Convention on the Elimination of All Form of Discrimination Against Women⁷² that is intended to be ratified by states but not binding, GATT 1994, Rome Statute of the International Criminal Court 1998 and cases involving MNCs and indigenous people.

The case study will be conducted on cases dealing with violation of human rights, such as The Alien Tort Act, *Kioble v. Shell*⁷³ *Sahu v. Union Carbide*⁷⁴ *Maynas v. Occidental*⁷⁵ *Doe I v. Unocal Corp*⁷⁶ and *Defending the TIPNIS Indigenous Territory*⁷⁷ etc.

0.5. Secondary Sources

The purpose of the secondary literature is to uncover key areas on which legal scholars debate focuses on, such as analysis of:

- MNCs legal identity under international law⁷⁸: whether litigation can be brought under international law;
- MNCs participation in international law:⁷⁹ analysing MNCs contribution to building international law and effective exercise of their rights under it;
- MNCs operations⁸⁰, contribution towards global economy⁸¹ and economic benefits⁸²: how MNCs have improved the life of indigenous people and society through investments and economic activities;

⁶⁸ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 *African Human Rights Law Journal* 40, Entered into Force Nov. 25, 2005.

⁶⁹ Rio Declaration on Environment and Development (1992).

⁷⁰ <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2778>> accessed 5 March 2015.

⁷¹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 5 March 2015.

⁷² <<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>> accessed 5 March 2015.

⁷³ *Kiobel v Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 [2013] <http://www.oyez.org/cases/2010-2019/2011/2011_10_1491> accessed on 8th March 2015.

⁷⁴ *Sahu v Union Carbide Corp.*, 548 F. 3d 59 - Court of Appeals, 2nd Circuit 2008.

⁷⁵ *Carijano v Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 [2011] 9th Cir.

⁷⁶ *Doe I v Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

⁷⁷ <<http://www.earthrights.org/legal/defending-tipnis-indigenous-territory>> accessed 9 March 2015.

⁷⁸ Jan Wouters and Anna-Luise Chané. *Multinational Corporations in International Law* (2013).

⁷⁹ Wolfgang Friedmann. *The Changing Structure of International Law* (1964) 230

⁸⁰ Nicolás Zambrana Tévar, 'Shortcomings and Disadvantages of Existing Legal Mechanisms to Hold Multinational Corporations Accountable for Human Rights Violations' (2012) 4 (2) *Cuadernos de Derecho Transnacional* 397, 410.

⁸¹ Promoting a European Framework for Corporate Social Responsibility, European Commission Green Paper (2001) <http://www.csr-in-commerce.eu/data/files/resources/717/com_2001_0366_en.pdf> accessed 22 February 2015.

⁸² Jan Wouters and Leen Chanet, 'Corporate Human Rights Responsibility: A European Perspective'

- bad governance and governments' attitude towards MNCs⁸³: lack of good governance, corruption and its impact on litigation against MNCs;
- international organisations attitude towards MNC, UN⁸⁴, OECD⁸⁵, ILO⁸⁶ and European Union⁸⁷: international organisations are reluctant to enforce human right convention and treaties on MNCs as well as corporate social responsibility under international law;
- The Alien Tort Act ⁸⁸: proceeding against MNCs under the Alien Tort Act; and
- human rights violation by MNCs⁸⁹.

0.6. Key Issues of Legal Argument

The lack of enforcement of corporate accountability did allowed developing countries (these are the nations that have low living standards, undeveloped industrial base, and low Human Development Index (HDI))⁹⁰ governments to avoid implementation or ratifying international law and human rights law. It is not only about the inadequacy or enforcement of international law but economic and political power of MNCs⁹¹ and their legal identity under international law. It could further explain how a group of non-state actors is generally perceived as one of the driving forces of the global economy⁹² but fails to be recognised as legal personality under international law.

A major criticism of this concept led to the development of Norms on the Responsibility of Transnational Corporation and Other Business Enterprise with Regards to Human Rights⁹³

(2007) 6 *North-western University Journal of International Human Rights* 262.

⁸³ Antonio Cassese, *International Law in a Divided World* (Oxford University College 1986).

⁸⁴ UN Global Compact. (2000).

⁸⁵ OECD Declaration on International Investment and Multinational Enterprise (1976).

⁸⁶ ILO Tripartite Declaration of Principle Concerning Multinational Enterprise and Social Policy (1977)

⁸⁷ *Ibid.*

⁸⁸ Alien Tort Claims Act (ATCA), 28 U.S.C. §1350. The Judiciary Act is founded upon Article III, Section 1 of the U.S. Constitution.

⁸⁹ Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position outside the United States' (2011) 1 *City University of Hong Kong Law Review* 3 <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/ciunhok3&div=5&id=&page>> accessed 01 December 2014.

⁹⁰ Nuno Teixeira, Bruno Rafael and Pedro Pardal, 'Internationalization and Financial Performance: A Success Case in Portugal' *Handbook of Research on Entrepreneurial Success and its Impact on Regional Development* (2016). Also, "Nations with a lower standard of living, underdeveloped industrial base, and low Human Development Index (HDI) relative to other countries."

⁹¹ Janet Dine, *Companies, International Trade and Human Rights* (Vol. 4. Cambridge University Press 2005)

⁹² Robert W Cox, 'Labor and the Multinationals' (1976) *Foreign Affairs*, 344, 365. <<http://www.jstor.org/discover/10.2307/20039576?sid=21105965224613&uid=2&uid=3738032&uid=67&uid=3&uid=5910784&uid=40999&uid=41001&uid=62>> accessed 22 February 2015

⁹³ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

as the Declaration of Human Rights 1948 is not directly binding for state or MNCs⁹⁴. It has been long contended that under domestic law legal person such as companies should have a legal obligation. Under international law, there is no universal rule that companies are or should be responsible for their transnational unlawful act as observed in the application of The Alien Tort Act in *Kiobel v Shell* case⁹⁵.

It is difficult to explain the theoretical concept on international law enforcement, but it might be related to the probability that all states are perceived to observe all principles of international law and almost all their duties, all the time⁹⁶ in good faith. A typical example is ILO Convention No 29 on Forced Labour that gives national parties undertake to subdue the use of force labour⁹⁷.

Convention against Corruption (1997) went further to address host state and home state, which established jurisdiction not only over acts of bribery committed in their state but also aboard⁹⁸. However, it does not address corruption directly for the unlawful act committed outside its territory even though this infringes human rights on substantial ground.

Some multilateral treaties are directly applicable to companies. The 1966 Convention on Civil Liability for Oil Pollution Damage makes available that owner of a ship shall be liable for any pollution damage caused⁹⁹. So does the Law of the Sea: it forbids not only state but also natural and legal person from appropriating parts of the seabed or its minerals¹⁰⁰. These relationships may partly be explained by the bias behaviour of international legal system actors, legal scholars and the power of MNCs. States may be reluctant to enforce international law and principle of corporate social responsibility because of restraint and forces of globalisation, states competition to attract MNCs investment, which leads to the race to bottom that consequently weakened or strengthened their bargaining power of investment.

Other studies indicate that MNCs engaged in extractive industries like oil, gas and diamonds, are particular persuaded to such collaboration with host state¹⁰¹. Angola, Congo,

⁹⁴ Universal Declaration of Human Rights (1948) <<http://www.un.org/en/documents/udhr/>> accessed 26 February 2015.

⁹⁵ David P Stewart and Ingrid Wuerth, 'Kiobel v Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) 107 (3) *American Journal of International Law* 601, 621.

⁹⁶ Lousi Henken, *How Nations Behave: Law and Foreign Policy* (Praeger 1968).

⁹⁷ Convention Concerning Forced Labour (1930): 'Each Member of the International Labour Organisation which Ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms with shortest possible time' art 1 (1).

⁹⁸ Convention on Combating Bribery of Foreign Public Official in International Business Transactions (1997) art 4 (2).

⁹⁹ International Convention on Civil Liability for Oil Pollution Damages (1969) art III.

¹⁰⁰ UN Convention on the Law of the Sea (1982) art 137 (1).

¹⁰¹ Multinational Enterprise in Situations of Violent Conflict and Widespread Human Rights Abuses, OECD Working Paper on International Investment, Number 2002/1, May 20012.

Myanmar, Nigeria and Sudan are among the states highlighted in these studies. As the evidence, it will be unacceptable for companies, distinct from other non-state actors should have or should not have obligation under international law. Why should individuals¹⁰² and armed opposition groups¹⁰³ have international legal obligations and companies that are more powerful had none? This discrepancy could be attributed to the behaviour of the international legal system, international communities and governments' reluctance to impose obligations on MNCs. Conceivably, what states are concerned about is that their sovereign power may be threatened if MNCs are held accountable under international law. This could be observed in Nigeria case against Shell, which could exemplify that Nigeria would not be happy if Shell has been held under international law and ultimately exposing the dark side of Nigerian government.

MNCs played a key role in the implementation of TRIPS¹⁰⁴. Adding to this, individuals are involved in various phases of WTO dispute settlement proceeding¹⁰⁵ a development that has already existed as the advancement of 'public –private partnership' in WTO litigation¹⁰⁶. The increasing development of MNCs economic and political power is important at the international level but also possesses a risk to the promotion of community interest¹⁰⁷, the so-called global public goods¹⁰⁸ as highlighted in the literature. However, there is a question to ask, why is an international legal system very reluctant to grant MNCs legal status while at the other hand MNCs enjoy legal identity under international and human rights law¹⁰⁹ to bring a successful litigation against the state? The promotion of communities' interest and self-interest put the protection of human rights and the environment, its enforcement of core labour and social standards at risk.

¹⁰² Rome Statute of the International Criminal Court (1998) art 6-8.

¹⁰³ Additional Protocol II to the Geneva Convention 1949 (1977).

¹⁰⁴ Susan K Sell, *Private Power, Public Law: the Globalization of Intellectual Property Rights* (Vol. 88. Cambridge University Press 2003).

¹⁰⁵ Christian Tietje and Karsten Nowrot, 'Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-state Actors in WTO Law' (2004) 5 (2) *European Business Organization Law Review* 321, 351.

¹⁰⁶ Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press 2003).

¹⁰⁷ Bruno Simma, *From Bilateralism to Community Interest in International Law* (Martinus Nijhoff 1994).

¹⁰⁸ Inge Kaul, Isabelle Grunberg and Marc Stern, *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999).

¹⁰⁹ Jan Wouters and Anna-Luise Chané. *Multinational Corporations in International Law* (2013).

0.7. Justification of Research Methodology

In order to fulfil the research goal set out in this thesis, it is necessary to study and analyse current concept of MNCs accountability and remedy under international law, analyse MNCs history and economic power, the current concept of imposing legal accountability on MNCs, the doctrine of legal personality under international law, MNCs legal personality and the United Nations Guiding Principles on Business and Human Rights (UNGPs), specifically Pilar 2 and Pilar 3.

A vigorous analyse of Article 1, 2 and 3 of United Nations Universal Declaration of Human Rights (UDHR) through statutory provisions and cases. A pivotal point of applying the doctrinal method for this research is that it will allow examining international law, human rights law, domestic law, the effectiveness of voluntary mechanism and case studies in the development of human rights violations by MNCs at international courts, dispute, case law, The US Alien Tort Act and remedy for victims of human rights violations.

For the purposes of this research the following legal documents will be analysed: UN Universal Declaration of Human Rights (1948), Draft Principles On Human Rights And The Environment, Protocol to the African Charter on Human and Peoples' on the Rights of Women in Africa , Rio Declaration on Environment and Development (1992) , UN General Assembly Resolution 3281, International Covenant on Economic, Social and Cultural Rights (ICESCR) , and the Convention on the Elimination of All Form of Discrimination Against Women that is intended to be ratified by states but not binding, Vienna convention on law of treaties 1969, OECD Guidelines for Multinational Enterprises, Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) and other voluntary MNCs accountability mechanism. It will also examine the leading cases in the research will be *Kiobel v. Shell Royal Dutch Petroleum*, *Sahu v. Union Carbide*, *Maynas v. Occidental*, *Doe I v. Unocal Corp.* and *Defending the TIPNIS Indigenous Territory*.

This study will incorporate previous comparative research to examine the different legal principles in the different jurisdiction such as EU, US, UK, Australia, India and Netherlands to establish corporate liability for human rights violations; particularly research carry out by FAFO¹¹⁰ and the International Commission of Jurists (ICJ).¹¹¹ Existing literature on the subject

¹¹⁰Anita Ramasastry and Robert C Thompson, 'Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law' (2006) *Oslo: Fafo Institute of Applied International Studies*.

¹¹¹ International Commission of Jurists, '*Corporate Complicity and Legal Accountability, Report of the International Crime, Geneva*' (Vols 1-4. 2008) < <http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/>> accessed 18 July 2016.

of corporate liability for human rights violation will be review, which will enable the formulation of a preliminary set off hypotheses about the nature of accountability, impediment of corporate accountability, barriers to justice and accountability gap at national level. Past and ongoing legal cases raising issues of corporate involvement in human rights violations will be reviewed in an attempt to establish the extent to which these theoretical issues and problem are reflected in practice.

The Business and Human Right Resource Centre¹¹² is a key source of information for this research. Over the past decades and current legal cases where subjected to a side-side comparison of cause action, the substantive and procedural issues raised and the outcomes in the (if concluded) will be noted. Noting the distribution of legal proceeding (most of which start at US Court), the outcome of individual country-specific survey collected by FAFO for the purpose of the FAFO study (covering 16 different jurisdiction drawn from different regions) shall be review against a pro forma set of question prepared specifically for the purpose of this research to determine the extent of which tort law and civil law could provide appropriate mechanism for MNCs human rights abuses.

Nevertheless, the doctrinal method is merely theoretical, and linking the research to the social-legal method will give a deeper understanding of the law in theory and the law in practice. Therefore, this research will be conducted in an integrated manner to address the law and social dynamics relating to the inquiry. Socio-legal aspect of this research will cover the examining complimentary of the law, cases, literature on MNCs and FDIs, MNCs economic activities, MNCs human rights violations and their influence on indigenous people, governance, governments' attitude and the attitude of the international legal system including the UN and NGOs.

The fundamental drawback of this method is the validity of information gathered and its interpretation by the third party. How valid is the report by NGOs? Is it fair and honest or is it politically motivated? However, this can be covered in further investigation. This will be conducted through gathering data from specific MNCs, victims and corporation. The aim of this is to understand what corporate accountability and remedy mean for victims of human rights violations in specific countries across the globe. However, due to the lack of validity of these information in the literature, it is imperative for this research to adopt third approach to expand and verify the data gathered from all sources.

¹¹² < <https://www.business-humanrights.org/>> accessed 30 June 2016.

The study will review all leading MNCs cases, with particular attention to cases in Nigeria, Chad, Congo, Peru, India, and Brazil as the settings. These countries were chosen because of leading cases in MNCs human rights violations and their status in the global economy as developing and emerging markets with a high level of FDI and MNCs investments. The focus point of the cases study will be in Nigeria because of the new development in *Kioble* case. This case will serve as an indicator and foundation for corporate human rights violations cases; it will highlight some of the legal arguments and difficulties in implementing international treaties and, most important, governments' views and attitude towards MNCs in developing countries such as these ones.

0.8. Research Method

This study aims to examine whether the tort law could be a more effective mechanism to bring litigation against MNCs' violations of human rights and the environment. In order to fulfil this goal, the research will need to start studying and analyse international law and human rights law through statutory provisions and cases. Therefore, the doctrinal research and social-legal research will serve as the starting tool for the deep dive into the inquiry. Additionally, the study will use comparative legal research method mainly to comparing national legal and international legal systems, even if different forms of globalisation, such as Europeanization, and an increasing recognition of non-state law, such as customary law, religious law or unofficial law-making by international companies.¹¹³ This is because the comparative legal method will allow this study to examine the relationship between legal systems or between rules of more than one system, their differences and similarities. Comparative legal research method will also aid in comparing legal systems, and such comparison in this study will produce results relating to the different legal cultures being analysed in this thesis. It will also play a role in a better understanding of foreign legal systems and the application of international law, both at national and international level. This research method is added to the methodology adopted in this study because, in this age of globalisation and the complexity and intertwinement of international public and private law, comparative research plays an increasingly important role in international harmonisation and unification of laws, thereby leading to more international cooperation and a better legal world order.

¹¹³ Harold Cooke Gutteridge, *Comparative Law: An Introduction to The Comparative Method of Legal Study and Research* (Vol. 1. CUP Archive 2015).

0.8.1. Doctrinal research

The word ‘doctrine’ is derived from the Latin ‘*doctrina*’ that means teaching, knowledge or learning¹¹⁴. In terms of the legal research, this method covers legal notions and principles of all types of cases, statutes and rules¹¹⁵

0.8.2. Advantages

The research based on doctrinal method gives an accurate theoretical overview of the legal system and opportunity to investigate a particular aspect of the law in question. Different studies consider this method closely connected with the doctrine of precedent¹¹⁶ which is based on legal rules and judges’ decisions.

This method allows studying law and legal perceptions in different periods. The validity gained from this method of research has dominated and influenced the 19th and 20th centuries interpretations of law and legal scholarships. It tends to dominate legal research design¹¹⁷ due to its explicit consistency and well defined structure. Therefore, the use of doctrinal method as a well-established approach in legal research enhances not only the investigation of the law itself but also the development of the law through cases and judgements in this thesis.

A pivotal point of applying the doctrinal research for this research is that it will allow examining international law, human rights law, treaties, conventions and case studies in the development of human rights violations by MNCs at international courts, dispute settlements, The Alien Tort Act, extraterritorial application of international law and national court judgements.

0.8.3. Limitations

However, there is a substantial limitation on this methodology. The rigid structure of doctrinal method tends to ignore the social dynamics and development of society as a whole. It is merely theoretical, and linking the research to the social –legal methods will give a deeper understanding of the law in theory and the law in practice. Therefore, this research will be conducted in an integrated manner to address the law and social dynamics relating to the inquiry.

¹¹⁴ <<http://web.archive.org/web/20100510202232/http://www.wordiq.com/definition/Doctrine>> accessed 16 March 2015.

¹¹⁵ Terry C Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 (1) *Deakin Law Review* 83

¹¹⁶ Terry C Hutchinson, ‘Doctrinal Research: Researching the Jury’ (2013) *Research Methods in Law* 7, 33.

¹¹⁷ Desmond Manderson and Richard Mohr, ‘From Oxymoron to Intersection: An Epidemiology of Legal Research’ (2002) 6 (1) *Law Text Culture* 159, 161.

Firstly, doctrinal research will involve rigorous study of international law, human rights law, treaties, conventions, case study and dispute settlements, legal argument of cases and The Alien Tort Act. However, such method will tend to overlook the practical aspect of the law.

Secondly, gathering information with this approach could generate a bias conclusion as it will be impossible to verify the accuracy of the data and its sources. The time limit is another considerable factor with this research method as it will involve gathering data from the UN, UNCTAD, and UN Commission on Human Rights, ICJ, WTO, ICC and National Courts. Alternative fundamental approach could be interviewing judges in proceedings of human rights violation cases, NGOs and the UN Human rights Commission; however, it is beyond the scope of this research. Therefore, the findings and data analysis will be based on a balance of probabilities and conventional wisdom.

0.8.4. *Social-Legal Research*

The growing body of literature highlights the importance of adopting empirical research methods to examine legal occurrences in rapidly developing social world as they allow investigating how the law affects society. Banakar, Reza, and Max Travers¹¹⁸ and Tamanaha, Brian Z.¹¹⁹ stress on the important of using socio-legal research to study a legal phenomenon. The socio-legal research will enable this research to find out the deficiencies in an enactment of international law, human rights law, treaties, conventions and the problems of its implementations.¹²⁰ The object of socio-legal research in this thesis is to find out lacunae or deficiencies in the existing laws and to suggest suitable measures to eliminate them. Also, another objective is that, where there is an area for which there is no law at all, by conducting socio-legal research, this thesis will be able to suggest a suitable legal theory for the existing deficiencies.

0.8.5. *Advantages*

Traditionally, doctrinal research method has been assessed by measuring law in theory and cases but has ignored the social aspect of law, the real purpose of law in practice. This has created a gap in the legal research. Hence, it could be argued that, integrating doctrinal method with socio-legal studies is the best option to examine international law, human rights law and

¹¹⁸ Reza Banakar and Max Travers, eds. *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing 2005).

¹¹⁹ Brian Z Tamanaha, *Realistic Socio-Legal Theory* (Oxford Press 1999).

¹²⁰ Mike McConville, ed. *Research Methods for Law* (Edinburgh University Press 2017).

MNCs human rights violations. The concept of socio-legal research is very difficult to define. Some authors argue that it is the study of law through social science perspective¹²¹. However, Adler defines this approach as a “legal scholarship that uses the research method of social science to investigate the law in practice and its legal institutions, which requires a substantial empirical foundation to give the researcher a good training in social research method”¹²².

It is necessary here to clarify that it should not be viewed as a research drill in socio-legal research or socio-legal studies focusing on empirical research methods and ignoring doctrinal research but it is an inclusive research method in order to strengthen and investigate a particular aspect of legal problem in this research, the ‘positivism approach’¹²³, and the ‘interpretive approach’¹²⁴. Adopting an integration approach will strengthen the understanding of a particular problem of the research, as well as social dynamics of society and the economic impact of MNCs on indigenous people through socio-legal studies. This approach will enable an in-depth analysis of quantitative and qualitative research data in response to the requirements of the question stated from the beginning of this research and other wide factors affecting indigenous people.

This approach will enable the research to collect and analyse quantitative and qualitative data on MNCs human rights violations, the economic impact of MNCs on states and indigenous people, the advantages and disadvantages of MNCs activities on society as a whole, while gathering data on social dynamics of the affected area, what is perceived as human rights violation under international law and national court. The fundamental aspect of this study is the analysis of government attitude towards the implementation of treaty and the international legal system, MNCs and indigenous people. Has the social dynamic impacted on what indigenous people see as human rights violation or is it lack of good governance, characterised by the sovereignty of state?

Many writers have challenged socio-legal research on the grounds that it lacks identity and it is sub-field of social policy. Travers contends that socio –legal research is a part of social policy and its main goal is to influence or help government policy in allocating legal services but do not change the understanding of the law¹²⁵. German sociologist Luhmann, argues that

¹²¹ Reza Banakar, *Merging Law and Sociology: Beyond the Dichotomies of Socio-Legal Research* (Galda and Wilch Publishing: Berlin/Wisconsin 2003).

¹²² Michael Adler, *Recognising the Problem: Socio-Legal Research Training in the UK* (Edinburgh University 2007).

¹²³ Donald Black, ed. *The Behavior of Law* (Emerald Group Publishing, 2010).

¹²⁴ Max Travers and John F Manzo, *Law In-action: Ethnomethodological and Conversation Analytic Approaches to Law* (eds Vol. 8. Dartmouth Publishing Company 1997).

¹²⁵ Max Travers, ‘Sociology of Law in Britain’ (2001) 32 (2) *American Sociologist* 26, 40.

law is a normatively locked, but cognitively open system “autopoiesis”¹²⁶ while social philosopher Habermas adopts a contrary view and claims that the law can function better as a system of institution by demonstrating increasingly devoted interests of everyday people in society¹²⁷

0.8.6. Limitations

Lacey maintains that expansion of socio-legal research has ‘indirectly though not often overtly’ postured a depth challenge to the conformist indulgent of legal theory¹²⁸. Although, it is the most comprehensive account of the negative side of socio-legal research produced so far, this claim does suffer from a number of flaws as socio-legal research does offer an understanding of law and society. Nevertheless, this study seeks to address contradictions surrounding socio-legal method in legal research by adopting an inclusive approach to this research, a) by studying the legal theory and b) by examining the practicality of the law and its purpose.

A socio-legal aspect of this research will cover the examining complimentary of the law, cases, literature on MNCs and FDI, MNCs economic activities, MNCs human rights violations and their influence on indigenous people, governance, governments’ attitude and the attitude of the international legal system including the UN and NGOs. The fundamental drawback of this method is the validity of information gathered and its interpretation by the third party. How valid is the report by NGOs? Is it fair and honest or is it politically motivated? A fieldwork in a selected country could be an alternative approach but it is beyond the scope of this thesis. While it could be acknowledged that the validity of the data could be very difficult to examine, it is imperative to note that the research will endeavour to gather information from relevant and trusted sources along with cross-examining complementary and secondary sources in order to understand concepts and debates surrounding a particular subject of the studies.

0.8.7. Comparative Legal Research

Comparative legal research is the study of the similarities and differences between the laws of two or more countries, or between two or more types of legal systems.¹²⁹ More specifically, in this thesis, it involves the study of the different legal systems in existence in the

¹²⁶ Niklas Luhmann, *Communication and Social Order: Risk: a Sociological Theory* (Transaction Publishers 1993).

¹²⁷ Jürgen Habermas, *Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996).

¹²⁸ Nicolas Lacey, ‘Reconstruction in Socio-legal Theory’ (1996) 5 *Social and Legal Studies* 131.

¹²⁹ Konrad Zweigert and Kötz Hein, *Introduction to Comparative Law* (Oxford University Press USA 1992).

world, including the common law, the civil law, international law, human rights law, European law and United Nations Treaties. In this research, the methodology includes the description and analysis of foreign legal systems, even where no explicit comparison is undertaken. The importance of comparative legal research has increased enormously in the present age of internationalism, economic globalisation and democratisation, that is why this method is included in the thesis, to help clarify the differences that exist between the international legal system, domestic and other foreign legal systems.¹³⁰

Likewise, the rationale behind this approach in this research is that several disciplines have developed as separate branches of comparative legal research, including comparative constitutional law, comparative administrative law, comparative civil law (in the sense of the law of torts, delicts, contracts and obligations), comparative commercial law (in the sense of business organisations and trade), and comparative criminal law. Therefore, it is possible for this thesis to study these specific areas as micro- or macro-comparative legal analysis, in order to arrive at a detailed comparison of two countries or broad-ranging studies of several countries. For instance, this will show how the law of private relations is organised, interpreted and used in different systems or countries. The principal purposes of comparative law in this research is to attain a deeper knowledge of the legal systems in effect today. This include:

- Public international law, which governs interactions between states, between states and international bodies and between international bodies themselves. The sources of public international law are international agreements, customary law, judicial decisions and academic writings;
- Private international law, deal with relations between individuals over state boundaries and it is regulated by treaty and domestic law; and
- Foreign law, is the domestic law of any country other than the one within which individuals are working.

0.8.9. Limitations of Comparative Legal Research in Thesis

The major limitations of comparative legal research is that the widespread use of comparison legal rule can easily cause the impression that this method is a firmly established in all legal system, smooth and unproblematic method of legal analysis and application, which

¹³⁰ *Ibid.*

due to its unquestionable logical status can generate reliable knowledge once some technical preconditions are met satisfactorily. However, the absence of enough independent, self-contained legal rule and cases to be compared in order to identify causal patterns of law, the researcher is thus often left with a substitute, namely that of narrating a story instead.¹³¹ Also, confronted by that empirical reality, researchers must turn pragmatically to the second method, of careful historical narrative, attempting to establish “what happened next” to see if it has the “feel” of a pattern, a process, or a series of decisions and contingencies. Another fundamental issue with the general comparison of legal rule concerns the choice of the legal system being compared. The main point is that, far from being an innocent and/or simple task, the choice of comparison legal systems is a critical and tricky issue in comparative legal research. In turn, this fact often tends to undermine or at least weaken the possibilities of conducting a balanced comparison of the legal systems, i.e. a comparison characterised by equally precise and equally comprehensive attention paid to all the legal system compared. Put differently, the narrowed options of choice of legal systems joined with the disproportionateness of competence may be the main reason accounting for the relative abundance of unequal comparative legal research.

0.9. The significance of this Research

Findings of the research will add to the knowledge and understanding of the subject of MNCs accountability and remedy under national law, international law, and human rights law. The concept of corporate accountability in relation to MNCs activities and its application under both national and international law. The implication of binding treaty on MNCs and protecting the rights of indigenous people and the environment. This study should be significant because it will:

1. Allow the identification of the concept and framework to address MNCs human rights violations under both national and international law by looking at the four actors involved in human rights violation, MNCs, Government, International Institutions and NGOs.
2. Support and enrich theory and existing literature on corporate accountability and remedy under international, human rights law and case studies.

¹³¹ Reza Azarian, ‘Potentials and Limitations of Comparative Method in Social Science’ (2011) 1 (2) *International Journal of Humanities and Social Science* 113, 125.

3. Generate greater awareness among public and international organisations on the importance of having a proper and practical view about the dilemmas of MNCs operation in relations to human rights law and the state.

0.10. Limitation of this Research

The main limitation of this thesis can be observed in two dimensions, the first is victims' perception of remedy and the ongoing UN binding treaty on business and human rights and the second is the application of a duty of care through universal jurisdiction in the international legal system. The thesis did not involve field work, which will help clarify the understanding of remedy from victim's point of view. It is also limited in the examination of the current negotiation of UN treaty on transnational corporations and other business enterprises with respect to human rights, however in a general analysis the thesis has attempted to clarify some of the problem associated with the ratification and implementation of the treaty at domestic level, if it ever comes into force.

Also, the issue of application of common law duty of care through universal jurisdiction is a limitation factor in the establishing of the international corporate court in this study. This is because universal jurisdiction, unlike the ICC, is a blunt instrument when it comes to bringing alleged human rights violations to trial. It can at times help, but is hampered by diplomatic immunity where the alleged human rights violations is a diplomat or a head of state. Even when the alleged perpetrator is not protected by diplomatic immunity, states are reluctant to permit the application of universal jurisdiction as it can harm state-to-state relations. In short, politics distorted the process at every turn. No doubt politics motivated the lack of appetite for the application of universal jurisdiction, and may have distorted the legal scholar's perception of the merit of this principle. However much more baldly, politics intervened to crush the cases involving universal jurisdiction, and to remove the guts from the jurisdictional statute.

Similarly, the principal potential problem, however, is less with the process of filing and administering complaints than it is with the process of thwarting them. Whatever the character of the cases, and whatever the character of the tribunal, whether national or international, the politics of the powerful intervenes to cut off the application of universal jurisdiction, regardless of their merits, and finally to cut down the scope of the jurisdiction. The experience of Belgium, and of United States opposition to the ICC are powerful examples. The

two sets of problems are interlocking. Where jurisdiction is very wide, it will act as a magnet for complaints, regardless of their merit, leading to arguments that complaints are rooted in political vendettas.

On the other hand, international power politics will tend to narrow the jurisdiction and to cut off complaints, which will lead to arguments that despicable complaints are being stifled. Having said that, universal jurisdiction is not destined to be a mockery, for some of the same reasons that legal scholars do not think that domestic jurisdiction in criminal cases, for all its limitations, is a mockery. Domestic criminal jurisdiction, at its best, aspires to be free of politics and discrimination, but of course it is not; cases are pressed or dismissed because of bias, whether overt or unconscious. At its worst, it is a state instrument of oppression. Interest in universal jurisdiction has grown in recent years partly because of the biases in domestic jurisdiction. The limitations of international criminal jurisdiction cannot mean that it must disappear, any more than many legal scholars expect domestic jurisdiction to disappear, and hence why this principle is recommended and applied in this thesis.

1. Introduction

Remedies for human rights violations such as right to life, freedom from oppression, workers' rights, right to food and shelter for all, the right to own property, right to health and clean air, freedom of expression¹³² and environmental damages are governed by an international voluntary mechanism under the auspices of a number of United Nations initiatives.¹³³ From the research carried out in this study, it appears that the reparations¹³⁴ for victims who suffered human rights abuses are ineffective and remedies are mostly unenforceable.¹³⁵ So far, states have been reluctant to offer an effective remedy, explicitly and in general for victims of human rights violations and environmental damages. The drafters of the nineteenth century human rights convention already believed that humanity had inviolable rights that are protected under any jurisdiction.¹³⁶ However, human rights treaties do not expressly envisage causes of action for victims of human rights abuses under international or national law, and they are hardly able to invoke their rights.

Also, critical observation of the development of accountability can be noted in the outcome of the end of the Second World War, which created a crucial principle in the human rights accountability movement. The Nuremberg and Tokyo tribunals tried military, civilian government, and industrialist (corporate) officials and found those in each category liable for

¹³² UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 24 May 2018.

Human rights are the basic rights and freedoms that belong to every person in the world, from birth until death. They apply regardless of where you are from, what you believe or how you choose to live your life. They can never be taken away, although they can sometimes be restricted for example if a person breaks the law, or in the interests of national security. These basic rights are based on shared values like dignity, fairness, equality, respect and independence. These values are defined and protected by law.

¹³³ Robert C Blitt, 'Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embrasive Approach to Corporate Human Rights Compliance' (2012) 48 (1) *Texas International Law Journal* 33.

¹³⁴ The action of making amends for a wrong one has done, by providing payment or other assistance to those who have been wronged. Reparation is a principle of law that has existed for centuries, referring to the obligation of a wrongdoing party to redress the damage caused to the injured party. Under international law, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Permanent Court of Arbitration, *Chorzow Factory Case* (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US), Merits 1986 ICJ Report, 14, 114 (June 27); *Corfu Channel Case*; (*UK v. Albania*); *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184; *Interpretation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J., Recueil, 1950, p. 228. See also Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State." (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (ILC draft Articles on State Responsibility)).

¹³⁵ Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 (851) *Revue Internationale de la Croix-Rouge/International Review of The Red Cross* 497, 527.

¹³⁶ Janet Holl Madigan, *Being Human, Being Good: The Source and Summit of Universal Human Rights* (Theses and Dissertations UMD 2004).

their actions and inaction.¹³⁷ The inclusion of military, state officials and private officials in the trials held in the occupied zones continued into the 1950s, although Cold War politics led to the dismissal of charges against the industrialists in the early 1950s.¹³⁸ Likewise, the increasing developments for human rights accountability included the US Civil Rights Movement and increasing activism around human rights issues including the formation of organisations such as Amnesty International in 1961 saw the push for liability for human rights abuses.¹³⁹ In addition to these developments, rights were increasingly codified with the emergence of a growing number of human rights treaties in 1966¹⁴⁰ and the protocols on humanitarian law in 1977.¹⁴¹ A complementary development was the increasing examination of the overlapping responsibilities for human rights violations of state and non-state actors, prominently in the context of gender rights, which examined and developed standards for due diligence in cases of domestic violence over the last years.¹⁴²

It is through this development of human rights law that the role of transnational corporations began to receive additional international attention. In 1972, the UN Economic and Social Council ordered a study of the impact of transnational corporations on the development process and international relations.¹⁴³ In 1979, the UN created an advisory body, the Commission on Transnational Corporations (UNCTC).¹⁴⁴ From the period 1977–90, the UNCTC developed a code of conduct for multinational corporations, but the final draft prepared in 1990 was never adopted.¹⁴⁵ Country-specific standards included the 1977 Sullivan

¹³⁷ Michael R Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Macmillan 1997).

¹³⁸ Michael Bazylar and Jennifer Green, 'Nuremberg-Era Jurisprudence Redux: The Supreme Court in *Kiobel v Royal Dutch Petroleum Co.* and The Legal Legacy of N`uremberg' (2012) 7 *Charleston Law Review* 23.

¹³⁹ *Ibid.*

¹⁴⁰ Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 (8) *Yale Law Journal* 1335, 2042 and Beth Simmons, 'Treaty Compliance and Violation' (2010) 13 *Annual Review of Political Science* 273, 296.

¹⁴¹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature June 8, 1977, 1125 UNT.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature June 8, 1977, 1125 UNT.S. 609 (entered into force Dec. 7, 1978).

¹⁴² Catherine Phuong, 'Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: a Feminist Analysis' (2002) 10 (2) *Feminist Legal Studies* 203, 205.

¹⁴³ United Nation Economic and Social Council Res. 1721 (LIII) (July 28, 1972).

¹⁴⁴ Karl P Sauvart, 'The Negotiations of The United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned' (2015) 16 (1) *Journal of World Investment & Trade* 11, 87.

¹⁴⁵ De La Vega Connie, Amol Mehra & Alexandra Wong, Holding Businesses Accountable for Human Rights Violations: Recent Developments and Next Steps (2011). <<https://perma.cc/8WAA-SGCC>> accessed 13 June 2016.

Principles to address apartheid South Africa¹⁴⁶ and the 1984 MacBride Principles, the code of conduct for US companies doing business in Northern Ireland.¹⁴⁷

Furthermore, what has become clear in the past decades is that there is a substantial focus on actors with the highest levels of responsibility for human rights violations was an important development in these multiple movements for greater accountability in the human rights spectrum.¹⁴⁸ Together, these dynamics added to the momentum for a universal system of accountability for non-state actors,¹⁴⁹ a point which shall be argued throughout this thesis. This development is observed in the 1990s, which saw an increasing focus on the right of human rights victims to remedies for the violations against them. Special international tribunals were created to address mass atrocities in the former Yugoslavia and Rwanda,¹⁵⁰ followed by the 1998 establishment of the International Criminal Court (ICC).¹⁵¹ The ICC statute, often referred to as the “Rome Statute,”¹⁵² required the establishment of a trust fund so that victims of those convicted of human rights violations would benefit from the “principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”¹⁵³ Furthermore, in 2003, the ICC Prosecutor stated that these violations could include corporate officers,¹⁵⁴ and in September 2016, the ICC issued a policy paper discussing the liability of corporate officials for environmental crimes.¹⁵⁵

In 1989, the UN Sub-commission on the Prevention of Discrimination and Protection of Minorities began to research the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms.¹⁵⁶ The research by the

¹⁴⁶ The Global Sullivan Principles, The University of Minnesota Human Rights Library (2016). <<https://perma.cc/JU6X-WGCT>> accessed 24 May 2016.

¹⁴⁷ Father Sean McManus, ‘The MacBride Principles, The University of Minnesota Human Rights Library’ (2016). <<https://perma.cc/JA8X-5HCM>> accessed 8 January 2016.

¹⁴⁸ Michael Bazylar and Jennifer Green (n 136).

¹⁴⁹ *Ibid.*

¹⁵⁰ John RWD Jones, *The Practice of The International Criminal Tribunals for The former Yugoslavia and Rwanda* (Transnational Pub Incorporated 2000).

¹⁵¹ Cesare PR Romano, André Nollkaemper and Jann K Kleffner, eds. *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press 2004).

¹⁵² Mahnoush H Arsanjani, ‘The Rome Statute of The International Criminal Court’ (1999) 93 (1) *American Journal of International Law* 22, 43.

¹⁵³ Rome Statute of the International Criminal Court, art. 75, opened for signature July 17, 1998, 2187 UNT.S. 90 (entered into force July 1, 2002). <<https://perma.cc/Z3ML-Q9FR>> accessed 7 March 2016.

¹⁵⁴ International Criminal Court, Policy Paper on Case Selection and Prioritisation (2003) <<https://perma.cc/SDL9-A7B2>> accessed 8 March 2017.

¹⁵⁵ International Criminal Court, Policy Paper on Case Selection and Prioritisation (2016). <<https://perma.cc/SDL9-A7B2>> accessed 16 May 2017.

¹⁵⁶ Theo Van Boven, ‘The United Nations Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (2010) *United Nations Audiovisual Library of International Law*. New York, United Nations. <<https://perma.cc/7U38-HQ8F>> accessed 2 September 2017.

Sub-commission examined violations by those who were labelled with more “indirect” responsibility, or who might have violated rights by omission rather than commission.¹⁵⁷ This ultimately led to a Resolution by the UN General Assembly which summarised the important steps toward an international system to advance the right of victims to remedies, including compensation and restitution.¹⁵⁸ At the same time, the movement to impose transnational norms on corporations also intensified throughout this period. To date, several studies investigating corporate human rights violations have illustrate that the cases in US courts Australia, England, and France against multinational corporations and corporate officers further elaborate the push for human rights accountability at the international level.¹⁵⁹ The UN continued to develop standards for businesses and their officers. In 2002, the UN Commission on Human Rights / Sub-commission drafted a set of principles to directly bind businesses and endorsed corporate officer responsibility.¹⁶⁰ The preamble

[r]eaffirm[ed] that transnational corporations and other business enterprises, their officers including managers, members of corporate boards or directors and other executives and persons working for them have, inter alia, human rights obligations and responsibilities.¹⁶¹

However, these standards were met with strong opposition and were obstructed at the UN Commission.¹⁶²

Additionally, it seems that voluntary mechanisms such as the Guiding Principles (GPs),¹⁶³ the OECD Guidelines,¹⁶⁴ the ILO Tripartite Declaration of Principles Concerning

¹⁵⁷ *Ibid.*

¹⁵⁸ G.A. Res. 60/147, Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005). <<https://perma.cc/C49S-5MA3>> accessed 8 September 2017.

¹⁵⁹ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Vol. 4. Hart Publishing 2004).

¹⁶⁰ Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

¹⁶¹ David Weissbrodt and Muria Kruger, ‘Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights’ (2003) 97 (4) *American Journal of International Law* 901, 922.

¹⁶² *Ibid.*

¹⁶³ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (UN Press 2011).

¹⁶⁴ Kathryn Gordon, ‘The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison’ (OECD Working Papers on International Investment 2001).

Multinational Enterprises and Social Policy,¹⁶⁵ and the SA800 Standards¹⁶⁶ have not helped victims gain access to justice and effective remedies either. In fact, as it has been argued, these initiatives have contributed to ongoing human rights violations in the international arena by allowing corporations to choose the methods and processes with which they respect human rights and the environment.¹⁶⁷ Some research has found that while voluntary regulation has resulted in some substantive improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority at both national and international levels. It seems possible that the relevance of rights under international law and human rights law is questionable if victims have no legal capacity to enforce their rights before either a national or international court once they claim to have become a victim of human rights abuses. International law has historically been between states, are treated as subjects with legal personality. Allowing them the power to draft and consent to international agreements that regulate their affairs and relationships with each other. This theory contrasts with domestic law, as it goes beyond the internal affairs of a state to impinge upon the interests of other states and the international community as a whole, such as violations of human rights. The rights for remedy is imperative for victims involved in human rights abuses, but, however, the theory of international law and the exercise of state jurisdiction in domestic affairs has created a legal and jurisdictional impediment for victims access to remedy. The parameter of international law and state jurisdiction has contributed to the lack of effective remedy at both national and international level, which has created an obstacle for the rights for remedy. In addition, voluntary regulation does not provide an effective remedy for such misconducts. As put by Lord Denning, “a right without a remedy is no rights at all”.¹⁶⁸ Even though, Lord Denning have no legal authority at the international level, his Lord’s view stress on the importance of human rights and access to remedy. This means that it is mandatory for rights to be

¹⁶⁵ Jernej Letnar Cernic, ‘Corporate Responsibility for Human Rights: Analyzing The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy’ (2009) 6(1) *Miskolc Journal of International Law* 24.

¹⁶⁶ Grigoris Giannarakis, Nikolaos Litinas and Nikolaos Sariannidis, ‘Evaluation of Corporate Social Responsibility Performance Standards’ (2011) 5(17) *African Journal of Business Management* 7367.

¹⁶⁷ David Vogel, ‘The Private Regulation of Global Corporate Conduct: Achievements and Limitations’ (2010) 49 (1) *Business & Society* 68, 87, also see: Steven R Ratner, ‘Corporations and Human Rights: a Theory of Legal responsibility’ (2001) 111 (3) *Yale Law Journal* 443, 545.

¹⁶⁸ *Gouriet v Union of Post Office Workers* [1978] AC 435, p. 435. “Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary; it is a useful power and over the course of the last hundred years it has become more and more extensively used. However, the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not of anyone else”. As to the right to bring private prosecutions, they are ‘a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.

accompanied by effective remedy. The lack of a solution for human rights abuses has often resulted from human activities, such as the disposal of toxic chemicals, the generation of power, and the exploitation of oil. Thus, the disposal of toxic chemicals, the generation of power, and the exploitation of oil can be seen as the violation of the rights to a clean air, right to health, rights to development and clean environment.¹⁶⁹ The mismanagement of natural resources has caused severe watershed erosion, desertification, and atmospheric pollution which, in turn have severely impaired human life.¹⁷⁰ Although human suffering associated with environmental destruction is growing,¹⁷¹ international and regional human rights institutions have yet to clarify the obligations of governments to protect and provide remedies for the victims involved. A primary concern of this can be seen in the “ICC [which] widens remit to include environmental destruction cases”.¹⁷² The Hague court has cited that it will prosecute governments and individuals for environmental crimes, including land grabs.¹⁷³ As put forward by Gallmetzer, the ICC will exercise its jurisdiction by looking at the broader contexts in which crimes are committed. Recent evidence suggests that the ICC is extending its focus on corporate accountability to include Rome Statute crimes already in their jurisdiction. The ICC, however, does not fully explain what it means by stating that the “Office will also seek to cooperate and provide assistance to states, upon request,”¹⁷⁴ with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment.¹⁷⁵ Thus, what does the ICC mean by assisting national government,¹⁷⁶ in a form of legal prosecution or investigation? This is not clear in the ICC

¹⁶⁹ Bronwen Manby, *The Price of Oil: corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Vol. 2156. Human Rights Watch 1999).

¹⁷⁰ Michelle Leighton Schwartz, ‘International Legal Protection for Victims of Environmental Abuse’ (1993) 18 *Yale Journal of International Law* 355.

¹⁷¹ Michelle Leighton Schwartz, ‘International Legal Protection for Victims of Environmental Abuse’ (1993) 18 *Yale Journal International Law* 355.

¹⁷² John Vidal and Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases* (2016) The Guardian. <<https://www.theguardian.com/global/2016/sep/15/hague-court-widens-remit-to-include-environmental-destruction-cases>> accessed 15 June 2017. “This shift means it can start holding corporate executives to account for large-scale land grabbing and massive displacement happening during peace time”.

¹⁷³ *Ibid.*, The office [of the prosecutor] will give particular consideration to prosecuting Rome statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”.

¹⁷⁴ *Ibid.*

¹⁷⁵ Payal Patel, ‘Expanding Past Genocide, Crimes Against Humanity, and War Crimes: Can an ICC Policy Paper Expand The Court's Mandate to Prosecuting Environmental Crimes?’ (2016) 14 *Loyola University Chicago International Law Review* 175, 175.

¹⁷⁶ Anna Stenning and Samantha Walton, *Introduction* (2017) iii-x. <<http://www.tandfonline.com/doi/full/10.1080/14688417.2017.1310440>> accessed 15 June 2017.

widens remit to include environmental destruction cases policy. Considering the different gap such as false justice, false equality before the law, lack of cooperation by the world most powerful states,¹⁷⁷ misrepresentation of rule of law¹⁷⁸, that exist in developing country¹⁷⁹ judicial systems and the unwillingness of countries to cooperate with the ICC, it is hard to see how this policy will be effective in practice.¹⁸⁰ Not to mention the various difficulties of holding corporations accountable for their business misconduct under international criminal law.¹⁸¹ Furthermore, without states and international institutions working together, it will be difficult for the ICC to promote direct interaction with victims and their associations at all stages of its activities. In addition to this, it will further be difficult for the ICC to coordinate preliminary examinations, investigations, pre-trials, and trial to reparation stages.

The relationship between the victim of corporate human rights violations, relationship between the corporation, its subsidiary and the environment, relationship between the subsidiary and the victims and the environment require a renewed examination of the proper

¹⁷⁷ Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Zed Books Ltd 2013).

¹⁷⁸ Antonin Scalia, 'The Rule of Law as A Law of Rules' (1989): 56 (4) *University of Chicago Law Review* 1175, 1188. The rule of law means;

- All persons and organisations including the government are subject to and accountable to the law
- The law is clear, known, and enforced
- The Court system is independent and resolves disputes in a fair and public manner
- All persons are presumed innocent until proven otherwise by a Court
- No person shall be arbitrarily arrested, imprisoned, or deprived of their property
- Punishment must be determined by a Court and be proportionate to the offence

¹⁷⁹ Least developed countries (LDCs) are low-income countries confronting severe structural impediments to sustainable development. They are highly vulnerable to economic and environmental shocks and have low levels of human assets. United Nations, 'Economic Analysis & Policy Division' (2018) <<https://www.un.org/development/desa/dpad/least-developed-country-category.html>> accessed 4 July 2016.

¹⁸⁰ Holding corporate officers individually liable offers a feasible and readily available option to establish corporate accountability. Individual criminal liability of corporate officers clearly falls within the jurisdiction of the ICC and the international tribunals over natural persons and would therefore not require any treaty amendments to the existing statutory structures. However, there are hurdles that impair the actual practicability of individual corporate officer liability as the main tool to hold corporations accountable. Most prominently, the discovery process and evidence production are significantly more cumbersome when holding individual corporate officers criminally liable.

¹⁸¹ Jonathan A Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094. International criminal law deals with the criminal responsibility of individuals for international crimes. There is no generally accepted definition of international crimes. A distinction can be made between international crimes which are based on international customary law and therefore apply universally and crimes resulting from specific treaties which criminalise certain conduct and require the contracting states to implement legislation for the criminal prosecution of this conduct in their domestic legal system. The international core crimes, i.e., crimes over which international tribunals have been given jurisdiction under international law, are: genocide, war crimes, crimes against humanity and aggression

balance between the corporate misconduct and solutions for victims.¹⁸² It is therefore likely that the connection between international criminal law and environmental crime will not yield effective accountability for corporate human rights violations and environmental damages, but may provide some grounds for enforcing human rights obligation in the international community. Hence, it could possibly be hypothesised that what is conceived as a violation or breach of a duty of care under civil and tort law will most likely not be conceived of as a violation of domestic criminal law, international criminal law, or criminal obligations under international law. Therefore, the need to create legal principle for corporate accountability is likely to arise in the existing civil and tort law framework, which will give expression to the new human rights treaties and the existing obligations under the Universal Declaration of Human Rights 1948.¹⁸³

Nonetheless, current and past development of environmental crime has led many authors in the last two decades to see environmental law as the new legal framework for corporate human rights accountability and for the violations of human rights with respect to environment law.¹⁸⁴ The main reason behind such a choice appears to be that international

¹⁸² One innovative tool that the US Department of Justice (DOJ) has used to enforce the Foreign Corrupt Practices Act (FCPA) has been the non-monetary criminal penalty of assigning an independent compliance monitor to oversee the company. Under the FCPA regime there has been an increasing number of prosecutions in recent years of individual corporate officers for violations of the FCPA. , Jon Jordan, 'Recent Developments in the Foreign Corrupt Practices Act and The New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery' (2010) 7 *New York University Journal of Law & Business* 845. There is no specialised accounting provision for human rights, unlike for FCPA-related matters; however, there are discernible regional trends. Human rights are subject to the reporting requirements under the E.U. directive on disclosure of non-financial information "to the extent [that this information is] necessary for an understanding of the undertaking's development, performance, position and impact of its activity". See Council Directive 2014/95/EU O.J. (L 330) 1 (regarding disclosure of non-financial and diversity information by certain large undertakings and groups). The decision to impose a compliance monitor depends on the specific facts of the case. According to the Resource Guide to the US Foreign Corrupt Practices Act (FCPA) by the US Department of Justice (DOJ) and US Securities and Exchange Commission (SEC), the following factors determine whether a monitor is appropriate, namely: "seriousness of the offense[;] duration of the misconduct[;] pervasiveness of the misconduct, including whether the conduct cuts across geographic and / or product lines[;] nature and size of the company[;] quality of the company's compliance program at the time of the misconduct[;] subsequent remediation efforts". Lucinda Law, 'The Demand Side of Transnational Bribery and Corruption: Why Levelling the Playing Field on the Supply Side Isn't Enough' (2015) 84 *Fordham Law Review* 563 and DEP'T OF JUSTICE, CRIM. DIV., & SEC, ENF'T DIV., A RESOURCE GUIDE TO THE US FOREIGN CORRUPT PRACTICES ACT, at 71 (2012) [hereinafter DOJ & SEC RESOURCE GUIDE]. <<https://www.sec.gov/litigation.shtml>> accessed 14 July 2017. While individual prosecutions remain important to deter future criminal conduct, it is also crucial to address systemic problems in the corporations that can lead to a culture of non-compliance. Joseph F Warin, Michael S Diamant, and Veronica Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better' (2011).

¹⁸³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 15 June 2017.

¹⁸⁴ Alone Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 (3) *European Journal of International Law* 613, 642, Lorand Bartels, 'Human Rights and Sustainable Development Obligations

environment crime and environmental law have been identified as one of the areas of international mechanisms to regulate corporate misconduct,¹⁸⁵ the protection of human rights, and the environment.¹⁸⁶ Commenters have argued that the evolution of this field of international legal order, both from substantive and from an institutional and legal procedural perspective,¹⁸⁷ will provide victims of corporate human rights abuses legal redress. In relation to the substance on the other hand, the recognition of problematic areas of corporate environmental abuses that are linked to human rights have led to the incorporation of the principle of inter and intra-generational equity. In other words, it means that we inherit the earth from previous generations and have an obligation to pass it on in reasonable condition to future generations.¹⁸⁸ This has ultimately changed the traditional role of the state with its mutual relationship, towards a more practical role.

A possible explanation for this might be that states should act in the interest of individuals and groups in a society and in the common interest of humanity. Failure to meet this obligation may constitute a violation of the state in protecting its citizens under international law and human rights law.¹⁸⁹ Studies such as accountability of transnational corporations in the developing world: the case for an enforceable international mechanism¹⁹⁰ conducted thus far have highlighted a potential inconsistency with this argument because international environmental law cannot be used as a mechanism for corporate human rights obligations. A possible reason for this states that a country is limited in terms of solutions for

in EU Free Trade Agreements' (2013) 40 *Legal Issues of Economics Integration* 297 and Daniel Augestein, 'Study of The Legal Framework on Human Rights and the Environmental Applicable to European Enterprise Operating Outside the European Union' (2014). <http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf> accessed on 28 May 2017.

¹⁸⁵ Joshua P Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right to a Healthy Environment' (1997) 15 *Business and International Law Journal* 261.

¹⁸⁶ Antonio Cardesa-Salzmann, 'Constitutionalising Secondary Rules in Global Environmental Regimes: Non-compliance Procedures and the Enforcement of Multilateral Environmental Agreements' (2011). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2790886> accessed 20 April 2017.

¹⁸⁷ *Ibid.*

¹⁸⁸ Edith Brown Weiss, *Intergenerational Equity: a Legal Framework for Global Environmental Change* (United Nations University 1992) "Intergenerational equity is a concept that says that humans 'hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other'".

¹⁸⁹ Ian Brownlie and Kathleen Baker, *Principles of Public International Law* (Vol. 1. Oxford Clarendon Press 1973). "The Responsibility to Protect," found that sovereignty not only gave a State the right to "control" its affairs, it also conferred on the State primary "responsibility" for protecting the people within its borders. It proposed that when a State fails to protect its people either through lack of ability or a lack of willingness the responsibility shifts to the broader international community".

¹⁹⁰ Kamil Omotoso and Hakeem Yusuf, 'Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism' (2017) 13 (1) *Critical Perspectives on International Business* 54, 71.

corporate misconduct and criminal liability. Also, as will be explained, states have failed to establish effective mechanisms in regulating corporate misconduct linked to environmental crime. Typical examples include the Niger Delta,¹⁹¹ Bhopal Disaster¹⁹², The Gulf Oil Spill¹⁹³, Lago Agrio¹⁹⁴, Ok Tedi¹⁹⁵, and the Sandoz Spill environmental disaster.¹⁹⁶ Debates regarding environmental crimes have stated that the application of human rights into international environmental law requires the creation of judicial balancing since environmental law does not provide criminal obligation themselves. The issues relevant, therefore, become subject to judicial discretion which are difficult to implement in practice.

Taking the above into consideration, this thesis seeks to answer the following: what legal solutions should the national and international system implement in order to remedy victims of corporate human rights abuses and environmental damage. Although voluntary mechanisms such the Guiding Principles (GPs), the OECD Guidelines, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the SA800 Standards have occasionally raised awareness of human rights violations and environmental damages, research has found that little has been done to prevent ongoing human rights abuses. Equally, this research found that it is only occasionally that a tort law such as The Alien Tort Statute (28 USC. § 1350; ATS) provides an avenue for a tort claimant to obtain monetary compensation.¹⁹⁷ For this research the Alien Tort Statute is very important because it has since become the font of transnational public law litigation in American courts. This litigation, frequently involving largely foreign parties and events, has become a form of civil-side universal jurisdiction. Like more traditional forms of universal jurisdiction, it allows American courts to hear human rights claims based on the enormity of the offense, even when the claims lack any significant ties to the United States. However, unlike traditional universal

¹⁹¹ Okechukwu Ibeanu, 'Oiling the Friction: Environmental Conflict Management in the Niger Delta, Nigeria' (2000) 6 (6) *Environmental Change and Security Project Report* 19, 32.

¹⁹² Lee Wilkins, *Shared Vulnerability: The Media and American Perceptions of The Bhopal Disaster* (Vol. 8. Greenwood Press 1987).

¹⁹³ Bernard D Goldstein, Howard J Osofsky and Maureen Y Lichtveld, 'The Gulf oil spill' (2011) 364 (14) *New England Journal of Medicine* 1334, 1348.

¹⁹⁴ Cortelyou Kenney, 'Disaster in the Amazon: Dodging Boomerang Suits in Transnational Human Rights Litigation' (2009) 97 (3) *California Law Review* 857, 904.

¹⁹⁵ Stuart Kirsch, 'Indigenous Movements and the Risks of Counter Globalization: Tracking the Campaign Against Papua New Guinea's Ok Tedi mine' (2007) 34 (2) *American ethnologist* 303, 321.

¹⁹⁶ Aaron Schwabach, 'The Sandoz Spill: The Failure of International Law to Protect The Rhine from Pollution' (1989) 16 *Ecology Law Quarterly* 443.

¹⁹⁷ The Alien Tort Statute (28 USC. § 1350; ATS) "The Alien Tort Statute ("ATS"; also known as the Alien Tort Claims Act) refers to 28 USC. § 1350, granting jurisdiction to federal district courts "of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States." It serves as a statutory instrument for gaining universal jurisdiction over violations of international law."

jurisdiction, which is overwhelmingly a criminal phenomenon, the ATS places control over initiation and conduct of the litigation in private hands and engages the exceptional machinery of American civil justice. Though, the fact remains that victims of human rights violations are often left without any remedy, specifically those victims located in a developing country that want to attract multinational corporations but lack the legal and judicial system necessary for regulating corporate business practices effectively, as well as for providing remedies for abuses that occur during business operations.¹⁹⁸ The key problem is that victims of corporate abuse face serious obstacles to obtaining a legal remedy both in the jurisdiction where the harm occurred (“host state”) as well as where multinational companies are headquartered (“home state”). When multinational companies commit human right abuses in host countries, host state courts often remain the preferred forum for pursuing legal redress. However, for various reasons which include a lack of due process, political interference, mistrust of the courts or lack of affordable legal assistance, a claim in the host state may not be a viable option.¹⁹⁹ In these instances, legal options in the home state also need to be leveraged to ensure justice.

Victims of corporate human rights abuses and environmental damages come from a diversity of backgrounds and experiences. These relationships may partly be explained by victims' perceptions of effective remedy and the process of remedy which maybe varied and multidimensional in developing countries. Perhaps, cultural differences may also impact perceptions of remedies for victims of human rights abuses. In some cultures, moreover, active participation in criminal proceedings may be essential, whereas in others, the admission of guilt by the wrongdoer is most important. It can therefore, be assumed that the fact that one can never undo what was done or provide adequate remedies may mitigate against reparations, whereas in others, the symbolic effect is seen as extremely beneficial.²⁰⁰ The context of the violation should give rise to specific perceptions of what kind of remedies should be awarded. For example, a situation of massive population displacement and ethnic cleansing may necessitate a remedy for the return of people from the community and displaced persons, and/or provide alternative solutions for these victims. However, this has not been the case. One of the

¹⁹⁸ John Madeley, *Big Business, Poor Peoples: The Impact of Transnational Corporations on the World's Poor* (Palgrave Macmillan 1999).

¹⁹⁹ Amnesty International, ‘Creating a Saradigm Shift: Segal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse’ (2017).

²⁰⁰Max F Perutz, *Redress: Torture Survivors Perceptions of Reparation: A Preliminary Survey* (2001) <<http://www.redress.org/downloads/publications/TSPR.pdf>> accessed 4 July 2017.

core issues that emerges from this is that great scrutiny may be required in judicial procedures along with transparency, in order for effective remedies to be put in place for victims. focus.

Another obstacle in seeking solutions with respect to corporate accountability include the legal challenges victims of corporate misconducts face by both the host and home state jurisdiction in obtaining solutions from a company subsidiary. The “corporate veil”, or its more technical term “separate legal personality,” doctrine is a major barrier to holding parent companies legally accountable for abuses committed by their subsidiaries. According to this doctrine, each separately incorporated member of a corporate group is considered to be a distinct legal entity that holds and manages its own separate liabilities. This doctrine implies that the liabilities of one member of a corporate group will not automatically be imputed to another merely because one holds shares in the other, even if this is the totality or majority of those shares.²⁰¹ There also exist obstacles in obtaining a judicial or non-judicial remedy from parent corporate human right violations and environmental damages. Perhaps, it could be that the international legal system and the national legal system have failed to address some of the concept of parent corporation and subsidiary relations. Also, “there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary’s activities”.²⁰² Conversely, whenever the victims try to sue parent companies in view of the practical or legal necessities alluded to above, parent companies invariably rely, amongst others, on two principles of corporate law: “separate corporate personality”²⁰³ and “limited liability”. One of the consequences of the legal separation is that a company is generally not liable legally for the conduct (both acts and omissions) of its subsidiaries. On the other hand, the principle of limited liability would limit the liability of a parent company for the wrongful conduct of its subsidiary company to the extent of its investment in the subsidiary.²⁰⁴ It may be the case that victims who have suffered

²⁰¹ Henry W Ballantine, ‘Separate Entity of Parent and Subsidiary Corporations’ (1925) *California Law Review* 12, 21.

²⁰² Human Rights Council, ‘Improving Accountability and Access to Remedy For Victims of Business-Related Human Rights Abuse: Report of The United Nations High Commissioner for Human Rights’, A/HRC/32/19 (10 May 2016), para 22 (‘OHCHR Guidance’)

²⁰³ David Millon, ‘Theories of the Corporation’ (1990) *Duke Law Journal* 201. “There are different theories explaining or justifying the idea of separate corporate personality, e.g., legal fiction, state concession, aggregate, natural entity, and the nexus of contracts”.

²⁰⁴ Surya Deva, Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law? (2017). “The twin principles were developed during a period when ordinarily only human beings could be shareholders in companies. This meant that unless authorised by a specific charter issued by the Queen or the King, artificial legal entities like companies were neither allowed to hold shares in other companies nor establish their own subsidiaries. Without fully appreciating the differences between “natural” shareholders and “corporate” shareholders, companies were allowed to reap benefits of the principles of separate corporate personality and limited liability. The enjoyment of limited liability for

from corporate human rights abuses through corporate subsidiaries in developing countries,²⁰⁵ which include environmental violations that have taken place in high-risk host states, may be denied access to remedies against the subsidiary in the host state.²⁰⁶ This may be the case for varying reasons, which include: insufficient precautionary measures, the lack of human rights regulatory mechanism at the national level, judicial redress at the national level, lack of funds, underfunding, bankruptcy, or lack of enforcement.²⁰⁷

Further analysis in research demonstrates that multinational companies are normally structured in parent-subsidiary relationships for a variety of managerial, regulatory, and tax reasons,²⁰⁸ which make it very difficult to hold them liable for business misconduct. Parent-subsidiary relationships have created a legal deficit that have contributed to a lack of solutions at the national level. This legal deficit remains within the sphere of a subsidiary not subject to the jurisdiction where the parent company is domiciled. The lack of effective remedy from the subsidiary could be due to the lack of identity of the parent corporation that is regulated by corporate law.²⁰⁹ Further examination conducted during this research revealed that human rights contained in multilateral agreements cannot be invoked by individuals against (private) companies. Interestingly, the correlation between this legal theory and the corporate law treats subsidiaries separate from the parent corporation.²¹⁰ This distinct legal concept treats business entities separate for the purposes of taxation, regulation, and liability. In other words, a subsidiary can sue and be sued separately from its parent, and its obligations will not normally be the obligations of its parent.²¹¹

parent companies is regarded more problematic in tort cases (as opposed to contract cases) in which non-consenting victims may suffer from corporate activities.

²⁰⁵ Michael Diamond, *Corporation 905* (3rd edn, Carolina Academic Press 2012); Special Representative on Business and Human Rights, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respects, and Remedy” Framework, adopted by the Human Rights Council, 17th Sess., Mar. 21, 2011, U. N. Doc. A/HRC/17/L.17/31 (2011).

²⁰⁶ *Burnham v Superior Ct.*, 495 US 604, 628 (1990); *Kulko v Superior Ct.*, 436 U.S. 84, 101 (1978). A court must have personal jurisdiction over the defendant to hear the case. See also, *Daimler AG v Bauman*, 134 S. Ct., 746 (2014). In *Bauman*, the Supreme Court essentially held that courts cannot assert general personal jurisdiction, even if the corporation consistent with due process when it is not headquartered or incorporated within its jurisdiction, even if the corporations does significant business there directly or through a subsidiary. The court also reject the argument that the economic activities of a parent’s wholly owned subsidiary could contributed to the parent company for purpose of general personal jurisdiction.

²⁰⁷ Manby Bronwen, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Vol. 2156 Human Rights Watch 1999).

²⁰⁸ Alan O Sykes, ‘Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis’ (2011) 100 *Georgetown Law Journal* 2161.

²⁰⁹ Murray A Pickering, ‘The Company as a Separate Legal Entity’ (1968) 31 (5) *Modern Law Review* 481, 511.

²¹⁰ Henry W Ballantine, ‘Separate Entity of Parent and Subsidiary Corporations’ (1925) *California Law Review* 12, 21.

²¹¹ Jay Lawrence Westbrook, ‘Theories of Parent Company Liability and The Prospects for an International Settlement’ (1985) 20 *University of Texas School of Law* 321.

Furthermore, complex corporate structures used to organise business conglomerates within the transnational context often make access to justice for victims exceptionally difficult and even the establishment of a link between the violation and parent corporation very challenging.²¹² The key problem could be that there is no record of the violation and in most cases, victims may not have the knowledge and legal expertise to examine complex legal issues, such as ones related to human rights violations and environmental damages.²¹³ It could also be that there is a lack of proximity to the victims and the corporation's business activities.²¹⁴ Difficulties arise, however, when an attempt is made to establish legal proximity²¹⁵ between the parent corporation and the subsidiary to bring a claim against the parent corporation. Moreover, the subsidiary may be underfunded or there may not be legal redress facilities in the host state legal system. Lastly, the presence of corruption and the ineffectiveness of the domestic legal systems might represent another insurmountable obstacle for victims of corporate abuses.²¹⁶ This observation may support the hypothesis that in considering legal options to establishing the liability of a parent company, legislators and advocates must assess the following factors: "duty of care," the extent to which control must be a determining factor in assigning liability; how to define control; and, whether it must be proven or can be assumed in court.

The reasons acknowledged above indicate some of the main impediments for providing victims of corporate human rights abuses and environmental damages with effective remedies.²¹⁷ As it has been mentioned in the above paragraph, in the parent corporation subsidiary doctrine (parent corporation legal doctrine)²¹⁸ and the organisational structure of corporate enterprises, both parties financially benefit from the subsidiary's business activities.²¹⁹ Hitherto, these make it legally and financially difficult for victims to gain access

²¹² Rolf H Weber and Rainer Baisch, 'Liability of Parent Companies for Human Rights Violations of Subsidiaries' (2015). <<https://ssrn.com/abstract=2625536> or <http://dx.doi.org/10.2139/ssrn.2625536>> accessed 25 September 2017.

²¹³ Refer to chapter 6 and 7 of the thesis.

²¹⁴ Ronen Shamir, 'Between Self-Regulation and The Alien Tort Claims Act: On The Contested Concept of Corporate Social Responsibility' (2004) 38 (4) *Law & Society Review* 635, 664.

²¹⁵ Lord Atkin's Neighbour Principle, "A sufficient relationship of proximity or neighbourhood exists between the alleged wrongdoer and the person who has suffered damage. It is fair, just and reasonable to impose liability".

²¹⁶ Sarah Knuckey and Eleanor Jenkin, 'Company-Created Remedy Mechanisms for Serious Human Rights Abuses: a Promising New Frontier for the Right to Remedy?' (2015) 19 (6) *International Journal of Human Rights* 801, 827.

²¹⁷ Joshua P Eaton, 'The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal* 261.

²¹⁸ Christopher R Knight, 'International Human Rights Litigation after Bauman: The Viability of Veil Piercing to Hale Foreign Parent Corporations into US Courts' (2016) 41 *University of Dayton Law Review* 213.

²¹⁹ Julian Birkinshaw, Neil Hood and Stefan Jonsson, 'Building Firm-Specific Advantages in Multinational

to an effective remedy against the parent corporation because of a deeply ingrained orthodox legal doctrine of corporate law²²⁰ (i.e. parent corporation doctrine and the doctrine of limited liability of shareholders),²²¹ which also applies to corporate shareholders.²²² Victims can only convince their home state court to pierce the corporate veil if the parent corporation is directly engaged in the abuse or if the subsidiary was acting as the parent's alter ego.²²³ Without this, the parent corporation cannot be held liable or be required to provide a remedy to a victim of the subsidiary's action. Given these difficulties, the question that needs to be asked is, what is the legal principle for establishing the proximity between victims, parent corporations, and the subsidiary's misconduct?

It is difficult to explain how to address the issue of corporate law in this doctoral thesis, though it might be related to the view that "corporation as fiction" as seen in the *Case of Suttons*.²²⁴ This theory arose by necessity from the idea that law regulates human beings and corporations therefore do not constitute human beings. The representation of certain organisations as corporations was justified by accepting that, although in reality they are not human beings, courts can treat them as though they are. The consequence is that there is no limit to the jurisdiction of courts and Parliament over laws as to what corporations are involved.²²⁵ Furthermore, the "bracket" theory was taken to be an alternative vision, although it is not essentially so. It envisions "corporation" as a shorthand for a whole set of rules with

Corporations: The Role of Subsidiary Initiative' (1998) *Strategic Management Journal* 221, 241.

²²⁰ In the orthodox legal view, the company is imagined as a full, rights-bearing person; although the many and varied ways in which the courts have 'pierced the corporate veil.' In contrast to the orthodox legal conception, classical economics imagines the company as a simple conduit for optimising shareholders' utility. Tax law tends to manifest a floating conception of the company, whereby it is treated in some areas as a person and in other areas as a mere conduit. Also see, David. Millon, 'Theories of The Corporation' (1990) 2 *Duke Law Journal* 201, 262.

²²¹ Bryan A Garner, *Black's Law Dictionary 1054* (10th ed. 2014), also see Robert B Thompson, 'Piercing The Corporate Veil: an Empirical Study' (1990) 76 *Cornell Law Review* 1036 and William O Douglas and Carrol M Shanks, 'Insulation from Liability Through Subsidiary Corporations' (1929) 39 (2) *Yale Law Journal* 193, 218.

²²² *United State v Bestfoods*, 524 US, 61-64 (1998) (acknowledging that shareholders protections applies to only parents of subsidiaries) also see; Phillip I Blumberg, 'Limited Liability and Corporate Groups' (1985) 11 *Journal Corporation Law* 573.

²²³ *Bestfoods*, 524 US at 62 ("but there is an equally fundamental principal of corporate law, applicable to the parent subsidiary relationship as well as generally, the corporate veil may be pierced when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purpose on the shahreholders' behalf").

²²⁴ *Case of Sutton's Hospital* (1612) 77 Eng Rep 960. "Sir Edward Coke wrote in the report the following, and it is great reason that an Hospital in expectancy or intendment, or nomination, shall be sufficient to support the name of an Incorporation, when the Corporation itself is *onely in abstracto, and resteth onely* in intendment and consideration of the Law; for a Corporation aggregate of many is invisible, immortal, & *resteth only* in intendment and consideration of the Law; and therefore cannot have predecessor nor successor.

²²⁵ *Ibid.*

respect to its relationship to human beings. For instance, limited liability becomes a way of expressing an extraordinarily complicated set of terms in contracts.²²⁶ Another source of uncertainty is the “concession” theory²²⁷ focuses on substance rather than form by acknowledging that incorporations contain advantages, whether or not in the form of default terms in implicit contracts. It directs attention to the bargain that the incorporating authority can offer in return for the advantages of incorporation regulation. It identifies that if the costs of regulation outweigh the benefits, firms will not be incorporated into bodies.²²⁸ Additionally, the “realist theory” unlike the previous three, which are all versions of much the same, denies that society is comprised only of human beings.²²⁹ The subjects of law include those institutions with the capacity to respect and apply the rules, as stated by the theory.

The first two theories place limitations on the capacity of law to regulate by constructing an irreducible minimum of “corporateness”.²³⁰ This notion is derived from German sociology of the 1890s²³¹ and was implemented into common law jurisprudence only in translation form. It had a profound effect of facilitating an anthropomorphic approach to the

²²⁶ Petri Mäntysaari, ‘Theories of Corporate Law and Corporations: Past Approaches’ (Springer Berlin Heidelberg 2012).

²²⁷ John Dewey, ‘The Historic Background of Corporate Legal Personality’ (1926) 35 (6) *Yale Law Journal* 655, 673, also see; Stefan J Padfield, ‘Corporate Social Responsibility & Concession Theory’ (2015) 6 *William & Mary Business Law Review* 1.

Under the concession theory, the state is considered to be in the same level as the human being and as such, it can bestow on or withdraw legal personality from other groups and associations within its jurisdictions as an attribute of its sovereignty. Hence, a juristic person is merely a concession or creation of the state. Concession theory is often regarded as the offspring of the fiction theory as it has similar assertion that the corporations within the state have no legal personality except as it is conceded by the state.

²²⁸ Stefan J Padfield, ‘Corporate Social Responsibility & Concession Theory’ (2015) 6 *William & Mary Business Law Review* 1.

²²⁹ David Millon, ‘Theories of the Corporation’ (1990) 2 *Duke Law Journal* 201, 262.

²³⁰ The phrase evolved from a statement made by Stale J in *Chadwick v Pioneer Private Telephone Co. Ltd* [1941] 1 All E.R. 522, 523D, concerning the obligation required of an employee: “A contract of service implies an obligation to serve, and it comprises some degree of control by the master.”

This was then expanded by MacKenna J. in *Ready Mixed Concrete (South East) Ltd v Minister of Pension and National Insurance* [1968] 2 QB 497, where his lordship considered that there were three conditions which must be fulfilled for a contract of service to exist: “A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service”.

In expanding the point (i) MacKenna J stated “there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill”. In the judgment of Stephenson LJ in *Nethermere (St Neots) Ltd v Gardinier* [1984] ICR 612 his lordship expanded the theory of MacKenna J further by stating that: “There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service. I doubt it can be reduced any lower than in the sentences just quoted [referring to those above].

²³¹ Harry Liebersohn, *Fate and Utopia in German Sociology 1870-1923* (Mit Press 1990).

acceptance of the corporate form in areas of law designed for human beings. Lord Denning in particular referred to the company as having a “head” and “brain” when formulating reasons for why it might have intention for the purpose of intentional torts²³² and crimes.²³³ These theories assume that persons, even group persons, are the basic unit in society and are concerned with their legitimacy. Law then regulates legitimate or “legal” persons.²³⁴ Given the assumptions of each theory, implications flow for that law. The law of legal persons is not otherwise explained in the definition, and its content is subject to debate.²³⁵ However, implications for each theory sometimes do not match existing or potential legal doctrine for corporate accountability and remedy under international law.²³⁶ They are, furthermore, disproven. Nonetheless, the explanations are limited, for instance, and say little of how internal relations in corporations are to be regulated. This is because evidential difficulties may arise where the corporation concerned has a diffuse structure, because of the need to link the offence to a controlling officer/person. The smaller the corporation, the more likely it will be that guilty knowledge can be attributed to the controlling officer/person and therefore to the corporation itself. Thus, it will be difficult to establish corporate liability in this circumstance, therefore, it could be appropriate to find corporate liability through the duty of care.

The description of corporate legal personality in regards to human rights violations and environmental damages is inadequate, wrong, and incomplete.²³⁷ Having said that, this thesis supports the reality approach to corporate legal personality and argues that corporations are capable of acquiring legal status under domestic and international law.²³⁸ It can, therefore, be

²³² Jake Dear and Steven E Zipperstein, ‘Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations’ (1984) 24 *Santa Clara Law Review* 1.

A "tort" is some kind of wrongful act that causes harm to someone else. This definition covers a wide range of actions, and the legal field of torts is split up into many different subcategories. One of the ways torts are split up is by the mental state of the person that does the wrongdoing. When the person that acts wrongly actually intends to perform the action, it becomes what is known as an "intentional tort".

The easiest example of an intentional tort is a punch to the face. In that case, the actor intended to make a fist and slam it into his victims face, and the actor also intended to harm his victim. However, the person who performs an intentional tort need not intend the harm. For example, if you surprise someone with an unstable heart condition, and the fright causes that person to have a heart attack, you commit an intentional tort, even if you did not intend to scare that person into a heart attack

²³³ *H.L Bolton (Engineering) Co Ltd v T.J Graham and Sons Ltd* [1957] 1QB 159 at 172. That is made clear in Lord Haldane’s speech in *Lennard’s Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* [1915] AC 705’ So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or the managers will render the company itself guilty”.

²³⁴ Philip Allott, ‘The Concept of International Law’ (1999) 10 (1) *European Journal of International Law* 31, 50.

²³⁵ Steven R Ratner, ‘Corporations and Human Rights: a Theory of Legal Responsibility’ (2001) 111 (3) *Yale Law Journal* 443, 545.

²³⁶ Peter A French, ‘The Corporation as a Moral Person’ (1979) 16 (3) *American Philosophical Quarterly* 207, 215.

²³⁷ Martin Wolff, ‘On the Nature of Legal Persons’ (1938) 54 *Law Quarterly Review* 494.

²³⁸ Max Radin, ‘The Endless Problem of Corporate Personality’ (1932) 32 (4) *Columbia Law Review* 643, 667

assumed that the substantial benefits that parent corporations receive through their subsidiaries' business activities²³⁹ in the form of dividends, tax benefits, and preferential tax treatment, make them liable for subsidiary misconducts.²⁴⁰ The growing acknowledgment that victims should be able to obtain a remedy against parent corporations for violations of international human rights norms²⁴¹ and serious environmental damages,²⁴² specifically where they cannot obtain such a remedy against the corporate subsidiary in the host country,²⁴³ should be seen as a valid legal argument. However, in the vast corporation human rights violation case, this has not been the case so far, as the legal theory of corporate law have restricted the development of corporate accountability under international law.²⁴⁴ The majority of victims of human rights violations in developing country till date are seen to have no appropriate remedy for corporate misconducts that have impacted on their life.²⁴⁵ This is because there is a lack of good governance, law and judicial mechanism for corporate accountability in these countries.²⁴⁶

In addition, the doctrine of limited liability has also restricted the accountability of corporate human rights violations no matter how great the harm, and no matter how much financial benefit the parent corporation receives from the business operations of the subsidiary.²⁴⁷ The doctrine of limited liability advocate that a limited liability company is a company where the shareholder's liability towards the loss or deficit is limited by shares.²⁴⁸ Together these theories and the principle of limited liability have created a major obstacle for victims' access to effective remedy for corporate misconduct²⁴⁹ and disclosure (corporate

²³⁹ Phillip I Blumberg, 'Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems' (2002) 50 *American Journal of Comparative Law* 493, 529.

²⁴⁰ Nina A Mendelson, 'A Control-Based Approach to Shareholder Liability for Corporate Torts' (2002) 102 *Columbia Law Review* 1203.

²⁴¹ Gwynne Skinner, 'Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World' (2014) *Browser Download This Paper*.

²⁴² Hari M Osofsky, 'Environmental Human Rights under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations' (1996) 20 *Suffolk Transnational Law Review* 335.

²⁴³ Gwynne Skinner, 'Rethinking Limited Liability of Parent Corporations for Their Subsidiaries' Extraterritorial Violations of Human Rights Law' (2016) <<http://clsbluesky.law.columbia.edu/2016/02/10/rethinking-limited-liability-of-parent-corporations-for-their-subsidiaries-extraterritorial-violations-of-human-rights-law/>> Access 20 April 2017.

²⁴⁴ Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 (4) *Modern Law Review* 598, 625.

²⁴⁵ Michael Blowfield and Jędrzej George Frynas, 'Editorial Setting New Agendas: Critical Perspectives on Corporate Social Responsibility in The Developing World' (2005) 81 (3) *International affairs* 499, 513.

²⁴⁶ Erik Berglöf and Stijn Claessens, 'Enforcement and Good Corporate Governance in Developing Countries and Transition Economies' (2006) 21 (1) *World Bank Research Observer* 123, 150.

²⁴⁷ Robert B Thompson, 'Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise' (1994) 57 *Vand Law Review* 1.

²⁴⁸ H. M. Curteis, 'The Doctrine of Limited Liability' (1938) 83 (532) *Rusi Journal* 695, 701.

²⁴⁹ John Ruggie, 'Report of the Special Representative of The Secretary-General on the Issue of Human Rights

disclosure can be defined as the communication of information by people inside the public firms towards people outside the main aim of corporate disclosure is “to communicate firm performance and governance to outside investors”²⁵⁰ of human rights-relevant information, whether held by state authorities or private actors. This is very important because it is in the interest of corporation to provide clear, timely and reliable information that is adequately prepared, and to make relevant information equally accessible to all stakeholders and human rights victims. Also, the lack of access to human rights-relevant information, including evidence of detrimental impacts of companies’ activities, has undermined the ability of affected individuals and communities to build a robust lawsuit. This is particularly the case where the victims cannot identify the subsidiary causing the harm and cannot obtain a remedy in the host country.²⁵¹

As a consequence, many victims of business operations carried out in violation of international human rights norms who live in host countries with ineffectual and / or corrupt governments and judicial systems have faced serious obstacles in obtaining remedies against the subsidiary in the host country.²⁵² This is because there is often no mechanism for victims in host countries to obtain human rights-relevant information and remedy or there is no statutory or common law basis to bring a claim against the parent corporation.²⁵³ This has led many victims unable to obtain judicial redress for the harm caused them. Also, where there is a judicial judgment, there exists a lack of funds to provide remedy for the victims, or the subsidiary of the parent corporation is underfunded, or there exists a lack of transparency and information.²⁵⁴ The evaluation of the adequacy of a corporation’s human rights duty of care should includes an assessment of its disclosure practices. An adequate corporate human rights duty of care process should require the business disclosure of information about human rights

and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing The United Nations ‘Protect, Respect and Remedy’ Framework’ (2011) 29 (2) *Netherlands Quarterly of Human Rights* 224, 253.

²⁵⁰ Paul M Healy and Krishna G Palepu, ‘Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature’ (2001): 31(1) *Journal of accounting and Economics* 405, 440.

²⁵¹ Ariadne K Sacharoff, ‘Multinationals in Host Countries: Can They Be Held Liable under The Alien Tort Claims Act for Human Rights Violations’ (1997) 23 *Brooklyn Journal of International Law* 927.

²⁵² Stephen J Kobrin, ‘Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights’ (2009) 19 (3) *Business Ethics Quarterly* 349, 374.

²⁵³ Barbara A Frey, ‘The Legal and Ethical Responsibilities of Transnational Corporations in The Protection of International Human Rights’ (1997) 6 *Minnesota Journal of Global Trade* 153.

²⁵⁴ Justice C Nwobike, ‘The African Commission on Human and Peoples’ Rights and The Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and The Center for Economic and Social Rights (CESR) v Nigeria’ (2005) 1 (2) *African Journal of Legal Studies* 129, 146.

policies, processes and their outcomes, as well as information about actual and potential adverse human rights impacts of specific business activities or operation. Furthermore, the corporate duty of care should include timely access to activity information that is reliable, useful and accessible to ensure genuine engagement and consultation with potentially affected individuals and communities. Corporate duty of care and disclosure are intrinsically connected and indispensable for each other. Disclosure failures are serious failures of corporate duty of care.

An awareness by the international community of this issue is demonstrated by the fact that John Ruggie, the UN Special Representative on Business and Human Rights, was tasked with establishing an international framework as a common global standard for preventing and addressing the adverse human rights impact of business operations.²⁵⁵ The main purpose behind Ruggie's work was to ensure businesses were accountable for human rights abuses related to corporate business operations. Ruggie sought to do this by developing the Guiding Principles (GPs).²⁵⁶ Interestingly, the GP's framework elaborated the duty of a state to protect against human rights violations by a third party in its jurisdiction, including the corporate responsibility to respect human rights through due diligence and effective judicial and non-judicial access to remedies for victims of business-related abuses.

Ruggie developed the Guiding Principles based on the UN concept of "Responsibility to Protect".²⁵⁷ The concept adopts three pillars for examining the respective obligations and responsibilities of individuals with regard to human rights. Undoubtedly, Ruggie's GPs not only clarified the relationship between multi-national corporations (MNCs) and human rights, but also highlighted several important issues regarding corporations and human rights in general. However, the author's view on accountability and remedy for human rights abuses lacks a substantial ground as it does not provide clear mechanisms for cases when national states are reluctant or incapable of protecting citizens from human rights violations by MNCs. This is specifically in regard to Pillar 2, which states: "corporate responsibility to respect, and [P]illar 3, access to remedy. As such, this latest development has proven to be unsuccessful as well".²⁵⁸ It has failed, moreover, to fill the core gap which currently existed in the concept of

²⁵⁵ John G Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (2008) 3 (2) *Innovations* 189, 212.

²⁵⁶ Par Al Gedicks, *The New Resource Wars: Native and Environmental Struggles Against Multinational Corporations* (Vol. 210, Black Rose Books Ltd 1994).

²⁵⁷ UNGA '2005 World Summit Outcomes' (24 October 2005) UN Doc A/RES/60/1.

²⁵⁸ Björn Fasterling and Geert Demuijnck, 'Human rights in The void? Due Diligence in The UN Guiding Principles on Business and Human Rights' (2013) 116 (4) *Journal of Business Ethics* 799, 814.

corporate accountability for human rights abuses, which includes remedy and enforcement. Also, the last decades have seen a rapid increase in the fears that voluntary implementation could allow too much discretion by corporate officers, and states have become quiet about establishing limits on corporate activity. This desire for quicker, more binding action led some governments and non-governmental organisations to renew calls for a binding treaty. In 2014, the Human Rights Council established an international working group to begin the drafting process for a treaty on business and human rights.²⁵⁹

In July 2015, the working group held its first meeting to begin discussing the parameters of a treaty.²⁶⁰ Furthermore, in February 2017 France adopted an unprecedented law that embodies some of the principles discussed above. Law 2017-399 (Duty of Vigilance law)²⁶¹ imposes a “duty of vigilance” on French companies and subsidiaries, whose head office is located in France or parent subsidiary located abroad, of a certain size to prevent serious human rights abuses and environmental damage resulting from their own activities, the activities of companies they control, and those of established business relations.²⁶² To this end, they must put measures in place to regularly identify and assess risks and take action to mitigate these risks and prevent serious abuses.²⁶³ Importantly, any person whose human rights are allegedly affected as a result of a lack of vigilance on the part of the French company can bring a civil claim against it before French courts. The law determines that a company has control over another when it holds a majority of its voting rights, when it has the right to elect the majority of the members of its administrative, executive or supervisory bodies, or when it exercises a dominant influence over it by virtue of a contract or statutory clauses.²⁶⁴ Unfortunately, the range of companies captured by the law was defined too narrowly.²⁶⁵ In effect, it applied to

²⁵⁹ Open-Ended Intergovernmental Working on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Human Rights Council (2014). <<https://perma.cc/GY7A-JB3R>> accessed 18 September 2015.

²⁶⁰ *Ibid.*

²⁶¹ Loi n° 2017-399 Du 27 mars 2017 Relative au Devoir de Vigilance Des Sociétés Mères et Des Entreprises Donneuses d'Ordre. <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id>. More information in English available at: <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains>> accessed 5 June 2017.

²⁶² Article 1 of the Duty of Vigilance law. Importantly, the Duty of Vigilance law goes beyond subsidiaries and controlled companies within the corporate group and extends to suppliers and subcontractors in a “stable commercial relation”.

²⁶³ 5 Article 1 of the Duty of Vigilance Law.

²⁶⁴ *Ibid.*

²⁶⁵ The law only covers companies that have their registered office in France and that, at the end of two consecutive financial years, employ at least five thousand employees within their company and subsidiaries in France or that employ at least ten thousand employees within their company and subsidiaries both in France and abroad. Article 1, Duty of Vigilance law.

just 100 to 150 of France’s largest companies. Nevertheless, this is the first law to establish an express duty on companies to prevent human rights abuses both domestically and abroad, and to account for the steps taken to achieve this objective. Significantly, this legislation recognises and takes steps to address the existing accountability gap of companies that operate across borders.²⁶⁶

Similarly, the Swiss Government is currently considering a proposal by a large coalition of national civil society organisations to enact legislation to compel companies to undertake human rights and environmental due diligence in all their activities abroad (the “Responsible Business Initiative”).²⁶⁷ This follows a successful popular initiative launched in 2015, which gathered well over the required 100,000 signatures to prompt a national referendum on the proposal.²⁶⁸ The proposed legal text, if enacted, would require Swiss-based companies to carry out human rights due diligence to identify actual and potential impacts on human rights and the environment, take appropriate measures to prevent and/or cease violations and account for the actions that they took. These duties would apply to “controlled companies” as well as all other business relationships. Unlike the French Duty of Vigilance law, the proposal does not define control. Instead, it clarifies that control would be determined according to the factual circumstances of each case. In addition, Swiss-based companies would be liable for damage caused by companies under their control unless they could prove that they carried out appropriate due diligence to avoid the harm.²⁶⁹ This is another commendable effort to strengthen prevention of corporate abuse across borders.²⁷⁰

Likewise, a useful precedent is the “due diligence” defence established by the UK Bribery Act (2010). Section 7 of the Act determines that a commercial organisation will be liable if it fails to prevent bribery by an “associated person” carried out on its behalf. However, the commercial organisation can invoke as a defence that it “had in place adequate procedures designed to prevent persons associated with [the commercial organisation] from undertaking

²⁶⁶ The initial proposal of the French Duty of Vigilance law had included a presumption of liability of the companies subject to a vigilance duty where damage resulted from their own activities or those of subsidiaries and subcontractors. Under its original terms, a company would have been able to rebut such presumption by proving that it had taken all necessary and reasonable measures to prevent the damage. However, this critical feature of the law was removed from subsequent drafts because of the strong opposition from some members of parliament.

²⁶⁷ <<http://konzern-initiative.ch/?lang=en> <http://konzern-initiative.ch/swiss-quality-must-include-the-protection-of-human-rights-and-the-environment/?lang=en>> accessed 1 November 2017

²⁶⁸ <<http://konzern-initiative.ch/over-140000-signatures-for-the-swiss-responsible-business-initiative/?lang=en>> accessed 5 November 2017

²⁶⁹ <<http://konzern-initiative.ch/initiativtext/?lang=en> 21 > accessed 5 November 2017.

²⁷⁰ Amnesty International, ‘Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse’ (2017)

such conduct”.²⁷¹ A “due diligence” defence is envisaged in the Swiss Responsible Business Initiative discussed above. Drawing from provisions on “principal liability” of Swiss law, the advocates argue that it should be the responsibility of the Swiss parent company to prove that it took all due care to avoid harm, rather than placing the burden of proving lack of care on the injured party. Under this proposal, companies would not be liable for damages caused by entities under their control if they could prove that they took all due care to avoid the damage, or that the damage would have occurred even if all due care had been taken.²⁷²

Additionally, in May 2017, the E.U. passed Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas requiring importers of certain raw minerals and metals (tin, tantalum, tungsten and gold) to carry out human rights due diligence in accordance with the five steps required under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.²⁷³ This was a welcome first step by the EU. However, the way in which the law is to be enforced has been entirely left to Member States, and it is unclear whether and how this will work in practice. E.U. Member States must adopt rules dealing with infringements of the law by importers, and issue a “notice of remedial action” (an order to correct a failure or deficiency) to any importer that infringes the legislation. Authorities in each member state will also be responsible for undertaking “ex-post checks” to ensure importers comply with their due diligence obligations under the law. In practice, however, this means that the effectiveness of these mechanisms will depend on whether E.U. Member States adopt adequate laws and regulations to deter and address infringements (like effective penalties for non-compliance) and whether the relevant authorities take a pro-active approach to checking compliance.²⁷⁴

²⁷¹ Section 7 of the UK Bribery Act (2010) <<http://www.legislation.gov.uk/ukpga/2010/23/contents/26>> accessed 30 October 2017.

²⁷² <<http://konzern-initiative.ch/initiativtext/?lang=en>> accessed 30 November 2017. If the controlling company were subject to an express duty of care or obligation to prevent as suggested, an alleged failure to comply with these duties could be the basis for a direct claim against the parent/controlling company. However, this proposal is meant to provide a different basis for a claim against the parent/controlling company that could operate independently. The liability at stake is that of the subsidiary, but because of the circumstances around the subsidiary, an automatic recourse to, or the automatic liability of, the parent is established. This is because it is the subsidiary’s liability that is at stake, the host state law would normally apply.

²⁷³ Council of Europe Recommendation on Human Rights and Business, para. 22. <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4> accessed 22 November 2017.

²⁷⁴ <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:130:TOC>> accessed 22 November 2017.

The German Green Party also tabled a proposal in the Bundestag in 2016 under which German companies of a certain size that operate directly, or through subsidiaries, in a high-risk sector or area, would be required to conduct human rights due diligence to identify and address risks of contributing to human rights abuses.²⁷⁵ The Government's majority in the Bundestag rejected the motion, but civil society organisations continue to promote it.²⁷⁶ The proposal broadly lays out the required due diligence steps, while also allowing for a number of factors, such as country and sector-specific risks, and the size of the company, to be taken into account in any assessment of the adequacy of the actual steps taken. Unlike the French Duty of Vigilance, which would be enforced through private claims, this would be enforceable by the state through a variety of instruments, including administrative orders and fines. However, public enforcement is supplemented by a provision that would allow or facilitate civil liability claims in case of due diligence failures. According to the proposal, the due diligence duties established in the law would define the expected standard of conduct for tort/non-contractual liability claims.

In view of all that has been mentioned thus far, one may suppose that the main problem arises when the host state is not able to apply its own domestic law to the MNCs operating on their soil²⁷⁷ or when the home state is unwilling to impose accountability or restrict the operations of MNCs under its jurisdiction.²⁷⁸ These findings suggest that legal rights and remedy are difficult to acquire in a host state. According to this thesis, the obstacles may have hampered effective implementation of human rights law, judicial remedy, and deterrents for

²⁷⁵ The German Original of The Proposed Law can be Found in: Klinger/Krajewski/Krebs/Hartmann, *Verankerung menschenrechtlicher Sorgfaltspflicht von Unternehmen im deutschen Recht* (March 2016), pages 38 to 42. <<https://germanwatch.org/de/download/14745.pdf>> accessed 20 November 2017. The proposal drew from model legislation put forward by a group of civil society organisations.

²⁷⁶ Civil society organisations promoted the adoption of the proposal in the state's National Action Plan on Business and Human Rights (NAP), which was adopted in December 2016. The proposal was not incorporated in the NAP, but a commitment was made that if at least 50% of German companies with more than 500 employees failed to put policies and processes in place to conduct human rights due diligence by 2020, the government would consider further steps, including the introduction of mandatory human rights due diligence. See Business & Human Rights Resource Centre, '3 entry points to implement the German National Action Plan'. <<https://business-humanrights.org/en/3-entry-points-to-implement-the-germannational-action-plan>> accessed 20 November 2017.

²⁷⁷ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

²⁷⁸ Laura A Dickinson, 'Government for Hire: Privatizing Foreign Affairs and The Problem of Accountability under International Law' (2005) 47 *William & Mary Law Review* 135, Markos Karavias, 'Shared Responsibility and Multinational Enterprises' (2015) 62 (2) *Netherlands International Law Review* 91, 117, Cindy S Woods, 'It Isn't a State Problem: The Minas Conga Mine Controversy and The Need for Binding International Obligations on Corporate Actors' (2014) 46 *Georgetown Journal of International Law* 629, Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1.

corporate human rights abuse, immunities, and the statute of limitation. For the same reason, the focus of this thesis is centred on the legal rights and procedural rights to enforce remedies, while recognising that these are not only rights victims seek. The victims of corporate human rights abuses and environmental damages may have a broad range of needs and may seek a variety of remedies under human rights law and environmental law. Likewise, a scenario that warrants the same solution is that of subsidiaries operating in countries that offer no realistic avenues to seek reparation against them if they cause harm. This may be the case of countries affected by or emerging from armed conflict, or where there is a total collapse of the rule of law.²⁷⁹ In these circumstances, the level of inefficiency of the legal system, the degree of impunity for human rights abuse, or the level of arbitrariness in the promulgation, enforcement and adjudication of laws may be such that the prospects of achieving due process and justice in a given case may be very low.

In addition to the corporation's legal subjects, states have naturally sought to regulate them within their domestic legal systems. In these cases, home state laws should allow claims to be brought directly against the controlling corporation, or against both the controlling business and its subsidiary.²⁸⁰ If allegations of wrongdoing against the subsidiary were proven,²⁸¹ the controlling corporation would be liable for the harm, regardless of fault. Again, the element of fault of the controlling corporations in these cases would be irrelevant in court. However, due to the fact corporations are steadily becoming more powerful, such efforts appear increasingly futile. Where government own interests are concerned, corporations even attempt to dominate

²⁷⁹ The concept of Rule of law is of old origin and is an ancient ideal. It was discussed by ancient Greek philosophers such as Plato and Aristotle around 350 BC. Plato wrote: "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state". Likewise, Aristotle also endorsed the concept of Rule of law by writing that "law should govern and those in power should be servants of the laws. Absence of discretionary powers and supremacy of Law: viz. no man is above law. No man is punishable except for a distinct breach of law established in an ordinary legal manner before ordinary courts. The government cannot punish any one merely by its own fiat. Persons in authority do not enjoy wide, arbitrary or discretionary powers. Dicey asserted that wherever there is discretion there is room for arbitrariness. Richard A Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (UNC Press Books 2017).

²⁸⁰ Some states such as the UK and Netherlands allow claims against both the parent company and the subsidiary to proceed jointly based on "joinder" (the union in one lawsuit of multiple co-defendants). The added value of this proposal is that a proven claim against the subsidiary would automatically engage the liability of the parent.

²⁸¹ As stated above, the host state law determining the liability of the subsidiary would normally apply. However, given the possible inadequacy of the law emanating from countries affected by the sort of circumstances envisaged in this thesis, it should be possible to invoke "public policy" considerations to apply home state law to assess the conduct of the subsidiary.

the state, generating a paradoxical role reversal.²⁸² The pervasive influence of the corporation and its ever-increasing effects on human rights globally ‘is now the two hours’ traffic of our stage.²⁸³ The evidence is accumulating that in the modern world, state power has been replaced by MNC economic power, where MNCs play an extensive role in the formation of regulations on business and human rights.²⁸⁴ Likewise, the expansion of international investment²⁸⁵ and trade²⁸⁶ has not promoted accountability, but has rather fuelled a system of corruption²⁸⁷ and the ineffective legal enforceable mechanism for corporate governance.²⁸⁸ The current concept of corporate governance²⁸⁹ has not resulted in effective corporate accountability or transparency of transnational business operations. Similarly, there is only a handful of evidence to support the development and effectiveness of corporate governance in regulating corporate conduct. The continued development of trade agreements²⁹⁰ and the economic operations of MNCs²⁹¹ has produced many economic gains and benefits while at the same time has contributed to substantial human right violations²⁹² and environmental damage through corporate-related harm.

Although the past decades have seen a rapid development of MNCs’ economic power, including financial institutions,²⁹³ no effective mechanism has been developed for holding them accountable for human rights violations and environmental damages that are linked to

²⁸² Nicholas Connolly & Manette Kaisershot, ‘Corporate Power and Human Rights’ (2015) 19 (6) *International Journal of Human Rights*.

²⁸³ *Ibid.*

²⁸⁴ Ralph Nader, *The Case Against Free Trade: GATT, NAFTA, and The Globalization of Corporate Power* (Vol. 49. North Atlantic Books 1993).

²⁸⁵ William Arthur Lewis, *The Evolution of The International Economic Order* (Princeton University Press 2015)

²⁸⁶ John H. Dunning, *The Globalization of Business (Routledge Revivals): The Challenge of the 1990* (Routledge 2014).

²⁸⁷ Shang-Jin Wei, ‘Corruption in Economic Development: Beneficial Grease, Minor Annoyance, or Major Obstacle?’ (1999) *World Bank Policy Research Working Paper No. 2048*.

²⁸⁸ Ian Bannon and Paul Collier, eds. *Natural Resources and Violent Conflict: Options and Actions* (World Bank publications 2003).

²⁸⁹ Corporate governance is the framework that allows for a company to be directed and controlled, and ensures that those who direct and control the company do so accountably. This framework of policies, procedures and practices (and related systems) allows a business to operate effectively, responsively, ethically and compliantly, while controlling risk. Van Lutgart den Berghe, *International Standardisation of Good corporate Governance: Best Practices for the Board of Directors* (Springer Science & Business Media 2012).

²⁹⁰ World Trade Report, ‘Speeding Up Trade: Benefits and Challenges of Implementing The WTO Trade Facilitation’ (2015). <https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf> accessed 12 August 2016.

²⁹¹ Tracey S Keys, Thomas W. Malnight, and Christel K. Stoklund, ‘Corporate Clout 2013: Time for Responsible Capitalism’ (2013) *Strategy Dynamics Global*. <<http://globaltrends.activatemediacom/wp-content/uploads/2013/06/corporate%20clout%202013.pdf>> accessed 12 August 2016

²⁹² Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International* (Vol. 48, Cambridge University Press 2006).

²⁹³ Leslie Sklair, *Transnational Capitalist Class* (John Wiley & Sons Ltd 2012).

their business operations.²⁹⁴ Drawing on an extensive range of sources on MNCs' human rights violations,²⁹⁵ most authors set out the different ways in which MNC operations and human rights abuses are linked, such as:

- Forced eviction and displacement due to large infrastructure, specifically in energy and agricultural projects, which are mostly financed by international financial institutions (IFIs) and national development banks;
- Loss of lands and livelihood as a result of extractive industry operations;
- Adverse health impacts and environmental contamination caused by exploitation of natural resources, factory operations, or industrial accidents;
- Loss of life and arbitrary detention and torture of community members and human rights campaigners by security forces who have been provided with equipment or employed by a company;
- Poor and unsafe working conditions in factories which are part of the global supply chain for apparel and electronic retail brands; and
- Violations of privacy, freedom of expression, and freedom of association resulting from technology companies complying with government surveillance or domestic law.²⁹⁶

These human rights abuses are linked to a violation of Economic, Social and Cultural Rights that occurs when a State fails in its obligations to ensure that they are enjoyed without discrimination or in its obligation to respect, protect and fulfil them. Often a violation of one of the rights stated above is linked to a violation of other rights. Such as:

- Forcibly evicting people from their homes (the right to adequate housing);
- Contaminating water, for example, with waste from State-owned facilities (the right to health);
- Failure to ensure a minimum wage sufficient for a decent living (rights at work);
- Failure to prevent starvation in all areas and communities in the country (freedom from hunger);

²⁹⁴ Michael Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer' (2001) 41 *Washburn Law Journal* 399.

²⁹⁵ Layna Mosley and Saika Uno, 'Racing to the Bottom or Climbing to the Top? Economic Globalization and Collective Labour Rights' (2007) 40 (8) *Comparative Political Studies* 923, 948.

²⁹⁶ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006).

- Denying access to information and services related to sexual and reproductive health (the right to health);
- Systematically segregating children with disabilities from mainstream schools (the right to education);
- Failure to prevent employers from discriminating in recruitment (based on sex, disability, race, political opinion, social origin, HIV status, etc.) (The right to work);
- Failure to prohibit public and private entities from destroying or contaminating food and its source, such as arable land and water (the right to food);
- Failure to provide for a reasonable limitation of working hours in the public and private sector (rights at work);
- Banning the use of minority or indigenous languages (the right to participate in cultural life);
- Denying social assistance to people because of their status (e.g., people without a fixed domicile, asylum-seekers) (the right to social security);
- Failure to ensure maternity leave for working mothers (protection of and assistance to the family); and
- Arbitrary and illegal disconnection of water for personal and domestic use (the right to water).

The UNGPs advocate that all business across all sector in the global economy are required to take the appropriate due diligence steps to “identify, prevent, mitigate and account for how [they] address their impacts on human rights”. “Pillar 2” of the UNGPs elaborate further on what is required under each of these steps. Intergovernmental organisations such as the Organisation for Economic Cooperation and Development (OECD) have begun elaborating sector and issue-specific due diligence standards for companies, which lay out what is required to avoid harm in relation to particular situations. These standards provide guidance to assess liability to the extent that they elaborate on what “reasonable steps” might look like in particular circumstances. These assessments of corporate due diligence should not be a “box ticking” exercise but focus on the adequacy of the measures taken, the extent to which they were genuinely geared towards preventing harm. However, in general, human rights violations and environmental damage caused by MNCs over the last few decades have exposed critical

corporate accountability gaps²⁹⁷ where corporate accountability and protection provided by international law and human rights mechanisms have not kept pace with the rapid development of MNC's economic power. Corporate accountability literature abounds with competing for a description of accountability whose many qualities, however, avoid those of reliable legal methodology and intellectual legal rigour, which in turn can provide a remedy for victims of human rights violations and environmental damages. The outcomes of these remedies, furthermore, are both predictable and consistent. In short, the current concept of corporate accountability has not identified the process or the legal methodology for identification and appraisal of the evidentiary rules of corporate liability under international law and human rights law.²⁹⁸ What specifically needs to be asked with respect to the MNC accountability gap is the effectiveness of the MNC liability under the current mechanism.

Also, corporate responsibility,²⁹⁹ corporate social responsibility (CSR) and corporate accountability are sometimes confused or seen to be synonymous.³⁰⁰ However, corporate social responsibility and corporate accountability are typically distinguished from one another along several lines. Corporate social responsibility in its broadest sense refers to varied practices that reflect the belief that corporations have responsibilities beyond generating profit for their shareholders. Such responsibilities include the negative duty to refrain from harm caused to the environment, individuals or communities, and sometimes also positive duties to protect society and the environment, for example protecting human rights of workers and communities

²⁹⁷ The thesis referred to corporate accountability gap as areas where the law is insufficient, obscure, or imperfect. These are not the typical cases of a mere discord between the abstract rule and the specific facts of corporate liability, which can be resolved through interpretation. Nor are they manifestations of an unsatisfactory legal solution, which are the province of law reform efforts. The law is instead silent, absent, simply unavailable as a means to resolution.

²⁹⁸ Yvette Selim, 'Examining Victims and Perpetrators in Post-conflict Nepal' (2017) *International Review of Victimology*.

²⁹⁹ Stephen Tully, ed. *Research Handbook on Corporate Legal Responsibility* (Edward Elgar Publishing 2005). Corporate Legal Responsibility considers general theory and basic concepts such as corporate legal personality, the doctrine of attribution, corporate governance and directors' duties, and reviews the range of individuals to which corporations may be held responsible, particularly employees, suppliers, shareholders, 'stakeholders' and women.

³⁰⁰ Subhabrata Bobby Banerjee, 'Corporate Social Responsibility: The good, The Bad and The Ugly' (2008) 34 (1) *Critical Sociology* 51, 79. Corporate Social Responsibility movement aimed at encouraging companies to be more aware of the impact of their business on the rest of society, including their own stakeholders and the environment. Corporate social responsibility (CSR) is a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders. CSR is a concept with many definitions and practices. The way it is understood and implemented differs greatly for each company and country. The company has been ranked 'Food Industry leader' in the Dow Jones Sustainability World Indexes for the 11 consecutive years and ranked 7th in the 'Global 100 Most Sustainable Corporations in the World. Eveline Van de Velde, Wim Vermeir and Filip Corten, 'Corporate Social Responsibility and Financial Performance' (2005) 5 (3) *Corporate Governance: The International Journal of Business in Society* 129, 138.

affected by business activities.³⁰¹ Such responsibilities are generally considered to extend not only to direct social and environmental impacts of business activity, but also to more indirect effects resulting from relationships with business partners, such as those involved in global production chains.³⁰² In contrast, the term corporate accountability is commonly used instead to refer to more confrontational or enforceable strategies of influencing corporate behaviour. Often, the term corporate social responsibility is used to indicate voluntary approaches, albeit those supported by market based incentives.³⁰³ Corporate accountability typically implies that corporate behaviour is influenced by pressure exerted by social and governmental actors beyond the company itself.³⁰⁴ Such actors can adopt a range of strategies, including but not limited to the mobilisation of legal mechanisms to enforce social standards.³⁰⁵ Together, these studies indicate that corporate social responsibility and corporate accountability illustrate different level of liability in a legal context.

Perhaps, the most important innovation of the corporate accountability movement has been its demands for increased participation by affected groups.³⁰⁶ This has been shown to be extremely important in many contexts as a basis for effective compliance with specified norms.³⁰⁷ In the few and often short-lived cases in which worker organisation or representation has been established, positive outcomes for workers have often been achieved, both in factory settings and among homeworkers.³⁰⁸ Participation in initiatives can feed into underlying changes to social power relations via their spill-over into campaigning activities, and their potential to create sustainable social alliances between workers, producers and communities affected by transnational business activity.³⁰⁹ However, such participatory, multi-stakeholder

³⁰¹ Carmen Valor, 'Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability' (2005) 110 (2) *Business and Society Review* 191, 212.

³⁰² Dirk Matten and Jeremy Moon, 'Implicit' and "explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility' (2008) 33 (2) *Academy of management Review* 404, 424.

³⁰³ Doreen J McBarnet, Aurora Voiculescu and Tom Campbell, eds. *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009).

³⁰⁴ Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2007) 6 *Northwestern University Journal of International Human Rights* 222.

³⁰⁵ Julia Graff, 'Corporate War Criminals and The International Criminal Court: Blood and Profits in The Democratic Republic of Congo' (2004) 11 *Human Rights Brief* 23, 67.

³⁰⁶ Craig N Smith, *Morality and The Market (Routledge Revivals): Consumer Pressure for Corporate Accountability* (Routledge 2014).

³⁰⁷ David Weissbrodt and Muria Kruger, 'Norms on The Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 (4) *American Journal of International Law* 901, 922.

³⁰⁸ Lena Ayoub, 'Nike Just Does It And Why The United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad' (1998) 11 *DePaul Business Law Journal* 395.

³⁰⁹ Simon Chesterman, 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights

processes do however tend to confront a range of practical challenges associated with both weak capacity among key stakeholder groups to engage effectively, and in some cases also difficulties in mediating conflicting priorities of affected stakeholders.³¹⁰ Clearly, significant challenges continue to confront all these different strategies of corporate accountability.³¹¹ However, to view these initiatives as static institutional arrangements misunderstands their purpose and impact as both experimental, learning devices in specific governance contexts, and as broader vehicles for social transformation via their provision of ongoing sources of knowledge and pressure that can leverage processes of progressive change within wider social and political institutions. Much uncertainty remains and a great deal more experimentation will be needed as corporate accountability initiatives continue to be formed and improved, either as stand-alone forms of corporate regulation or in conjunction with other strategies.³¹²

In addition, the concept of transparency in corporate responsibility and accountability are essential foundations for independent and responsible business conduct and auditing organisation operation. Business independence, accountability and transparency are essential prerequisites in a corporate operation that is based on the rule of law (The term rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency)³¹³ and credibility of international business practice.³¹⁴ Accountability and transparency are two important elements of good business governance.³¹⁵ Transparency is a powerful force that, when consistently

Violations the Case of Norway's Sovereign Wealth Fund' (2007) 23 *American University International Law Review* 577.

³¹⁰ Esben Rahbek Pedersen, 'Making Corporate Social Responsibility (CSR) Operable: How Companies Translate Stakeholder Dialogue into Practice' (2006) 111 (2) *Business and Society Review* 137, 163.

³¹¹ John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 (4) *American Journal of International Law* 819, 840.

³¹² Rob Gray, Dave Owen and Carol Adams, *Accounting & Accountability: Changes and Challenges in Corporate Social and Environmental Reporting* (Prentice Hall 1996).

³¹³ Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 54 (4) *University of Chicago Law Review* 1175, ANOTHER OBSTACLE 1188.

³¹⁴ Mark Casson, *A Theory of Cooperation in International Business* (Palgrave Macmillan UK 1989).

³¹⁵ Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33 (5) *West European Politics* 946, 967

applied, can help fight corruption, improve governance, human rights standards and promote business accountability.³¹⁶ A possible explanation for this might be that accountability and transparency are not easily separated: they both encompass many of the same actions, for instance, public reporting, respecting human rights, environmental law, observing financial law and avoid business malpractice such as fraud and corruption.³¹⁷ The concept of accountability for corporate business operations may be referring to the legal and reporting framework, organisational structure, strategy, procedures and actions to help ensure that business and organisation meet their legal obligations with regard to their audit mandate and required reporting within their budget.³¹⁸ It may encompass evaluate and follow up business own performance as well as the impact of their audit. Report on the regularity and the efficiency of the use of funds, including their own actions and activities and the use of their resources to achieve business objectives.³¹⁹

While, the notion of transparency refers to the timely, reliable, clear and relevant public reporting on its status, mandate, strategy, activities, financial management, operations and performance. In addition, it includes the obligation of public reporting on audit findings and conclusions and public access to information about the corporate business activities and dealings.³²⁰ Thus, the notion of transparency in itself is not the most important thing in business accountability, it is the accountability that it makes possible. Transparency itself is, in fact, a metaphor based on the ability of making something clear without any hiding agendas, however, transparent reveal what is hiding in corporation operations.³²¹ In practice, transparency allows the revelation of what otherwise might have been concealed, and it is applied in a social context to reveal human activity in which there is a valid public interest.³²² Which could be applied to all of those who hold power and responsibility position in society, whether that is political or economic.³²³ Therefore, the notion of business transparency is distinctions between open

³¹⁶ Yadong Luo, 'Corporate Governance and Accountability in Multinational Enterprises: Concepts and Agenda' (2005) 11 (1) *Journal of International Management* 1, 18.

³¹⁷ Richard Welford, 'Corporate Social Responsibility in Europe and Asia: Critical Elements and Best Practice' (2004) 13 *Journal of Corporate Citizenship* 31.

³¹⁸ Andrew Crane and Dirk Matten, *Business Ethics: Managing Corporate Citizenship and Sustainability in The Age of Globalization* (Oxford University Press 2016).

³¹⁹ Stuart M Cooper and David L Owen, 'Corporate Social Reporting and Stakeholder Accountability: The Missing link' (2007) 32 (7) *Accounting, Organizations and Society* 649, 667.

³²⁰ David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency' (2007) 17 (3) *Business Ethics Quarterly* 453, 476.

³²¹ Paul Sturges, 'What is This Absence Called Transparency' (2007) 7 (7) *International Review of Information Ethics* 1, 8.

³²² Carolyn Ball, 'What is Transparency?' (2009) 11 (4) *Public Integrity* 293, 308.

³²³ Shantanu Dixit, Subodh Wagle and Girish Sant, 'The Real Challenge in Power Sector Restructuring: Instilling

governance, procedural transparency, radical transparency, and systemic or total transparency.³²⁴ This means that transparency can be used to scrutinise the activity of the businesses, including freedom of information laws, accounting and audit systems, and the protection of public interest disclosure (whistleblowing). However, whether transparency carries a legal duty, it a subject of legal³²⁵ and literal interpretation,³²⁶ which also need to be distinguished from each other.

Therefore, this research aims to examine corporate accountability and whether tort and civil law offer better accountability and remedy for victims of corporate human rights abuses. In principle, the application of protected human rights in civil and tort law need not create any conceptual difficulty where corporate human rights violations and environmental damages are at stake. The doctrine of tort and the civil legal principle is capable of extending the obligation of corporations under international law and human rights law. The point of departure for the direct application of the duty of care³²⁷ is that human rights law has always played a role in civil and tort law and vice vers. Therefore, at the foundation of civil law and tort law system are human rights obligations, self-relations, and human dignity.³²⁸ This can be seen with tort rule on protecting one image or protecting rights of individuals (as is the case against state and non-state actors).³²⁹ Likewise, the notion of taking care not to injure one's neighbour,³³⁰

Public Control Through Transparency, Accountability and Public Participation (TAP)' (2001) 5 (3) *Energy for Sustainable Development* 95, 102, Ronald J Krotoszynski Jr, 'Transparency, Accountability, and Competency: An Essay on The Obama Administration, Google Government, and The Difficulties of Securing Effective Governance' (2010) 65 *University of Miami Law Review* 449.

³²⁴ Paul Sturges (n 316)

³²⁵ Percy Ellwood Corbett, *Law and Society in the Relations of States* (Harcourt Brace 1951).

³²⁶ Gabriël Moens and John Trone, *Commercial Law of the European Union* (Vol. 4. Springer Science & Business Media 2010). Literal interpretation is the one method arising from the literal meaning of the words. According to *Moens and Trone*, "where the legal provisions are clear, the Court will usually not depart from their literal meaning.

³²⁷ The principle of duty of care is that you have an obligation to avoid acts or omissions, which could be reasonably foreseen to injure or harm other people. This means that you must anticipate risks for your neighbour and take care to prevent them coming to harm.

³²⁸ Stephen D Sugarman, 'A New Approach to Tort Doctrine: Taking the Best from the Civil Law and Common Law of Canada' (2002) 17 *Supreme Court Law Review* 375, 388.

³²⁹ Arthur R Miller, 'Simplified Pleading, Meaningful Days in Court, and Trials on The Merits: Reflections on The Deformation of Federal Procedure' (2013) 88 *New York University Law Review* 286. Defamation occurs when there is publication to a third party of words or matters containing an untrue imputation against the reputation of individuals, companies or firms which serve to undermine such reputation in the eyes of right thinking members of society generally, by exposing the victim to hatred, contempt or ridicule.

³³⁰ *Donoghue (or McAlister) v Stevenson* [1932] All ER Rep 1; [1932] AC 562 "In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in *Heaven v Pender* (11 Q. B. D. 503,

reasonableness, and negligence reflect, *inter alia*, an appropriate balance between corporate business conduct and human rights. Therefore, the notion of corporate duty of care under tort law is not a new concept, but is rather the evolution of an old legal principle. Thus, this thesis advocates for a content-dependent³³¹ conception of the principle of duty of care that is mindful of the demands of the legality of corporate liability as the best way forward for holding corporations accountable for human rights violation and environmental damages. The legal duty of care recommendation in this research is designed to operate in line with national law and international human right law. The duty of care or “duty to prevent” in this thesis is as an “obligation of means”. This requires carefulness in fulfilling a duty, but not guaranteeing the attainment of a specific result. This allows a corporation to refute or limit the extent of its liability by demonstrating that it took all reasonable steps to avoid causing harm, including in relation to their subsidiaries’ business activities. Nevertheless, these “reasonable steps” must be “outcome-oriented,” that is, designed and implemented with the express and overriding objective of preventing harm. They should be defined by reference to rigorous human rights standards that focus on the prevention of human rights abuses and environmental damages.

Overall, the obligation under tort and civil law indicate that the duty of care could ensure better prevention of adverse impacts by corporations and will also help victims of corporate human rights violation overcome some of the obstacles they face in achieving justice at the domestic court. The duty of care will require the corporation to identify key risks of impacts either linked to their business operations or those of the subsidiary and will take action to prevent them. This thesis goes further to argue *qui tacet consentire videtur si loqui debuisset ac potuisset* (he who is silent appears to consent if he should, and could, have spoken).³³² Thus a reputable presumption of a duty of care exist where a corporation is engaged in business operation with a subsidiary that may directly or indirectly damage the environment or violate

509.), in a definition to which is later refer. As framed, it was demonstrably too wide, “though it appears to me, if properly limited, to be capable of affording a valuable practical guide. At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

³³¹ Neha Jain, ‘General Principles of Law as a Gap-Fillers’ (2014) 27 *International Legal Theory Colloquium, New York Law School*. “A content-independent view of general principles of law, in contrast, simply takes their presence in the majority of municipal legal systems as the basis for their validity”.

³³² *Temple of Preah Vihear (Cambodia v Thailand)*, 1962 I.C.J. 6, 23 (June 15). “In the Temple of Preah Vihear case, the court merely referred to the principle of plea of error as an "established rule of law”.

the human rights of the community. The legal argument under the neighbourhood principle of a duty of care will make it easier for victims of corporate human rights abuses to argue that the corporation could have influenced the business misconduct and that it should take the appropriate measures to mitigate adverse impacts.

Approaching corporate accountability under the notion of duty of care is an important step forward in a global context where achieving corporate accountability is hindered by complexity, scale and reach of corporate structures, the absence of a level playing field, the legal and practical barriers faced by the victims to access remedies or the lack of enforcement of existing human rights standards especially concerning Multinational Corporations with a myriad of subsidiaries and suppliers.³³³ Admittedly, the reputable presumption of corporate duty of care must be preserved as a means to advancing human rights obligations at both the national and international level. Thus, it appears inevitable that the flexibility needed for the growth of corporate accountability must be supplied by a greater degree of flexibility in identifying a novel duty of care in business operations. Therefore, for the purpose of this research on corporate accountability and remedy, the term accountability refers broadly to the international law that assigns accountability for certain specific serious corporate human rights violations under international law and human rights law.

The central objective of the thesis is to strengthen the argument on MNC accountability and remedy, as well as to develop and present a new practical paradigm for international legal action against MNC's human rights violations in a host state or home state, in the context of the tort of negligence (the neighbourhood principles of duty of care). This thesis rests on the assumption that the corporation under a duty of care or equivalent has the ability to control the activities of the business directly causing the harm. The ability to control, and not actual control, should be enough as a basis for a legal liability. Control should be defined broadly to cover not only majority shareholding, but other situations that give entities either legal or factual control. In certain cases, such as (but not limited to) when there is a majority ownership (over 50%), the ability to control should be assumed and the claimant should not have to prove it. Creating and structuring a relationship with a subsidiary, for example through holding corporations or share companies so that there is no apparent control over its activities, should not be a defence. The suggestions in this research can also operate alongside the direct regulatory action by the state, and would help reinforce compliance. Lastly, the

³³³ Isabella D Bunn, 'Global Advocacy for Corporate Accountability: Transatlantic Perspectives from The NGO Community' (2003) 19 *American University International Law Review* 1265.

recommendation concerning applicable law is relevant and should be implemented in relation to all cases dealing with private claims under tort/non-contractual liability law. Thus, to answer the question set out in the study, this research is divided into two parts, with a total of eight chapters. The first part examines the concept of accountability, whereas the second concerns itself with remedy and enforcement.

1.1. Overview: Corporate Accountability under the Neighbourhood Principle (Chapter I)

To better understand the challenges that exist in corporate human rights accountability and the initiatives likely to be most effective for remedy and enforcement, one must understand the following subjects and theories: the diversity of legal structures, corporate law, legal theories, and the legal approaches of the different jurisdictions around the world. The research in this chapter attempt to analyse the concept of accountability by critically examining its general and legal definition, with the end result of developing a corporate accountability mechanism under tort and civil law. It draws upon empirical information from a wide range of literature on the concept of accountability. It then examines the general and legal definitions of accountability, accountability systems, and relevant regimes. Adopting this approach to corporate accountability allows the research to lay down the theoretical concept for the study by focusing on the substantive legal and practical issues that have an impact on the effectiveness of accountability and judicial mechanisms in achieving corporate accountability and effective remedies in cases of business-related human rights exploitations, with a particular emphasis on the legal definition of accountability under international public law.

1.1.2 Overview: The Analysis and Definition of Accountability (Chapter II)

Following the analysis and definition of accountability, and the mechanism of accountability, this part pulls out the components of accountability, which will allow for a better understanding of its practical application (in this context, it is composed of responsibility, answerability, blameworthiness, liability, and sanctions). The practical concept of accountability will show that the key element of corporate liability is a principal way in which the problem of corporate accountability can be tackled, by focusing on the key components that constitute accountability. The elements of accountability are crucially significant for

holding corporations accountable for human rights violations. These elements further provide development gateways for the attainment of remedies for business related human rights abuses. Therefore, the aim here is to examine and highlight the key elements that are required to establish accountability for non-state actors; a diagram will then be used to explain the various forms of accountability, and how this element creates a legal duty of care for non-state actors, such as corporations. It focuses on substantive legal and practical issues that have an impact upon the effectiveness of judicial mechanisms in achieving corporate accountability and access to remedies in cases of business related human rights abuses, with a particular emphasis on the elements developed in this thesis.

1.1.3 Overview: Examine How the Extent of International Criminal Law can Influence International Human Rights Law (Chapter III)

Chapter Three examines the extent to which international criminal law influences international human rights law in its use of tort law and civil law remedies. This chapter considers the current international criminal law principles and covenants to measure their efficacy at protecting human rights in relation to corporate human rights abuses in tort and civil law settings. It also analyses the effectiveness of the international criminal law system in prosecuting individual crimes under the doctrine of state responsibility and international crime in the international community. This chapter then argues that even though the international criminal system has been effective at prosecuting individuals for international crime prohibited under international law, it cannot also help to achieve tort and civil remedies for corporate human rights violations in the host state. It shows this by explaining the distinction between international human rights law, international humanitarian law and international criminal law, as well as explaining the model of the International Criminal Tribunal (ICT) and the International Criminal Court (ICC) that is used in the application of international criminal law.

This thesis goes on to argue that the difference between civil law and criminal law are significantly small, civil law and criminal law are similar but with two different objects where the law seeks to pursue redress or punishment. The object of civil law is the redress of wrongs by compelling remedy, while the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law or, at the very least, avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer; to give him and others a strong

inducement not to commit the same or similar crimes, to reform him if possible, and perhaps to satisfy the public sense that wrongdoing ought to meet with justice. Therefore, the argument here is that international criminal law can serve as an example or a model for enforcement and remedy for corporate human rights abuses, as they seem to serve the same objective, though the principle can only be effective under tort and civil law.

1.1.4 Overview: Examine the Limitations, Benefits and the Legal Drawback on the Applicability of the Alien Tort Claims Act (“ATCA”) (Chapter IV)

Chapter IV examines the arguments around the Alien Tort Claims Act (ATCA)³³⁴ because it allow for a suit by an alien for a tort but only in violation of the law of nations or a treaty of the United States. Likewise, the rationale behind the examination of ATCA in this thesis is that it 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. This Act was enacted in 1789 and remained dormant until 1980 when a federal court in *Filartiga v Peña-Irala*³³⁵ allowed a Paraguayan woman to bring a suit against a Paraguayan government official who had tortured and killed her brother. This chapter further assesses the Federal Court jurisprudence on corporate accountability under the Act that has developed over the years. It then reflects the impact that the current uncertain state of the ATCA will have on Multinational Corporation (MNC) misconduct overseas. The chapter concludes that, although many have indicated in the literature that *Kiobel v Royal Dutch Petroleum*³³⁶ marks the end of the ATCA, it is not the end of the ATCA but rather part of the evolutionary process to develop a new concept of corporate tort liability.

1.1.5 Overview: Tort of Negligence, under the Neighbourhood Principle Test (Chapter V)

Chapter V argues that the tort of negligence under the neighbourhood principle test could be an effective mechanism for holding corporations accountable for human rights violations. It goes on to argue that the relationship between the corporation, government, society, and the environment gives rise to a positive duty of care not to cause harm or damage

³³⁴ The Alien Tort Statute (28 USC. § 1350; ATS).

³³⁵ *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

³³⁶ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

to the environment.³³⁷ In a detailed reflection, it is also observed that the relationship between corporate business operations, supply chain, subsidiary, and human rights violations give rise to a rebuttable of duty of care. However, this can be limited in many different circumstances. Nonetheless, through the use of tort of negligence, this chapter highlights the positive grounds which victims can rely on to bring a successful claim against corporations. It further argues that the tort of negligence should be expanded and modified to reflect the development of parent corporations and subsidiary accountability, and the circumstances surrounding the business operations. Finally, it establishes a *prima facie* case for corporate accountability and the role an international court/tribunal could play in a corporate duty of care. In conclusion, this chapter offers a meaningful and practical understanding of the legal principle needed for accountability for corporate human rights violations and remedy through tort law if the corporation and its supply chain and subsidiary undertakings behave negligently.

1.1.6 Overview: Examine The Remedies that may be Available to The Victim of a Corporate Human Rights Violation in Tort Law (Chapter VI)

This chapter examines the remedies that may be available to a victim of corporate human rights violations in tort law. Under tort law, remedies should be considered once it has been established that a tort has been committed and that no defence applies. The award of effective damage is the most important part of a remedy in practice. Therefore, the tort of negligence must aim to put the victims back to where they were before the tort was committed. Sometimes, the commission of a tort, which involves the misappropriation of the claimant's rights, may have enabled the defendant to make a profit at the claimant's expense. Thus, in such cases, the claimant may be in a position to elect between a tort measure of damage and one based on the defendant's unjust enrichment.

This part of the study also attempts to address the question of remedy and enforcement by first looking at tort remedies for victims of transboundary environmental damage. It also

³³⁷ Foreseeability, Proximity, Fair, Just and Reasonable. "*Caparo Industries plc v Dickman* [1990] 2 AC 605.

Lord Bridge: (The Caparo test) "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other".

assesses the cause of action under the civil liability treaty and its effectiveness. The second part examines an alternate approach to an effective remedy for corporate human rights violations under tort by first seeking to establish the type of remedy that could be available for victims under the principle of duty of care. This chapter then moves on to recommend an appropriate remedy for corporate human rights abuses. The conclusion is based on the perception of the victims' understanding of remedy in the literature, the assessment of an appropriate remedy for them, which reflects the gravity of the corporation's human rights violations, environmental damage, the domestic law (in this thesis it is the law or legal system established within a state to govern events, transactions, and persons within or having a connection to that state; also internal, municipal, national, or local law/legal system) and international legal system.

1.1.7 Overview: Establishing an International Court for Business and Human Rights (Chapter VII)

This chapter continues the debate on corporate accountability by setting out a theoretical mechanism for corporate accountability that has the potential to effectively interpret the concept of the corporate duty of care under tort law. This chapter starts by looking at the purpose of the proposed Hybrid International Transnational Corporation Claim Court (HITNCCC), the anatomy of the Court, jurisdiction and applicable law, procedure and judgment, and how it can be applied in the international arena. In the event a corporation breaches its duty of care, and when harm occurs, the corporation should be held liable, and the court should award a remedy for the harm that satisfy the obligation of the corporation and placing the victims back to where they were before the violation happened. The major function of the court is to mitigate the imbalance between the corporations and the victims. In this respect, the court judgment shall constitute an integral part of the remedy for corporate human rights violations.

Therefore, it is argued in this chapter that the court should apply the concept of General Principle of Law to find a novel duty of care for corporate misconduct and environmental damages. This will ensure the universal application of the corporate duty of care. The General Principles of Law is a means for determining the rules of law, in other words, these are not authorities, but are rather of the sources of international human rights law obligations. The General Principles will ensure remedy and enforcement are purely a subject matter of a universal application of a duty of care, no matter how different some legal system may be. The

conceptual differences can be taken into account in the inductive process of ascertaining the meaning and content of duty of care and remedy. A further analysis conducted in the research show that the General Principles as an undefined and uncertain source of a legal rule that could have the capacity of binding the corporation to that which they have not specifically consented and to ensure morality and justice for the victims. Likewise, the General Principles as a subsidiary primary source of the rule, would mean that a court could apply them for the purpose of modifying and superseding international law and customary rules. Another feature of the court relates to the interpretation of human rights obligation within the legal framework of duty of care, which must be applied in the notion of General Principle of Law.

Lastly, the role of the courts is to uphold human rights obligations and provide a forum to resolve corporate human rights abuses issues, as well as to test and enforce the corporate duty of care in a fair and rational manner. Therefore, if the state does not regulate a specific issue of corporate human rights violations, then the court will address any *lacuna* in the domestic law by having recourse to (I) rules of international law; (II) general principles of international human rights law; (III) general principles of human rights law common to the major legal systems of the world; (IV) general principles of law that is in agreement with the fundamental requirements of rule of law, and the protection of human dignity and justice and (V) general principle of a duty of care (tort of negligent). Finally, the chapter concluded by arguing that tort law or duty of care should compel courts to consider human rights and the ability of claimants to access justice effectively as an overriding factor in deciding *forum non conveniens claims* in corporate human rights violation and environmental damages cases.

1.1.8 Overview VIII: This Chapter Provides a Conclusion of The Thesis.

Part I

Corporate Accountability under the Neighbourhood Principle

Chapter I

1.2. Aims and Objectives of Section 1 - Chapter I

The main aim of this chapter is to better understand the challenges that exist for corporate human rights accountability and environmental damages. As well as the initiatives likely to be most effective for remedy and enforcement human rights and environmental law, given the diversity of legal structures, traditions, and approaches around the different jurisdictions in the world. The research in this chapter attempts to analyse the concept of liability by critically examining the definition of human rights law, tort law and problems associated with the concept of corporate obligation, both in its legal and everyday use, with a view to developing a corporate liability mechanism under tort law. The research draws on empirical information from a wide range of general and legal literature on the concept of accountability. It examines the functioning of the general and legal concept of accountability, human rights law, tort of negligence, accountability systems, and relevant regimes. Adopting this approach to corporate liability allows the research to lay down the theoretical concept for the study by focusing on the substantive legal and practical issues that have an impact on the effectiveness of accountability and judicial mechanisms in achieving corporate accountability and effective remedies in cases of business-related human rights exploitations, with a particular emphasis on the legal definition of accountability under public international law. This is because the definition is important in the recognition of an effective international legal framework on business and human rights as an essential step towards protecting victims' access to remedies for corporate wrongdoings. It will also served as a legal instrument that could clarify the obligations of corporations to respect human rights.

1.3. Definition of Human Rights Law

Even though historically the specific phrase 'human rights' is mostly traced back to modern times after the World War II,³³⁸ however, the idea is as old as humanity itself,

³³⁸ Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics,*

inevitably intertwined with the history of justice and law.³³⁹ Human rights are rights that individuals have by virtue of being human.³⁴⁰ The essence of human rights revolves around the question of what it is about being “human” that gives rise to rights.³⁴¹ Human beings, thus support the ‘bottom-up’ approach to human rights, starting from the essence of being human.³⁴² In this understanding, human rights is as moral principles and as legal principles rooted in morality. Deriving from this moral and legal principles is the overarching and interrelated principles lie at the moral foundation of human rights: ‘human dignity’ and ‘equality.’³⁴³

As a consequence, human dignity as a concept is twofold, on the one hand it serves as the foundational premise of human rights and on the other hand as a legal term, for instance serving as a tool for interpretation. This last strand is often criticised for its use in methods of interpretation and application of specific human rights because of its lack of clear content or meaning.³⁴⁴ For present purposes of human dignity in the context of international human rights law refers to the foundational premise of human rights to all human beings.³⁴⁵ A possible implication of this is that “human dignity is understood as an affirmation that every human being has an equal and inherent moral value or status”,³⁴⁶ a view shared by Kant, who stated that no human being can be used merely as a means, but must always be used at the same time as an end in his classical work *The Metaphysics of Moral*.³⁴⁷

The concept of human dignity also has value as a true legal proposition.³⁴⁸ Human dignity serves as one of the most fundamental concepts of international human rights law, exemplified by its widespread appearance in almost all human rights instruments and regular application by human rights bodies.³⁴⁹ It is a principle recurring in binding human rights treaties

Morals: Text and Materials (Oxford University Press USA 2008).

³³⁹ Reis A Monteiro, *Ethics of Human Rights* (Springer Science & Business Media 2014).

³⁴⁰ James Griffin and James Thomas Griffin, *On Human Rights* (Oxford University Press 2008).

³⁴¹ Dinah L Shelton, ed. *Advanced Introduction to International Human Rights Law* (Edward Elgar Publishing 2014).

³⁴² *Ibid.*

³⁴³ James Griffin and James Thomas Griffin (n 335).

³⁴⁴ Justin Bates, ‘Human Dignity an Empty Phrase in Search of Meaning?’ (2005) 10 (2) *Judicial Review* 165, 168.

³⁴⁵ Dinah L Shelton (n 336).

³⁴⁶ Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 (4) *European Journal of international Law* 655, 724.

³⁴⁷ Immanuel Kant, *Moral Law: Groundwork of the Metaphysics of Morals* (Routledge 2013).

³⁴⁸ Jack Donnelly, ‘Human Rights and Human Dignity: an Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76 (2) *American Political Science Review* 303, 316.

³⁴⁹ Dinah Shelton, ed. *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013). Mentioning in international human rights treaties see for instance Art. 10 ICCPR, Art. 13 ICESCR and preambles of CERD, CEDAW, CRC and CRPD.

as well as in jurisprudence.³⁵⁰ The ECtHR for instance affirmed that “the very essence of the convention is respect for human dignity”, which is easily imagined for example with application of article 3 ECHR.³⁵¹ Human dignity is also explicitly present in the other regional human rights documents.³⁵² The notion of human dignity not only provides for a measuring or interpretational tool in application of civil rights but also has a role to play in respect of economic and social life in answering the question on the benefits needed for a dignified life.³⁵³

The concept of equality is inherently linked with human dignity as exemplified by reading of article 1 of the UDHR 1948: “All human beings are born free and equal in dignity and rights.”³⁵⁴ The moral principle underlying human rights is that we are all moral persons and therefore deserve equal respect, fittingly named ‘the principle of equal respect’.³⁵⁵ The consequence of equality as a foundational principle is that rights most of the time must be balanced against rights of others. Equality holds in it a right of non-discrimination which is perceived as “the most fundamental of the rights of man the starting point of all other liberties”.³⁵⁶ Such a reasoning indeed lies at the foundation of the international concept of human rights which is found for example in the abolition of slavery and minority rights and the right to self-determination.

When considering human rights in legal terms we imagine that ‘rights’ exist as a counterpart of duties. Classically states are seen as the main duty holders in this regard since they exercise authority over persons and have the power to exercise a great degree of influence on them. However, when we keep the moral foundations of human rights in mind we may imagine that states are not the only actors in the international sphere which have the power to exercise authority over individuals and the scope of duty bearers may thus be expanded towards a more horizontal nature, an argument traced back to the moral foundation of human rights. In

³⁵⁰ Dinah L Shelton (n 336).

³⁵¹ 2 ECtHR (Merits), 29 April 2002, *Pretty v The United Kingdom*. App. No. 2346/02, para. 65; ECtHR (Judgment) 8 November 2011, *VC v Slovakia*, App 18968/07, para. 105.

³⁵² African charter on Human Rights and Peoples’ Rights, OAU Doc CAB/LEG./67/3/Rev 5 reprinted in 21 ILM 59 (1982), preamble; Revised Arab Charter on Human Rights, May 22 2004, unofficial English translation 12 Int’L Hum Rts Reps 893, preamble, arts 3, 17, 20, 40; ASEAN Declaration on Human Rights, 18 Nov 2013 <www.asean.org/news/asean-statement-communicues/item/aseanhuman-rights-declaration> accessed 3 June 2018.

³⁵³ The Social and Economic Rights Action Center and the Center for Economic and Social *Rights v Nigeria*, No. 155/96. Furthermore: German Federal Constitutional Court, 9 February 2010, BverfGE 125, 175 at 222 with comment by Inga T Winkler and Claudia Mahler, ‘Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?’ (2013) 13 (3) *Human Rights Law Review* 388, 401.

³⁵⁴ Universal Declaration of Human Rights (UDHR), 1948, UNGA res 217 A, article 1.

³⁵⁵ Dinah L Shelton (n 336).

³⁵⁶ Hersch Lauterpacht, *An International Bill of the Rights of Man* (OUP Oxford 2013).

a more elaborate argument on human dignity, following up on Kant's views, Dworkin indeed stipulates that human dignity has two faces, the intrinsic value of every human being, and the moral responsibility to realise a successful life, which confirms the close interrelation of moral rights and moral duties. "Based on this moral conception of human dignity, it leads to the argument that human rights constitute the legal face of human beings. That is, human rights are not only the relational aspect of human dignity that justifies the interrelation of moral rights and moral duties; they are also the institutional aspect of implementing human moral rights and duties and the legitimate aspect to enforce a remedy for moral rights violation."³⁵⁷

To conclude, as put by Shelton "human rights exist because human beings exist with goals and the potential for personal development based upon individual capacities which contribute to that personal development. This can only be accomplished if basic needs which allow for existence are met and if other persons refrain from interfering with the free and rational actions of the individual. Recognition of the fact that there are rational and legal limits to individual, corporate or state conduct that would interfere unreasonably with the free aims and life projects of others is a basic idea underlying contemporary understanding of human rights."³⁵⁸ Deriving from the moral foundation of human dignity, the main characteristics of human rights as it is known today stipulate that they are inherent, interdependent, and indivisible. This means first that they are of such a nature that they cannot be granted or taken away, a concept rooted in human dignity. Second, interdependence means that the enjoyment of one right influences the enjoyment of another right. This holds true not only when considering the rights of one person, but also when balancing the rights of one against the rights of another, a promulgation of the principle of equality. And third, human rights are indivisible which means that they must all be respected without exception. The notion of human rights throughout history is founded in a social contract between individuals and the state.³⁵⁹ It is only since the World War II that human rights became a part of the realm international law and thus forming the 'international human rights law' branch of international law.

³⁵⁷ Manfred Nowak, 'On the Creation of World Court of Human Rights' (2012) 7 *National Taiwan University Law Review* 257.

³⁵⁸ Dinah L Shelton (n 336).

³⁵⁹ Alfons Söllner, 'Jean-Jacques Rousseau, Du Contrat Social ou Principes du Droit Politique, Amsterdam 1762' in *Key Works of Political Science* (VS Verlag for Social Sciences 2007).

1.4. The Nature of Human Rights and the Law

International Human Rights Law is the structuration of human rights in the international legal order. The great leap of said structuration became apparent in the post-WWII period.³⁶⁰ International human rights law has become an area of international law that encompasses a set of individual entitlements of persons against governments.³⁶¹ These entitlements, human rights, range from civil to political rights such as the rights to be free from arbitrary deprivation of life, torture and other ill-treatment or to freedom of thought, conscience and religion, to social and economic rights such as the rights to health and to education.

Substantive International Human Rights Law can be found in many different sources, either conventional or customary, and binding or non-binding, so called 'soft' law.³⁶² Therefore, International Human Rights Law has evolved both on the international and regional plane through several binding treaties, such as the International Covenant on Civil and Political Rights 1966 (ICCPR), the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) and Convention on the Elimination of All Forms Racial Discrimination 1965 (CERD), centred around state obligations and rights for individuals. Nowadays, a change in the international legal order can be perceived and the involvement of other actors is increasingly recognised.³⁶³

Now that the importance of human rights has been recognised in this thesis, the next question is: what is the law? Cassese identifies three steps towards legal positivism.³⁶⁴ These steps are: identifying the substance of the rights, establishing binding duties for the protection of those rights and finally enforce those duties.³⁶⁵ The first step has been taken by the Universal Declaration of Human Rights 1948,³⁶⁶ the second by the emergence of binding human rights treaties at the United Nations, the first of which was the Convention on the Elimination of All Forms Racial Discrimination (CERD) in 1965,³⁶⁷ closely followed by the International

³⁶⁰ Paul Sieghart, *The International Law of Human Rights* (Oxford University Press 1983).

³⁶¹ Schachter Oscar, *International Law in Theory and Practice* (Vol. 13. Martinus Nijhoff Publishers 1991).

³⁶² Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006).

³⁶³ Antonio Cassese, ed. *Realizing Utopia: the Future of International Law* (Oxford University Press 2012).

³⁶⁴ *Ibid.*

³⁶⁵ Christian Tomuschat, *Human Rights: between Idealism and Realism* (OUP Oxford 2014).

³⁶⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

<http://www.refworld.org/docid/3ae6b3712c.html> >accessed 3 June 2018.

³⁶⁷ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195
<http://www.refworld.org/docid/3ae6b3940.html>
>accessed 3 June 2018.

Covenant on Civil and Political Rights (ICCPR) in 1966³⁶⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966.³⁶⁹ The last stage of enforcement is the most difficult one to take in the realm of international law and was made difficult by the polarisation of the international community during the cold war. Thus, international human rights law is a part of public international law, which is traditionally governed by and for sovereign states.³⁷⁰ The role of other actors and the individual at the centre of international human rights law is undeniable.³⁷¹ Indeed it is a field of law that is subject to constant evolution. “However, one conceives human rights law, it is surely not static. Human rights law is driven, not by the steady accretion of precedents and practice, but rather by outrage and solidarity.”³⁷² Nevertheless the international legal system remains primarily governed by states. However, an account of human rights enforcement by means of individual access to justice will be discussed later on in this thesis.

1.5. Introduction into the Neighbourhood Principle under English Tort Law Doctrine

This section describes the neighbourhood principle under the English Tort Law doctrine. A possible reason for this choice of legal doctrine might be that neighbourhood principle established a conduct that falls below the standards of behaviour established by law for the protection of others against an unreasonable risk of harm.³⁷³ A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances then a duty of care might exist.³⁷⁴ The English legal system is a Common Law system of law. One of the most significant differences between the Common

³⁶⁸ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21

December 1965, United Nations, Treaty Series, vol. 660, p. 195
<<http://www.refworld.org/docid/3ae6b3940.html>> accessed 3 June 2018

³⁶⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 4 June 2018.

³⁷⁰ Andrew Clapham (n 357).

³⁷¹ Dinah L Shelton (n 336).

³⁷² *Ibid.*

³⁷³ Cornelius J Peck, ‘Negligence and Liability Without Fault in Tort Law’ (1970) 46 *Washington Law Review* 225

³⁷⁴ Robert FV Heuston, ‘*Donoghue v Stevenson* in Retrospect’ (1957) 20 *Modern Law Review* 1. The concept of negligence developed under English Law. Although English Common Law had long imposed liability for the wrongful acts of others, negligence did not emerge as an independent cause of action until the eighteenth century. Another important concept emerged at that time: legal liability for a failure to act. Originally liability for failing to act was imposed on those who undertook to perform some service and breached a promise to exercise care or skill in performing that service.

Law system, Religious Law³⁷⁵ Canon Law³⁷⁶ and the Civil Law system (the principal legal system in continental Europe) is that the former judicial decisions are binding on both the lower courts and on the court that have made the decision that is known as a system of precedent.³⁷⁷ The English legal system is divided into two: Public law; and Private law.³⁷⁸ Private Law is divided between Property Law and the Law of Obligation, with the law of obligation consisting of Contract, Tort, and Restitutions. Thus, this introduction will help this research understand the advantages of corporate accountability under the neighbourhood principle. It will offer an understanding into the concept of duty of care and how this can be applied to corporations.

1.6. What Is Tort Law?

At its simplest, Tort is the law of non-criminal wrongs.³⁷⁹ The plural “wrongs” here is deliberate. Thus, tort law is the name given to the diverse collection of legal wrongs, such as negligence, trespass to land, assault, battery, libel etc. (Rudden in the early 1990s counted 70 individual torts³⁸⁰). In addition, the boundaries between torts are fluid and the popularity of any individual tort can change. An explanation of this is that old torts die out (the rule in *Rylands v Fletcher*,³⁸¹ may be a case point here) while new ones emerge (such as the tort of misuse of

³⁷⁵ Kent Greenawalt, ‘Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance’ (1997) 71 *Southern California Law Review* 781. Religious Law refers to a religious system or document used as a legal source. The main Religious Laws are Sharia in Islam, Halakha in Judaism, and Canon Law in Christianity. In some cases, these are intended purely as individual moral guidance, whereas in other cases they are intended and may be used as the basis for a country's legal system. Sharia, the Islamic legal system of Sharia (Islamic Law) and Fiqh (Islamic Jurisprudence) is the most widely used Religious Law. Islamic Sharia Law (and Fiqh jurisprudence) is based on legal precedent and reasoning by analogy (Qiyas), thus considered similar to Common Law. It is not a divine law, as only a fraction of Sharia law is based on the Qur'an and Sunnah, while the majority of its rulings are based on the Ulema (jurists) who used the methods of Ijma (consensus), Qiyas (analogical deduction), Ijtihad (reason) and Urf (common practice) to derive Fatwā (legal opinions). During the Islamic Golden Age, classical Islamic Law influenced the development of Common and Civil Law institutions. Sharia Law governs a number of Islamic countries, including Saudi Arabia and Iran, though most use Sharia Law only as a supplement to national law. It can relate to all aspects of civil law, including property rights, contracts or public law

³⁷⁶ James A Brundage, *Medieval Canon Law* (Routledge 2014). Christian Canon Law is similar to Civil Law in its use of civil codes. It is not a divine law as it is not found in “revelation”. Instead, it is seen as human law inspired by the word of God and applying the demands of that revelation to the actual situation of the church. Canon Law regulates the internal ordering of the Roman Catholic, Eastern Orthodox and the Anglican Churches. Canon law is amended and adapted by the legislative authority of the church, such as councils of bishops, single bishops for their respective sees, the Pope for the entire Catholic Church, and the British Parliament for the Church of England.

³⁷⁷ Catherine Elliott and Frances Quinn, *English Legal System* (Pearson Education 2008).

³⁷⁸ Richard Ward, Amanda Akhtar and Amanda Wragg, *Walker & Walker's English Legal System* (Oxford University Press 2011).

³⁷⁹ Dan B Dobbs, *The Law of Torts* (Vol. 2. West Group 2001).

³⁸⁰ Bernard Rudden, ‘Torticles’ (1991) 6 /7 *Tulane European and Civil Law Forum* 105.

³⁸¹ *Rylands v Fletcher* [1868] UKHL 1.

private information in *Vidal-Hall v Google Inc*).³⁸² Tort law covers a lot of ground, so could it provide an appropriate mechanism for corporate accountability? What is not clear is the extent to which the various individual torts (and the law of tort as a whole) share common features, principles, and justification in relation to corporate accountability. The best view may be Tony Weir's, who observed that "tort is what is in the tort books, and the only thing holding it together is the binding".³⁸³ Tony Weir's view is noted in tort cases, such as *Bourhill v Young*,³⁸⁴ *Osman v United Kingdom*,³⁸⁵ and *Hall v Simons*.³⁸⁶ Therefore, in comparing tort law to international law and human rights law, tort law has the ability to address a variety of corporate human rights violations and cases of environmental damage.

Also, in comparison to, say contract law (traditionally tort law's other half in the Law of Obligation)³⁸⁷ which is said to be grounded, *inter alia*, in the morality of promise-keeping, tort law appears to lack any such common theme or ambition, and resembles little more than a miscellaneous collection of relatively self-contained wrongs. As well, in recent years one particular tort, such as the tort of ³⁸⁸negligence has gained prominence and started to gain ground from other, older torts. This has extended the old tort to cover cause beyond the normal duty of care, in cases such as *Montgomery v Lanarkshire Health Board*,³⁸⁹ and *Caparo Industries plc v Dickman*.³⁹⁰ If this development continues, it may be possible that national judicial system will end up with a law of tort sharing a similar unity and coherence as is found in contract law. However, this move has not been universally welcomed and, in any case, it is

³⁸² *Vidal -Hall & Ors v Google Inc* [2014] EWHC 13 (QB) (16 January 2014). <<http://www.bailii.org/ew/cases/EWHC/QB/2014/13.html>> accessed 30 October 2016.

³⁸³ Tony Weir, *An Introduction to Tort Law* (Oxford University Press 2006).

³⁸⁴ *Bourhill v Young* [1943] AC 92.

³⁸⁵ *Osman v United Kingdom* [1998] EHRR 101. "Osman appealed to the European Court of Human Rights contending that the blanket immunity from actions provided to the police by the House of Lords in *Hill v CC Yorkshire* was in breach of Art 6 of the European Convention of Human Rights. Art 6 provides that in determination of civil rights every person is entitled to a hearing by an independent and impartial tribunal established by law".

³⁸⁶ *Arthur Hall v Simons* [2000] 3 WLR 543. "His case involved three conjoined appeals concerning claims against solicitors. Each solicitor had relied on the immunity rule relating to advocacy in negligence claims. At first instance the trial judge had struck out each claim. The Court of Appeal held that the claims were wrongly struck out. The House of Lords was invited to reconsider the immunity of legal professionals when conducting advocacy in court".

³⁸⁷ Robert Stevens, *Torts and Rights* (OUP Oxford 2007).

³⁸⁸ Frederick Pollock, *The Law of Torts: Treatise on The Principles of Obligations Arising from Civil Wrongs in The Common Law* (Banks & Brothers 1892). The civil wrong means that any wrong done by citizens or person who may be unintentional, which results to damages such as death, personal injury, property damages, nervous shock or any consequential loss. A person that suffers the damages may be able to use the tort law to get the compensation from the person that is liable for the injuries. Example of tort is when a person named Joe accidentally throws a pen and hit Mary's face.

³⁸⁹ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

³⁹⁰ *Caparo Industries plc v Dickman* [1990] UKHL.

not there yet. The description of tort law as a collection of civil wrongs for which the law provides a remedy, as Peter Cane suggests, is a way of protecting people's interest through "a system of precepts about how people may, ought and ought not to behave in their dealing with others",³⁹¹ which simply prompts another question: what wrongs or interests are protected under tort law? Does tort law protect rights under human rights law?

Tort law is concerned with civil wrongs, while criminal law is concerned with criminal conduct.³⁹² Unquestionably, the major (and mostly dynamic) field of law within tort is the law of negligence. In the context of personal injury claims, the injured person will be able to sue for negligence,³⁹³ although there are other regimes that are relevant. Negligence in the English legal system expanded throughout the nineteenth and twentieth centuries, and reflects the pressures that arise out of an industrialised and urban society, and has brought to bear upon the traditional groups of legal redress for interference with protected interests³⁹⁴. These relationships may partly be explained by the flexibility it brought to the legal system. The flexibility allows the courts to find liability in a novel context to establish liability and effective remedy. However, for the court to make a finding of negligence, the claimant must prove a number of things, the primary being that the defendant owed the claimant a duty of care. In this view, it is adequate to claim that tort law covers the rights derived from international law and human rights law.

1.7. Rights Protected under Tort Law

Tort law might arise, in cases, where someone had suffered an unwanted harm. Some involved physical injury (for example, the damage caused by elderly resident getting her foot

³⁹¹ Peter Cane, *The Anatomy of Tort Law* (Bloomsbury Publishing 1997).

³⁹² Henry M Hart, 'The Aims of the Criminal Law' (1958) 23 (3) *Law and Contemporary Problems* 401, 441.

³⁹³ Richard A Posner, 'A Theory of Negligence' (1972) 1 (1) *Journal of Legal Studies* 29, 96. Criminal law enforces and regulates social conduct, in addition to prohibiting threats, harm or other element that endangers the health, safety and moral welfare of people within a jurisdiction. Criminal law also enforces punishment of offenders who violate laws. In criminal law, specific objectives exist to enforce different degrees of crime. Criminal law, in fact, holds a distinction for having "uniquely serious consequences" for offenders who fail to abide by the laws of their jurisdiction. Modern consequences in criminal law commonly involve incarceration in jail or prison, government supervision or house arrest, fines, seizure of property and / or money from an offender. Physical punishment is prohibited in most jurisdictions around the world. Jurisdictions around the world follow five objectives to enforce criminal law punishment: retribution, rehabilitation, restoration, incapacitation, deterrence and retribution. The value of each varies between different jurisdictions.

³⁹⁴ Simon F Deakin, Angus Johnston and Basil S Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2012).

caught in a hole) or even death by motor accident, *Sutherland Shire Council v Heyman*³⁹⁵ (in the case of the pedestrian killed by the speeding motorist) *Fitzgerald v Lane*,³⁹⁶ and in others, the harm of psychological injury (such as that suffered by the office worker) *Page v Smith*³⁹⁷ and *White v Chief Constable of South Yorkshire*.³⁹⁸ Clearly not all cases involve physical or mental injury to the potential claimant; other types of harm include damage of property (such as the cause of explosion at the oil refinery) *Simaan General Contracting Co v Pilkington Glass Ltd*³⁹⁹ and financial loss (such as in the case of the buyer whose house is not worth as much they thought, or more controversially, the student who has not been recognised as dyslexic) *Junior Books v Veitchi Co Ltd*.⁴⁰⁰

In some of these examples, such as *Fitzgerald v Lane* and *White v Chief Constable of South Yorkshire*, there appears to be no damage or harm at all. However, even assuming for the sake of argument the ramblers walk over the farmer's land without causing damage (they do not, for example, tear at or pick flowers) or that one's housemate unlocks the bathroom door before the drunk student wakes up the next morning and so he is unaware of having been locked in all night, this can still be classified as an interference with the individual rights, *Mitchell and Another v Glasgow City Council*,⁴⁰¹ *Stovin v Wise*,⁴⁰² *Norwich City Council v Harvey*,⁴⁰³ and *Carmarthenshire County Council v Lewis*.⁴⁰⁴ Thus, you have a right to determine who has

³⁹⁵ *Sutherland Shire Council v Heyman* [1985] HCA 4.

³⁹⁶ *Fitzgerald v Lane* [1989] 1 AC 328.

³⁹⁷ *Page v Smith* [1996] 1 AC 155.

³⁹⁸ *White v Chief Constable of South Yorkshire* [1998] 3 WLR 1509. "This case arose from the disaster that occurred at Hillsborough football stadium in Sheffield in the FA cup semi-final match between Liverpool and Nottingham Forest in 1989. South Yorkshire Police had been responsible for crowd control at the football match and had been negligent in directing an excessively large number of spectators to one end of the stadium which resulted in the fatal crush in which 95 people were killed and over 400 were physically injured. Whilst *Alcock*, involved claims by relatives, this case involved claims for psychiatric injury from police officers who were on duty that day. Their claims differ from those in *Alcock*, in that they based their claims on the grounds that as employees, the defendant owed them a duty of care not to cause them psychiatric injury as a result of negligence, alternatively they claim as rescuers, which they argued promoted them to primary victims as oppose to secondary victims. At trial Waller J dismissed the claims on both grounds. The Court of Appeal reversed this decision".

³⁹⁹ *Simaan General Contracting Co v Pilkington Glass Ltd* [1988] CA 17.

⁴⁰⁰ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 52.

⁴⁰¹ *Mitchell v Glasgow City Council* [2009] UKHL 11.

⁴⁰² *Stovin v Wise* [1996] 3 WLR 389. "There are sound reasons why omissions require different treatment from positive conduct. It is one thing for the law to say that a person who undertakes some activity shall take reasonable care not to cause damage to others. It is another thing for the law to require that a person who is doing nothing in particular shall take steps to prevent another from suffering harm from the acts of third parties or natural causes".

⁴⁰³ *Norwich City Council v Harvey* [1988] 45 BLR 14.

⁴⁰⁴ *Carmarthenshire County Council v Lewis* [1955] AC 549. "The law takes a restrictive approach to imposing liability in relation to omissions. The law draws a distinction between misfeasance, where a party does an act negligently, and nonfeasance, where a party does nothing at all. Omissions relate to nonfeasance. The general rule is that no liability exists for an omission".

access to or makes use of your land. In other words, the law says that you get to control the use of your land, if any, that others may make of your property. Similarly, each of us has a right to bodily freedom and autonomy, others are not entitled to touch us or confine our movement (subject to certain exceptions) without consent. Even though the farmer or the drunk student may not have been harmed, in the sense of being worse off, as a result of this action, it can be said that there had been wrong-doing.

As such, tort law is not just, or indeed primarily, concerned with harm as much as it is with rights. Therefore, the question is, how are these rights protected and respected? The understanding of tort law as a system of rules protecting rights and interests will allow one to identify and apply tort law to the fundamental human rights principles. Tort law presents the legal system with a neat, linear form of protecting rights and interests. It also involves something of a description of the way the distinct torts are arranged and how they are interrelated. In an explanation, some torts exist and are defined to protect a single interest (for example, defamation protects the person and their reputation, and nuisance protects individual interests in enjoying their land), the tort of negligence offers protection to all legally recognised rights and interests.⁴⁰⁵ What this means is that often, for any single harm or injury, there will be more than one tort upon which a claim may be founded. So, if someone hits another person (as well as a criminal claim), it may be possible to bring a claim in battery or negligence, depending on the circumstances of the case.⁴⁰⁶

⁴⁰⁵ Harold Luntz, David Hambly and Robert Alexander Hayes, *Torts: Cases and Commentary* (Butterworths 1992).

⁴⁰⁶ Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) *Yale Law Journal* 1795, 1873. According to William Geldart, *Introduction to English Law* (D.C.M. Yardley ed., 9th ed. 1984) 146. The difference between civil law and criminal law turns on the difference between two different objects which law seeks to pursue, redress or punishment. The object of civil law is the redress of wrongs by compelling compensation or restitution: the wrongdoer is not punished; he only suffers so much harm as is necessary to make good the wrong he has done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer; to give him and others a strong inducement not to commit same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to meet with retribution.

Criminal law and civil law differ with respect to how cases are initiated (who may bring charges or file suit), how cases are decided (by a judge or a jury), what kinds of punishment or penalty may be imposed, what standards of proof must be met, and what legal protections may be available to the defendant.

In civil cases, by contrast, cases are initiated (suits are filed) by a private party (the plaintiff); cases are usually decided by a judge (though significant cases may involve juries); punishment almost always consists of a monetary award and never consists of imprisonment; to prevail, the plaintiff must establish the defendant's liability only according to the "preponderance of evidence"; and defendants are not entitled to the same legal protections as are the criminally accused.

Importantly, because a single wrongful act may constitute both a public offense and a private injury, it may give rise to both criminal and civil charges. A widely cited example is that of the former American football player O.J. Simpson: in 1995 he was acquitted of having murdered his wife and her friend, but

The concept that established the duty of care was generalised in the famous case of *Donoghue v Stevenson*.⁴⁰⁷ Also, tort law plays a role in deterring future tortious activity. The imposition of liability in relation to a particular activity enables others to regulate their behaviour accordingly. Thus, it is argued, following *Woodroffe-Hedley*,⁴⁰⁸ that mountain guides are more likely to use two ice screws rather than risk liability by relying on one. Likewise, one might think that anything that encourages safe practice is, in itself, a good thing. In general, therefore, it seems that the effect of the imposition of tortious liability in such circumstances is not to deter potentially negligent conduct but to stop the activity altogether. Thus, could this be a mechanism to deter corporate human rights violations? The function of tort is often coupled with the idea of gaining publicity about what has happened to stop it from ever happening again. This is often the line claimants take if they have suffered as a result of someone's negligent actions, see the case of *Woodroffe-Hedley v Cuthbertson*⁴⁰⁹ where Gerry Hedley's wife sort to bring a negligence action against the defendant for the death of the claimant.⁴¹⁰

1.8. Aims of Tort Negligence

Tort Law has both backwards and forward-looking elements. It seeks to protect an individual's interests both prospectively (that is, to prevent or deter future harm) and retrospectively (through the provision of compensation for past harm and the distribution of losses). Tort law has a number of disparate functions or purposes typically identified under the broad reading of compensation, deterrence, (corrective), justice and, less often, an inquiry and / or publicity.⁴¹¹ The tort of negligence is the most frequently used of all torts and is therefore perhaps the most important. It has flourished in the latter part of the twentieth century, rising to a dominant position because of the flexible nature of its rules that allow judges to expand the tort to protect any claimants who would otherwise have been left unprotected by the law.⁴¹²

two years later he was found liable for their killings in a civil suit for wrongful death. Paul Skolnick and Jerry I Shaw, 'The OJ Simpson Criminal Trial Verdict: Racism or Status Shield?' (1997) 53(3) *Journal of Social Issues* 503, 516.

⁴⁰⁷ Neil MacCormick, 'Donoghue v. Stevenson and Legal Reasoning' (1991) *Donoghue v. Stevenson and the Modern Law of Negligence, Continuing Legal Education of British Columbia, Vancouver* 191, 213.

⁴⁰⁸ Alistair Duff, '5 Legal Liability' (2003). <<http://platform.rgs.org/NR/rdonlyres/A1732337-720E-4FCC-950D-0BC094B57FDA/0/06ch5.pdf>> accessed 30 October 2016.

⁴⁰⁹ *Woodroffe-Hedley v Cuthbertson* [1997] QBD.

⁴¹⁰ Gary Younge 'Go Tell It on The Mountain' (1997) *The Guardian*, also see: Kirsty Horsey and Erika Rackley *Kidner's Casebook on Torts* (Oxford University Press USA 2015).

⁴¹¹ Kirsty Horsey and Erika Rackley, *Kidner's Casebook on Torts* (Oxford University Press USA 2015).

⁴¹² Paula Giliker and Silas Beckwith, *Tort* (Sweet and Maxwell 2000).

This combination of findings provides some support for the conceptual premise that applying this principle to corporate accountability could have the potential to restore the victims of corporate human rights abuses to the place they were prior to the wrongdoing or before the violations happened to them, however, this is not clear yet. Torts are divided into three categories, Intentional, (see footnote for definition)⁴¹³ Negligence (see footnote for definition),⁴¹⁴ and Nuisance (see footnote for definition),⁴¹⁵ however, this thesis will only focus on the tort of negligence, because it will provide victims of human rights violation a mechanism to bring a lawsuit against corporation. The other torts are relevant but however, excluded because the notion in this thesis is that tort of negligence has the ability to cover the three other torts through the concept of a duty of care. The current study found that the tort of negligence forms one of the most dynamic and rapidly changing areas of liability in modern law.⁴¹⁶ It is simply defined as a careless behaviour with no intention of causing damage.⁴¹⁷ This careless behaviour of others which makes other suffer damage may be entitled for reparation. That is the main concern of negligence,⁴¹⁸ hence why this thesis opts to focus exclusively on this aspect of tort law.

⁴¹³ Peter Handford, 'Intentional Negligence: A Contradiction in Terms?' (2010) *Sydney Law Review* 32, 29. Intentional torts, as the name suggests, are legal wrongs that are committed on purpose (as opposed to by accident or through carelessness). An intentional tort occurs when the defendant acts with the intent to cause actual harm or offense to another person (or at least the threat of harm or offense). Intentional torts include:

- Battery – applies to almost any form of harmful or offensive contact, even when no actual injury occurs.
- Assault – definition varies by state, but usually includes any intentional act that places the victim in reasonable fear of imminent harm (i.e. pointing a loaded gun at someone).
- False Imprisonment – occurs when one person intentionally restrains the movement of another person (actually or constructively) without the legal right to do so. This can occur when a security guard wrongfully detains a shoplifting suspect.
- Trespassing – unlawful entry onto someone else's property.

Defenses to Intentional Torts. The most common defenses to intentional tort allegations are:

- the defendant was acting in self-defense or in defense of a third person, and
- the defendant acted with the plaintiff's consent (i.e. the defendant touched the plaintiff with the plaintiff's permission, or entered the plaintiff's property with consent).

⁴¹⁴ Greg Walsh, 'Tort of Negligence definitions' (2011). The Tort of Negligence is a legal wrong that is suffered by someone at the hands of another who fails to take proper care to avoid what a reasonable person would regard as a foreseeable risk.

⁴¹⁵ Nuisance in the form of smells, *Wheeler v JJ Saunders* [1996] Ch 19, Encroachment by tree branches or roots, *Lemmon v Webb* [1894] 3, Nuisance noise *Kennaway v Thompson* [1981] QB 88, Cricket balls – *Miller v Jackson* [1977] 3 WLR 20 and Disturbance from a brothel *Thompson-Schwab v Costaki* [1956] 1 WLR 335.
Sedleigh-Denfield v O' Callaghan [1940] AC 880.

⁴¹⁶ Simon Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (Oxford University Press 2005).

⁴¹⁷ Joseph Carman Smith, *Liability in Negligence* (Carswell Legal Publications 1984).

⁴¹⁸ Robert A Leflar, 'Negligence in Name Only' (1952) 27 *New York University Law Review* 564. Negligence simply refers to failure to use reasonable care. In common law negligence is explained as the action taken that contradicts with what an ordinary reasonable member from a given community would act in that same community. It's doing something that a prudent person wouldn't do. It is the legal cause of damage

1.9. Definition of Negligence

The tort of negligence has usefully been defined as: “a breach of a legal duty to take care which results in damage to the claimant”.⁴¹⁹ The tort is not usually concerned with harm inflicted internationally on the claimant. Rather, it is a concern with injuries inflicted accidentally on the claimant or through a duty of care, however establishing negligence involves much more than simply showing that the defendant behaved carelessly, as careless behaviour is only one ingredient of negligence. To establish tort, the claimant must prove three things:

- a. The defendant owes the claimant a duty of care;
- b. The defendant has acted in breach of that duty; and
- c. As a result, the claimant has suffered damage that is not too remote a consequence of the defendant’s actions.

In order to impose a duty of care on the defendant, the claimant must make sure that the defendant has satisfied the above test. It is imperative to consider each element of the tort in turn. Rarely in practice, however, will disputes ever involve all three elements. Moreover, the court has a tendency to blur the distinction between each separate element of negligence, as shown in *Henderson v Merrett Syndicates Ltd*.⁴²⁰ Quite often, therefore, a judgment may indicate each of the defendants liable but may not make it clear which of the three separate

if it directly, naturally and continuously contributes in causing that damage. It is thus taken that were it not for negligence, then the damage would not have occurred. On the other hand, a tort is any wrongful act except breach of trust or contract resulting in injury to another individual’s property and reputation for which the injured individual qualifies to be compensated.

There are three elements in the tort of negligence; duty of care, breach of the duty and damages. Duty of care means that any single person must always take reasonable care so that he can avoid omissions and acts that he can foresee reasonably as likely to result to injury to his neighbour. In negligence law, a neighbour is that person who is directly and closely affected by one’s act such that one is supposed to have him/her in contemplation to be affected when directing the mind to the omissions and acts in question.

Standard of care must be proved by deciding whether the defendant in question owed the plaintiff a standard of care, the level of standard of care that the defendant owed the plaintiff and lastly, by determining whether another reasonable person in the same field like the defendant would do the same. Breaching of the standard of care must be proved by checking how likely the injury was and how it can be regarded, injury gravity (whether the plaintiff at all engaged in a dangerous activity) and efforts that may be required in order to remove injury risk (whether the defendant failed to act reasonably). Damages caused by the defendant must have resulted through the breach of duty of care and that this was not remote.

⁴¹⁹ William Vaughan Horton Rogers and John Anthony Jolowicz, *Winfield and Jolowicz on Tort* (Sweet & Maxwell 2010).

⁴²⁰ *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5. “Managing agents conducted the financial affairs of the Lloyds Names belonging to the syndicates under their charge. It was alleged that they managed these affairs with a lack of due care leading to enormous losses”.

requirements of the tort has not be fulfilled⁴²¹, which stems from the fact that the concept of reasonable foreseeability is used by the court in establishing all three elements of the tort.

1.10. The Application of Negligence

The tort of negligence covers such a wide range of factual situations that the search for a single set of rules applicable to all types of negligence cases is extremely difficult. The correct approach, is to focus on the type of interest which the claimant is trying to use the tort to protect (physical, the safety of property, financial, livelihood, well-being, or psychological well-being), and then to think about the policy reasons as to why the courts have felt either able, or unable to extend the scope of negligence to protect that interest in a particular situation.⁴²² Therefore, the language of the judges and the pattern of their decision-making in corporate human rights violations will only begin to make real sense when considered alongside the political and economic landscape, which in turn motivates decisions in negligence cases.

When one looks at what negligence is trying to achieve within society, the redistribution of certain risks within day-to-day activities, it becomes clear why the judges have difficulty in formulating workable rules for the tort. The point to grasp is that negligence is essentially concerned with conflict of values/interests within society. In essence, therefore, in order to decide the question of negligence in business human rights abuses, the judge must make a political and moral value judgment as to the relative merit of safety and protecting rights in society. So, the problem of corporate human rights violation is one of social, economic, and financial policy, not legal personality or treaty. A possible explanation to what is referred to here is that negligence exists to protect society from harm caused by corporations.

1.11. Critical Overview of Negligence

In 1932, Lord Atkin, in the landmark case in *Donoghue v Stevenson*⁴²³, formulated a general principle (known as the neighbour principle) by which the existence of a legal duty to take care could be determined, thus effectively inventing the modern tort of negligence. The

⁴²¹ *Sam (aka- Al-Sam) v Atkins* [2006] EWCA Civ 152, [2006] R.T.R14.

⁴²² Paula Giliker and Silas Beckwith (n 372).

⁴²³ *Donoghue v Stevenson* [1932] UKHL 100 (26 May 1932). <<http://www.bailii.org/uk/cases/UKHL/1932/100.html>> accessed 31 October 2016, or [1932] UKHL 100, 1932 SC (HL) 31, [1932] AC 562, [1931] UKHL 3.

main strength of this argument is that Lord Atkin's general principle, however, was that it contained too little by which, on the basis of logic, the limits of the tort could ever be confined.

As the tort of Negligence developed, the court sought to qualify Lord Atkin's general principles with a number of complexities, often inherently vague, and sometimes, rather arbitrary rules. The court has struggled to determine the proper scope of negligence, and have used the three ingredients (duty, breach, and causation) as a control mechanism to try to set a limit to the tort. The multifaceted approach can sometimes be rather confusing, but what is clear, however, is that in recent times there has been a marked tendency to deal with the question of liability by reference to the scope of the duty of care. Logically, establishing the existence of a duty of care is the first hurdle a claimant must overcome. It, therefore, makes sense for a court to deal with this first, because it simplifies the decision-making process.

In many situations, it will be obvious from establishing case law that the defendant owes the claimant a duty of care. The real problem for the courts is how to decide whether a duty should be owed in a novel factual situation which is not covered by authority. Because of the political and economic consideration involved, the court has found it difficult both to decide this question and to express their decisions in the appropriate language.⁴²⁴ In order to limit the scope of the duty of care, the court has repeatedly asserted the importance of the relationship between the defendant and the claimant. This approach, however, has not resulted in a universally applicable test for determining the existence of a duty of care. This qualification on Lord Atkin's neighbourhood principle has become so frequently used that the House of Lords has been forced to abandon the search for a single workable test in *Caparo v Dickman*,⁴²⁵ Lord Roskill concluded "it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer". However, critics of tort law have argue that it have created uncertainty, is unpredictable body of law that have find support if one considers the requirements of the rule of law.⁴²⁶ Though, the legal principles that have developed in relation to the imposition of a duty of care provide flexibility in the law, thus, this study contest that the critics view are invalid. This is because the duty of care enables the incremental development of tort law in order to meet changing social need. This development is not unconstrained, which provides for a level of consistency in negligence law. Furthermore, this research argue that critic's views of tort law are unjustified for two significant

⁴²⁴ Dominick R Vetri, *Tort law and Practice* (LexisNexis/Matthew Bender 1998).

⁴²⁵ *Capara v Dickman* [1990] 2 AC 605, [1990] UKHL 2, [1990] 1 All ER 568.

⁴²⁶ Christopher L Kutz, 'Just Disagreement: Indeterminacy and Rationality in The Rule of Law' (1994) 103 (3) *Yale Law Journal* 997, 1030.

reasons. 1. sceptical views of tort law lack a certain robustness because, ultimately, judicial decisions in negligence cases are legitimate legal developments. Hence sceptical interpretations may be persuasive, therefore, but they appear to have very little practical relevance. 2. if one agrees with Stanley Fish, then one may argue that judges are merely engaging with the incremental development of the law with relevance to existing doctrine.⁴²⁷ Hence, such judicial activism merely develops the liability rules in conjunction with the purposes of tort law and social need. Finally, the imposition of a duty of care is an interpretive task due to the inherent ambiguities of language.

It is suggested here that the tort of negligence does not have a specific formula for each case, hence the concept of the tort of negligence is decided on case by case, based on its merit. Bearing this in mind, it is perfectly acceptable to state that the tort of negligence offers a flexible approach of imposing a duty of care on an entity. Additionally, this study shall closely examine the historical development of duty of care, and the modern approach in *Caparo v Dickman*⁴²⁸ to decide whether corporations can be held accountable under this principle.

1.12. The Notion of Accountability⁴²⁹

The only area of international law that is capable of addressing the human rights violations of an individual rights perpetrated by a state, is the action by the government or government bodies against its citizens⁴³⁰ and aliens. This doctrine falls into two parts. The first

⁴²⁷ Stanley Fish, *There's No Such Thing as Free Speech: And It's a Good Thing, Too* (Oxford University Press 1994).

⁴²⁸ *Ibid.*

Caparo is the landmark case which has created the tripartite test in establishing duty of care. This test departs from *Donoghue v Stevenson* and the Wilberforce test laid down in *Anns v Merton London Borough Council* which starts from the assumption that there is a duty of care and that harm was foreseeable unless there is good reason to judge otherwise. Whereas *Caparo* starts from the assumption no duty is owed unless the criteria of the three-stage test is satisfied. These criteria are: Foreseeability, Proximity and whether it is fair, just and reasonable to impose such a duty. Yet this approach has been critiqued by over complicating “neighbour” principle in *Donoghue*. Moreover, there is an abundance of case law which moves away from the *Caparo* test altogether.

The House of Lords reversed the decision of the *COA* and held that no duty of care had arisen in relation to existing or potential shareholders. The only duty of care the auditor’s owed was to the governance of the firm. It was found that three factors had to exist for there to be a duty of care which where: Proximity, Knowledge of who the report would have been communicated to and for what purposes it would have been used.

⁴²⁹ This part of the chapter explained the rationale behind the definition of accountability. What is accountability? What does it mean to hold the state or indeed anyone “accountable”? Must accountability always be “to” another person or body? Friends of the Earth, ‘Briefing: Corporate Accountability’ (2005). <http://www.foe.co.uk/resource/briefings/corporate_accountability1.pdf> Accessed 5 July 2017.

⁴³⁰ Karl Josef Partsch, ‘Individuals in International Law’ (1995) 2 *Encyclopaedia of Public International Law* 957, 962.

is the law of state accountability for injury to its citizens⁴³¹ and aliens,⁴³² which primarily deals with the disruption of property interests by aliens of foreign states, though this also includes attacks on individual persons in their jurisdiction (including its citizens). The second is the law and custom of war, which acknowledges certain limitations on the conduct of a state in war, and is designed to promote some of the fundamental human rights of an individual during wartime.⁴³³

This concept is related to the principle of “sovereignty”⁴³⁴ that for many years has dominated the international relations between the states. Under current international law, sovereignty “in the sense of contemporary public international law, denotes the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law”.⁴³⁵ This analysis indicates that it is only the state that is accountable for what is happening in its jurisdiction and has a positive obligation to act. This positive obligation extends to the state citizen as a responsibility to protect,⁴³⁶ to all alien and all the actors in its jurisdiction. Hence, under the current concept of international law, it is adequate. However, this thesis argues that the concept does restrict the practical and legal concept of accountability because it neglects the broader notion of accountability which

⁴³¹ Edith Brown Weiss, ‘Invoking State Responsibility in the Twenty-First Century’ (2002) 96 (4) *American Journal of International Law* 798, 798. “The laws of state responsibility are the principles governing when and how a state is held responsible for a breach of an international obligation. Rather than set forth any particular obligations, the rules of state responsibility determine, in general, when an obligation has been breached and the legal consequences of that violation. In this way they are “secondary” rules that address basic issues of responsibility and remedies available for breach of “primary” or substantive rules of international law, such as with respect to the use of armed force. Because of this generality, the rules can be studied independently of the primary rules of obligation. They establish (1) the conditions of actions to qualify as internationally wrongful, (2) the circumstances under which actions of officials, private individuals and other entities may be attributed to the state, (3) general defences to liability and (4) the consequences of liability”. Andrea Bianchi, ‘Ad-Hocism and The Rule of Law’ (2002) 13 (1) *European Journal of International Law* 263, 272.

⁴³² Cornelius F Murphy Jr, ‘State Responsibility for Injuries to Aliens’ (1966) 41 *New York University Law Review* 125.

⁴³³ Myres Smith McDougal, Harold D Lasswell and Lung-chu Chen, ‘Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity’ (1980).

⁴³⁴ Virginie Guiraudon and Gallya Lahav, ‘A Reappraisal of The State Sovereignty Debate: The Case of Migration Control’ (2000) 33 (2) *Comparative Political Studies* 163, 195.

⁴³⁵ Helmut Steinberger, ‘Sovereignty’ (2000) 4 *Encyclopedia of Public International Law* 500. “In other words, Sovereignty is the ultimate power, authority and / or jurisdiction over a people and a territory. No other person, group, tribe or state can tell a sovereign entity what to do with its land and / or people. A sovereign entity can decide and administer its own laws, can determine the use of its land and can do pretty much as it pleases, free of external influence (within the limitations of international law)”

⁴³⁶ State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect. Ramesh Thakur, ‘The Responsibility to Protect: Norms’ (2011) *Laws, and the Use of Force in International Politics*, London.

includes non-state actors such as corporations. It have departed from the “concerted” approach for the access to remedies and legal standards on business and human rights, which will not undermine states’ obligation to oversee the conduct of corporations, as it would operate under the international principle of subsidiarity, by which international institutions may exercise jurisdiction in cases where national legal systems are unwilling or unable to fulfil their primary obligation to protect human rights and redress human rights violations, and could enhance domestic efforts to protect human rights through international cooperation and legal coherence, as it will impose common international standards on the problem.⁴³⁷ Thus, the current international legal framework has rejected the essential mechanism of accountability, which is an effective remedy and a fair and accessible justice system to hold a corporation or individual liable for misconduct.⁴³⁸ Even though the reason for this deficiency was clear from the beginning of the creation of international law, could it be said that international law did not anticipate future dynamics with respect to the international legal obligations of non-state actors in relation to human rights accountability and environmental damage?

International Law consists of the rules and principles of general application which concern itself with the conduct of states and international organisations in their relations with one another and with private individuals, minority groups, and transnational corporations.⁴³⁹ Transnational corporations, however, do not have a legal personality under international law. International legal personalities refers to the entities or legal persons that can have rights and obligations under international law.⁴⁴⁰ A state has the following characteristics: (1) a permanent

⁴³⁷ Luis Gallegos and Daniel Uribe, ‘The Next Step against Corporate Impunity: A World Court on Business and Human Rights?’ (2016) 57 *Harvard International Law Journal*.

⁴³⁸ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press USA 2015).

Companies can have a direct and adverse impact on the ability of people to seek remedy before any project or economic activity starts. They do this by shaping the legal or regulatory framework within which they will operate. In several of the cases investigated companies had significant input into defining the legal or regulatory framework governing their operations. In one relatively well-known case, the Ok Tedi mine in Papua New Guinea, the company effectively established its own legal framework for a mining operation, and amongst other things the legal framework resulted in rights violations being legitimised. Patricia K Townsend and William H Townsend, ‘Assessing an Assessment: The Ok Tedi Mine’ (2004) *Bridging Scales and Epistemologies: Linking Local Knowledge and Global Science in Multi-Scale Assessments*,” *Alexandria, Egypt* 17, 20, Brian Siang Peng Chu, ‘The BHP and Ok Tedi Case, 1984-2000: Issues, Outcomes and Implications for Corporate Social Reporting’ (2001) *News Journal of the Asia Pacific Centre for Environmental Accountability* 11.

Ok Tedi. In 1994, Papua-New Guinean (PNG) landowners sued BHP in the Supreme Court of Victoria in Melbourne, Australia alleging that BHP’s operations at the Ok Tedi copper mine caused destruction of the surrounding environment and of their traditional lifestyle. The plaintiffs alleged that BHP dumped mine tailings waste into the Ok Tedi and Fly Rivers.

⁴³⁹ Philip Allott, ‘The Concept of International Law’ (1999) 10 (1) *European Journal of International Law* 31, 50.

⁴⁴⁰ José E Alvarez, ‘Are Corporations Subjects of International Law’ (2011) 9 *Santa Clara Journal of International Law* 1.

population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states. The international legal system is a horizontal system dominated by states which are, in principle, considered sovereign and equal. International law is predominately made and implemented by states. Only states can have sovereignty over territory.⁴⁴¹ Only states can become members of the United Nations and other international organisations. Only states have access to the International Court of Justice.⁴⁴² Thus in this context, corporations do not meet the requirements under international law that allow them to acquire legal personality.⁴⁴³

This establishes a distinctive legal principle between the domestic legal system and international legal framework for the liability of a wrongful conduct.⁴⁴⁴ Thus, international law and domestic law differ in terms of magnitude.⁴⁴⁵ Domestic law governs the behaviours and actions of individuals within the state, whereas international law governs the behaviour and actions of bodies of government, this includes states or countries.⁴⁴⁶ The national law, which can also be called municipal law, come from legislature and customs, whereas international law consists of treaties and customs.⁴⁴⁷ Legislature is a body of people who are able to make or enact laws. Treaties are formal agreements among and between countries.⁴⁴⁸ Customs are practices which are deemed normal for individuals or states.⁴⁴⁹ A possible implication of this is that corporations may be a subject of national law in domestic court and may have a legal obligation in domestic court, though not in international legal settings.

⁴⁴¹ John Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics' (2005) 95 (2) *Annals of the Association of American Geographers* 437, 461.

⁴⁴² Kal Raustiala, 'States, NGOs, and international Environmental Institutions' (1997) 41 (1) *International Studies Quarterly* 719, 740.

⁴⁴³ Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law' (1999) *Indiana Journal of Global Legal Studies* 579, 645.

International law is based on rules made by states for states. States are sovereign and equal in their relations and can thus voluntarily create or accept to abide by legally binding rules, usually in the form of a treaty or convention. By signing and ratifying treaties, states willingly enter into legal, contractual relationships with other state parties to a particular treaty, which observance is normally controlled by the reciprocal effects of non-compliance.

⁴⁴⁴ Roland Portmann, *Legal Personality in International Law* (Vol. 70. Cambridge University Press 2010).

⁴⁴⁵ Friedrich V Kratochwil, *Rules, Norms, and Decisions: on The Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Vol. 2. Cambridge University Press 1991).

⁴⁴⁶ Ralph G Steinhardt, 'The Role of International law as a Canon of Domestic Statutory Construction' (1990) 43 *Vanderbilt Law Review* 1103.

⁴⁴⁷ Melvin A Eisenberg, 'The Concept of National Law and The Rule of Recognition' (2001) 29 *Florida State University Law Review* 1229.

⁴⁴⁸ Visar Morina, Fisnik Korenica, and Dren Doli. 'The Relationship Between International Law and National Law in The Case of Kosovo: A Constitutional Perspective' (2011) 9 (1) *International Journal of Constitutional Law* 274, 296.

⁴⁴⁹ Sally Engle Merry, 'Legal Pluralism' (1988) 22 (5) *Law & Society Review* 869, 896.

Customs are traditional common rule or practice that has become an intrinsic part of the accepted and expected conduct in a community, profession, or trade and is treated as a legal requirement.

Thus, the view of international law can be said in this research have resulted in the development of two distinct features of corporate accountability in domestic court and international legal settings: public and private accountability and remedial mechanisms. The latter are divided into two parts, one related to the enforcement of public law offences and the other is related to private law action by affected individuals and communities at the national level.⁴⁵⁰ Although domestic legal regimes do not necessarily fall neatly into one or the other grouping, it can be argued that there is some element of accountability at the domestic legal system, as explain in the above paragraph. However, the concept of accountability in many domestic jurisdictions is limited⁴⁵¹ and so falls short of the notion of accountability even though there are barriers common to both methods of enforcement of human rights accountability.⁴⁵² It could be suggested that there are sufficient differences between the two to warrant the development of a corporate accountability concept that has the ability to sanction and enforce a remedy. The problematic aspect of the concept of corporate accountability lies in errors related to liability, sanction, enforcement, and the principle of duty of care. The duty of care in relation to corporate accountability is the notion that a parent corporation is liable for a subsidiary's violation of international law, that is, the duty of care not to violate the human rights of the community and the environment.

Traditionally, a duty of care should protect victims of corporate human rights abuses. This is because where there is a particular relationship between the parties, such as parent corporation, supply chain, subsidiary and society, then there may be a duty to act positively⁴⁵³ for the benefit of the community the corporate operates.⁴⁵⁴ Closely connected with the parent

⁴⁵⁰ OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses, 10 May 2016, A/HRC/32/19 <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf> accessed 5 November 2016.

⁴⁵¹ Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press USA 2008).

⁴⁵² Steven R Ratner, 'Corporations and Human Rights: a Theory of Legal Responsibility' (2001) 111(3) *Yale Law Journal* 443, 545.

⁴⁵³ Liability for Omissions and Acts of Third Parties. No one is under a (legal) obligation to to assist others. Unless:

- He has undertaken a task, he has a duty to perform it carefully.
- He has a personal relationship with the other person
- When harm or loss is caused by a third party whom D should control (third parties).
- Acts of third parties are not the responsibility of a defendant unless there is a common law duty to prevent the third party from causing injury
- or other harm.

If there is such a duty then proximity (and so a duty) may be found to exist.

⁴⁵⁴ Henry W Ballantine, 'Separate Entity of Parent and Subsidiary Corporations' (1925) *California Law Review* 12, 21.

corporate liability for the duty of care is the question of liability for the acts of the supply chain and the subsidiary.⁴⁵⁵ This will typically arise when the corporation exercise control over the supply chain and subsidiary who committed the human rights violations.

This duty of care is most important in relation to the business activities of the corporation and its subsidiary. This is because corporate bodies, which may include state institutions as well as private corporations, are legal constructs which do not exist in the real physical world.⁴⁵⁶ Therefore, if the words and actions of a natural person cannot be attributed to a corporation, it is impossible to hold the corporation liable for anything.⁴⁵⁷ What this means is that the duty of care is reflected in the maxim *qui facit per alium facit per se* (he who acts through another act himself).⁴⁵⁸ This was acknowledged by the House of Lords in *Launchbury v Morgan* in 1973⁴⁵⁹ where it was accepted as the true basis of the doctrine of liability for a third party conduct.⁴⁶⁰ Applying this in international human rights will allow parent corporation to be in physical proximity to the human rights violations and environmental damages cause by its business operation, which will thereby be abolished where there is a close relationship between the victims, the supply chain, subsidiary, the parent corporation, and the human rights violations. This implied that the court should abandon attaching significance to whether the subsidiary conduct is closely connected to the parent corporation. Thus, the question should be, does the conduct of the parent corporation and its subsidiary give rise to a duty of care?

If the words or acts amount to a tort of negligence, the person to whom they are attributed by virtue of an economic or business relationship is responsible for the other party's conduct. With this view, the liability of the duty of care establishes a solid ground to hold any

⁴⁵⁵ Maximilian Schiessl, 'The Liability of Corporations and Shareholders for The Capitalization and Obligations of Subsidiaries under German Law' (1985) 7 *North-western Journal of International Law & Business* 480. A subsidiary is a company that is wholly owned, or majority controlled by another company parent. Companies' form or purchase subsidiaries for various reasons, including expanding business operations and spreading the risk of liability by engaging in new lines of business. Both the parent and subsidiary are separate entities and independent of one another. In some cases, the parent is the sole shareholder of the subsidiary, while in others the parent owns more than 50 percent of the voting stock. In either scenario, the parent, like any shareholder, elects the board of directors which, in turn, selects the subsidiary's management team.

⁴⁵⁶ These central principles of company law were first laid down in very clear terms by the House of Lords in the case *Salomon v Salomon & Company Ltd* [1897] AC 2. The ruling outlined in part in the quoted text of the assignment from Lord Macnaghten's ruling has several important consequences, not least that where the liability of the members is limited, they cannot, only in exceptional circumstances be held liable for the companies debts.

⁴⁵⁷ *Marries v Martin* [1966] QB 716 (AC) 733.

⁴⁵⁸ Robber Stevens, *Torts and Rights* (OUP Oxford 2007).

⁴⁵⁹ See Chapter 8, for the Application of the General Principle of Law.

⁴⁶⁰ Glanville Williams, 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) 72 (522) *Law Quarterly Review*.

entity accountable for misconduct. The duty of care being advocated in this thesis can be seen in the theory of the Latin maxim *Respondeat Superior* (let the master answer) concept. The duty of care and *Respondeat Superior* is a legal notion, which can be used together with tort law to hold a corporation accountable for its misconduct. This is because it does not presume what the master must be accountable for, but rather, expresses the master's responsibilities. The *Respondeat Superior*⁴⁶¹ is used in the US to attribute liability to a legal person,⁴⁶² however, such criterion is rejected in the UK where it is used as identification doctrine.⁴⁶³ The implication of this is that such a principle may not be widely accepted even within common law jurisdictions.

An effective remedy⁴⁶⁴ by fair and accessible judicial system is a strong mechanism of accountability. The measure of an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to victims. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices. Taken together, these remedies are the parameter set out in this thesis in relation to corporate accountability. Thus, the concept of accountability is a key guarantor of the human rights of people through the doctrine of a duty of care, which is the essential element of an effective sanction and remedy for victims whose rights have been violated by either the state or a non-state actor. Similarly, the relationships between accountability, effective sanctions⁴⁶⁵ and remedies, which are missing in the current

⁴⁶¹ Refer to chapter V for a Detail Explanation of *Respondeat Superior*.

⁴⁶² Anca Iulia Pop, 'Criminal Liability of Corporations Comparative Jurisprudence' (2006).

⁴⁶³ The identification doctrine has been described as being the main rule for determining corporate liability for both civil and criminal wrongs carried out by agents and the servants of the company. Under this theory, the minds, collectively and individually, of the person or persons who control and direct the corporation are in law, the mind of the corporation itself. The identification doctrine is thus also known as the directing mind theory. It was recognised that one of the beneficial aspects of the identification doctrine is that it has a unifying elegance and simplicity, and has also been accepted by case law over a long period of time, without any major criticisms. Simon Parsons, 'The Doctrine of Identification, Causation and Corporate liability for Manslaughter' (2003) 67 (1) *Journal of Criminal Law* 69, 81.

⁴⁶⁴ Under the rule of law, effective remedies, effectiveness of justice, notably in providing effective recourse to anyone who alleges that her or his rights have been violated, is essential. Without such recourse, justice is of little use. While the American Convention stipulates in Article 25 'effective recourse to a competent court or tribunal', the ICCPR contains a broader general provision requiring states to respect and ensure to all individuals within their territory the rights recognised in the Covenant. States must ensure that individuals have accessible, effective and enforceable remedies and obtain reparations where violations have occurred: General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant

⁴⁶⁵ The human rights conventions include various measures aimed at ensuring effective remedies for persons whose human rights have been violated. The remedies have partly been included in the provision on fair trial, partly in separate provision. For instance, the European Convention stipulates the right to access to court, which is an important element in remedying violations, in Article 6, the right to an effective remedy

international legal accountability of non-state actors, may partly be explained by the process of accountability, which has ignored the concept of a duty of care. Therefore, international law, human rights laws, norms and structures, should require states and corporations to answer for their actions to other actors in the international community, which include the ordinary person whose rights have been violated, because it can be said that the corporation is under a duty of care to act in a reasonable and positive way and not to harm anyone who may be in its close proximity. Consequently, if the duty of care is to be implemented in the current concept of accountability, then one would have thought this approach would result in an effective accountability system. However, this has not been the case, as the current concept of accountability has resulted in a 'free for all' or excuse for vengeance against the victim of human rights abuses.⁴⁶⁶ What the chapter is arguing is that the duty of care does indeed establish liability for corporations and this liability extends to the misconduct of its subsidiaries through its business operations. The duty of care being advocated in this thesis will establish the legal causation to prove in a claim of human rights abuse against corporations because the relevant information (and expertise to understand it) is in the hands of the corporate defendant. If claimants can *prima facie* demonstrate that they have suffered harm (the injury) and that this is likely to have been the result of the corporation's activities (causation), the duty of care will shift the burden of proof to the corporate defendant.

The duty of care through accountability process should lead to liability and sanctions. If the state or corporation therefore does not do as it should then sanctions could be put in place. However, the fundamental questions are: what is defined as duty of care, a reasonable state or corporation in the context of accountability? How does this fit with the concept of accountability?

The reasonable state or corporation, in law, is compared to a reasonable person, reasonable man or the man on the Clapham omnibus, which is a hypothetical person of legal fiction who is ultimately an anthropomorphic representation of the body of care standards

in Article 13 and actual reparations in Article 41. The ICCPR includes compensation in the article on fair trial (Article 14), which also includes a condition with regard to access to court. In addition, Article 2 ICCPR stipulates the existence of effective remedies. Article 1 of the American Convention contains a general legal obligation to respect the Convention and Article 25 contains the right to judicial protection.

⁴⁶⁶ Kyle Rex Jacobson, 'Doing Business With the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity' (2005) 56 *Air Force Law Review* 167, also see; Joshua P Eaton, 'Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and The Human Right to a Healthy Environment' (1997) 15 *Boston University International Law Journal* 261.

crafted by the courts and communicated through case law and jury instructions.⁴⁶⁷ The reasonable person (once known as the “reasonable man”) is the longest established “group of personalities who inhabit the legal system, which is available to be called upon when a problem arises that needs to be solved objectively”.⁴⁶⁸ Thus, the reasonable man could be the ordinarily prudent man of business,⁴⁶⁹ the officious bystander,⁴⁷⁰ the reasonable juror properly directed, and the fair-minded, and informed observer.⁴⁷¹ All of these colourful characters, and many others besides⁴⁷² provide important standard setting services to the law. What this means is that the reasonable man standard is more than just a common law duty of care test, but rather, it exists as legal instrument to protecting the venerable in society. As corporations are part of society, the law is created to protect society. As international law is the manifestation of domestic and customary law, the presumption here is that the reasonable corporation⁴⁷³ test can also be applied to international law and standards. One possible explanation is that states or corporations should be held accountable if their conduct falls below the reasonable man standard, because it is suggested here that the corporation as an entity is required to act in

⁴⁶⁷ *Blyth v Birmingham Waterworks Co* [1856] 11 Exch 781, also see *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205.

⁴⁶⁸ John Gardner, ‘The Many Faces of The Reasonable Person’ (2015) 131 *Law Quarterly Review* 563, 584

⁴⁶⁹ *Speight v Gaunt* (1883) LR 9 App Case 1 at 19, 20. Lord Blackburn. “A trustee must act for the beneficiaries as a prudent person of business would act in his own affairs. Sir George Jessel MR said: “It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee”.

⁴⁷⁰ *Shirlaw v Southern Foundries* [1939] 2 KB 206 at 227.

Held: “The Court of Appeal applied the officious bystander test and did imply the term. The officious bystander test: If a third party was with the parties at the time the contract was made and had they suggested the term should be implied it would be obvious that both parties would reply with a hearty “oh of course. It must be obvious that both parties would agree to the term at the time the contract was made”.

⁴⁷¹ *Webb v The Queen* (1994) 181 CLR 41 at 52 per Mason CJ and McHugh J. “The judgement indicate that it is the court’s view of the public’s view, not the court’s own view, which is determinative. If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored. Indeed, as Toohey J. pointed out in *Vakauta* (1989) 167 C.L.R. at p.585 in considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case. That does not mean that the trial judge’s opinions and findings are irrelevant. The fair-minded and informed observer would place great weight on the judge’s view of the facts. Indeed, in many cases the fair-minded observer would be bound to evaluate the incident in terms of the judge’s findings.’

⁴⁷² For news of a recent arrival from the EU (“the reasonably well-informed and normally diligent tenderer”) see *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49.

⁴⁷³ Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (NYU Press, 2007).

accordance with the rule of law⁴⁷⁴ and the moral principles of the society⁴⁷⁵ which the corporate conduct in business operations.

Therefore, if international legal system and domestic judicial system are to hold corporations to a specific intent standard for human rights violations, as opposed to a knowledge standard or the reasonable man, the bar for corporate accountability for human rights violations in corporate human rights abuses would be substantially high.⁴⁷⁶ Also, it is difficult for corporations to have the specific intent to commit atrocity, crimes or other serious human rights abuses, because the primary purpose of corporations is to maintain and increase corporate worth rather than commit human rights abuses. However, the pursuit of profits may lead to complicity behaviour. For example, a government that itself has the specific intent to perpetrate the criminal act.⁴⁷⁷ A note of caution is due here since criminal intent cannot be attributed to corporate accountability. Thus, if one accepts liability of legal persons before international tribunals and under international law, there remain many details that require further judicial rulings in terms of determining *actus reus* and imputing *mens rea* to the legal

⁴⁷⁴ The rule of law is the principle that the law should rule in the sense that it applies to all conduct and behaviour and covers both private and public officials. The most important sub principles of the rule of law are that no one is above the law, that there is equality for all before the law, that the law is always applied and that legal redress is available through the courts the rule of law is one of the fundamental principles of unwritten or uncodified constitution. The key idea of the rule of law is that the law should apply equally to all, rulers and ruled alike. This, in the words of the 19 century constitution expert, A.V.Dicey ensures a “government of law” and not a “government of men”. Richard A Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (University of North Carolina Press 1980), Albert Venn, Dicey, John Humphrey Carlile Morris and Lawrence Antony Collins, *Dicey and Morris on The Conflict of Laws* (Vol. 1. Sweet & Maxwell 2000).

⁴⁷⁵ Morality is a system of behaviour that pertains to standards of right or wrong behaviour. The word “morality” carries the concepts of: (1) moral standards, with regard to behaviour; (2) moral responsibility, referring to our conscience; and (3) a moral identity, or one who is capable of right or wrong action. Common synonyms include ethics, principles, virtue, and goodness. Morality has become a complicated issue in the multi-cultural world we live in today. The Golden Rule, “Do unto others what you would have them do unto you is commonly perceived as one of Jesus” greatest moral teachings. John A Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1981).

⁴⁷⁶ David Scheffer and Caroline Kaeb, ‘The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under The Alien Tort Statute and The Case for a Counterattack Strategy in Compliance Theory’ (2011) 29 *Berkeley Journal of International Law* 334.

⁴⁷⁷ Caroline Kaeb, ‘The Shifting Sands of Corporate Liability under International Criminal Law’ (2016) 49 *George Washington International Law Review* 351. For example, in the late 2015 ICTY judgment in the case of *Prosecutor v Jovica Stanišić and Franko Simatović (Simatović)*, the Appeals Chamber held that the Trial Chamber had erroneously applied a “specific direction” standard for aiding and abetting liability and remanded the case back to the Trial Chamber for retrial with explicit instructions to use the knowledge standard. This blunt instruction came as no surprise, because the ICTY Appeals Chamber had reaffirmed the knowledge standard and explicitly rejected the specific intent standard in its early 2015 ruling in *Prosecutor v Vujadin Popović (Popović)* “The utility of the tribunal jurisprudence is that it confirms a knowledge standard, which is a far more realistic *mens rea* standard for how corporations facilitate the commission of atrocity crimes and serious human rights abuses in the pursuit of their own profits. The specific intent standard essentially would require the corporation to share the perpetrator’s criminal intent to commit the underlying crime, an almost impossibly high standard to prove with respect to a legal person in any court of law”.

person. Questions include, but are not limited to: what type of decision-making authority on the part of the individual person is required to attribute responsibility to the entity? In other words, is corporate liability limited to the acts of “organs” or “representatives” of the corporation only, or does it extend also to acts of other agents?⁴⁷⁸ Can a reasonable man be aggregated across the entire organisation, or do all elements of the human rights violations need to be present in one specific individual natural person in order to attribute responsibility to the entity? What are the appropriate and effective penalties for legal persons as perpetrators of international crimes?

The sanction and remedy in question is of vital significance when holding legal persons accountable for human rights abuses, as legal persons constitute a fiction. Therefore, it is imperative for the court resort to tort and civil fines as a readily available sanction to levy against corporation because, as legal persons, they cannot be imprisoned or otherwise confined.⁴⁷⁹ As will be elaborated throughout this thesis, sanctions, and remedies can prove inadequate in stirring corporate behaviour. Given that these analyses are used by corporations and for-profit business organisations, monetary fines could commoditise moral values, which can have perverse consequences.⁴⁸⁰ A note of caution is due here in terms of sanctioning legal persons, and business organisations in particular, is necessary to ensure that the objectives of international human rights law⁴⁸¹ are achieved, particularly in terms of retribution and

⁴⁷⁸ In the Case Against Al-Jadeed S.A.L. & Al Khayat (The Al-Jadeed Case), STL-14-05/ T/CJ, Judgment, 61 (Special Trib. for Lebanon Sept. 18, 2015) [hereinafter al Khayat Judgment. Facts of the dispute: On 31 January 2014, two individuals and two legal persons (media companies) were charged by the initial Contempt Judge, Judge David Baragwanath, with contempt and obstruction of justice before the Special Tribunal for Lebanon. Orders in lieu of an indictment were made public on 24 April 2014. The accused in this case are Al Jadeed [CO.] S.A.L./NEW T.V. S.A.L. (N.T.V.), [hereafter “Al Jadeed S.A.L.”] a Lebanese broadcast media outlet registered before the Beirut Commercial Court, Commercial Registry Section, on 13 December 1990, and Ms. Karma Mohamed Tahsin Al Khayat, Al Jadeed S.A.L.’s Deputy Head of News and Political Programmes Manager and one of the company’s shareholders.

The first Order in Lieu of an Indictment of 31 January 2014 alleges that on 6, 7, 9, and 10 August 2012 Al Jadeed S.A.L. broadcasted five episodes in Arabic entitled “The Witnesses of the International Tribunal”. In each episode journalists allegedly approached individuals claimed by Al Jadeed S.A.L. to be confidential witnesses in the Ayyash et al case.

The broadcasts were allegedly subsequently transferred to Al Jadeed S.A.L.’s website (www.aljadeed.tv), where they allegedly remained until at least 4 December 2012, and Al Jadeed S.A.L.’s YouTube channel (www.youtube.com/user/aljadeedonline). In his confidential order, the Pre-Trial Judge specifically ordered “Al-Jadeed TV, its principals, employees, agents and affiliates immediately to remove any confidential information or material allegedly related to witnesses before the Tribunal, from their website and from any other resource accessible to the public”. This Order specifically refers to the material broadcast by Al Jadeed S.A.L.

⁴⁷⁹ John C Coffee, ‘No Soul to Damn: no Body to Kick: an Unscandalized Inquiry into the Problem of Corporate Punishment’ (1981) 79 (3) *Michigan Law Review* 386, 459.

⁴⁸⁰ Uri Gneezy and Aldo Rustichini, ‘A Fine is a Price’ (2000) 29 (1) *Journal of Legal Studies* 1, 17.

⁴⁸¹ Rhona Smith, *International Human Rights Law* (Oxford University Press 2018). The aims and objectives of human rights law in this thesis means the understanding of:

deterrence. In this thesis, the human rights are referred to as the fundamental rights that are privileges and entitlements individuals have for being humans. Fundamental Human rights are natural and inherent in all human beings regardless of their nation, location, language, religion, ethnic origin or any other status. This research referred to these rights as; the right to life, the right to dignity of persons, right to freedom of speech, right to freedom of association, the right to fair hearing, the right to freedom of movement, the right from freedom of discrimination, the right to personal liberty, the right to private family life and right to ownership of properties. Also, it is questionable whether monetary fines are an appropriate means for punishing corporate involvement in human rights abuses.

If the state fails in its obligation to protect or the corporation fails in its responsibility to respect human rights, which constitutes the actions of an unreasonable man, this means that it has fallen short of what it ought to do or should not do. However, in order to arrive at this conclusion, one needs to first establish: who is causing the violation and what its causes are, what accountability arises from failing to meet the reasonable man standard, and to who one must account to? It should then be established who is responsible for the commission of the violation and who the duty-bearers are in order to assess the context of the violations and how they happened, in addition to determining what can be expected from a court/tribunal and its inherent limitations of the state and corporate duties. The final issue that needs to be established is the extent to which the victims or their representatives face reprisal. The extent which the corporation complied with the duty of care test of liability and if the acts were (1) within the scope of the business, (2) committed or ordered by a superior agent (senior manager or solely owner), and (3) constituted human rights violation for which the punishments included fines and forfeitures of property.

Addressing these questions will result in an actor being identified, establishing who is to blame and what accountabilities arise from this blame. This will assist both international and

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- the connection between the acts and omissions by states in their bilateral relations with foreign states and the resulting breaches of human rights in the territory of the latter
 - states' operations through multilateral organisations and resulting breaches of human rights
 - how the members of multilateral institutions (may) influence the decision making process to ensure human rights compliance.
 - To develop principles of how extraterritorial obligations may be incorporated in the work to promote economic, social and cultural rights
 - To further the work on the legal theories of extraterritorial obligations of states.
 - To engage in high-level discussion on the experience with and implications of extraterritorial human rights effects of projects and programmes carried out by multilateral institutions.

national judicial bodies to have the authority and ability, in law and in practice, to award a range of remedies in human rights law cases arising from business-related human rights abuses that may include monetary damages⁴⁸² and / or non-monetary remedial measures,⁴⁸³ such as orders for restitution, aggravated damages,⁴⁸⁴ exemplary damages, measures to assist with the rehabilitation of victims and / or resources, satisfaction (public apologies), and guarantees of non-repetition (mandated compliance programmes, education and training), and a criminal prosecution where appropriate.

It is recommended that the concept of accountability⁴⁸⁵ should define, interpret, and enforce the formal legal norms and regulatory rules of international human rights.⁴⁸⁶ According to this rationale, accountability should consist of a system of governance, which are standards, laws and norms, that should be respected by all actors and all individuals and state officials operating in the international arena. Therefore, the notion of accountability should be seen as a legal framework that is capable of providing for the accountability of individuals, communities and other actors, including state and non-state actors, for its conduct. Consequently, accountability should have three essential components that are crucial for an effective enforcement of human rights law and remedy. This research suggested that these are international human rights law, norms and standards, answerability and enforceability. This will aid in the establishment of a strong concept of accountability.

In terms of the first component, this should be used to assess the behaviour and performance of states, corporations, private individuals, and corporate officials. They should be based on universal values, such as the concept of human dignity.⁴⁸⁷ The component of

⁴⁸² John R Maley, 'Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud' (1987) 20 *Indiana Law Review* 709.

⁴⁸³ Valerio Colandrea, 'On The Power of The European Court of Human Rights to Order Specific Non-Monetary Measures: Some Remarks in Light of The Assanidze, Broniowski and Sejdovic cases' (2007) *Human Rights Law Review* 396, 411.

⁴⁸⁴ For Explain of Aggravated Damages and Exemplary Damages, see chapter VII.

⁴⁸⁵ Richard Mulgan, 'Accountability': an Ever-Expanding Concept?' (2000) 78 (3) *Public Administration* 555, 573.

⁴⁸⁶ Paul Sieghart, *The International Law of Human Rights* (Oxford University Press 1983).

⁴⁸⁷ Human dignity is inviolable, and it must be respected and protected. The dignity of the human person is not only a fundamental right in itself, but constitutes the basis of fundamental rights in international law. The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". For this reason, the dignity of the human person is part of the substance of any right protected by international human rights law and it is universal apply to all human beings. It must, therefore, be respected, even where a right is restricted. Jürgen Habermas, 'The Concept of Human Dignity and The Realistic Utopia of Human Rights' (2010) 41 (4) *Metaphilosophy* 464, 480 and UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 5 July 2017.

accountability sets the standard in laws and regulations for corporations. As for the second component: “answerability”, the different parties (state, corporation, claimant, NGO and witnesses) are called upon to answer allegations of human rights violations, and to justify their actions or provide information. In the international criminal court and other ad hoc tribunal cases, prosecution/investigation departments, investigative judges or defence lawyers gather evidence and present their different perspectives. Finally, “enforcement”, means that adjudication should be followed by sanction or remedy where appropriate, i.e. a court or tribunal order that has a deterrent effect and is capable of stopping future human rights violations.

In each of these essential ingredients of accountability, international law and human rights have the ability to impose liability and award remedies for victims of human rights abuses through the duty of care by examining:

1. whether the corporate response was appropriate to the gravity of the abuse and the extent and nature of the loss and / or harm suffered by the victims;
2. whether it is to the extent permitted by the relevant legal system that reflects the degree of liability of the defendant corporation (for example, it can be demonstrated by whether the company exercised appropriate human rights duty of care, the strength and effectiveness of the company’s legal compliance efforts, any history of similar conduct, whether the company responded adequately to warnings and other relevant factors);
3. whether the concept of corporate accountability is designed in such a way as to minimise the risks of repetition or continuation of the harm; and
4. whether the corporation took account of issues of human rights duties and the needs of individuals or groups at risk of human rights abuses or vulnerable to environmental damage.

Elaborating on the concept of accountability via the duty of care in this way will allow effective control and punishment that give rise to assigning responsibility, sanctions, and remedy, which ensure control over a corporation’s activities that have impacted on human rights. In turn, a duty of care will ensure that the corporate maintain openness and dialogue with victims of human rights abuses, while creating trust, affirming basic human rights standards and ethical standards, and improving corporate adherence to international standards. Therefore, the notion of accountability and criminal accountability under international law should be examined together with the doctrine of duty of care in order to propose a concept of

corporate accountability that is based on tort and civil law principles of duty of care and duty bearer. This will ensure that national bodies and judicial bodies, and/or relevant state agencies monitor corporate behaviour, implementation of international human rights law and duties, and effective remedies in an appropriate manner. This will further ensure that there exists an effective mechanism by which interested persons can report and / or raise a complaint and/or seek remedial action with respect to any non-implementation of such remedies. This structured approach will act as guidance, based on a series of accountability and legal objectives, and the elements to demonstrate its flexibility in addition to the different ways which corporate accountability for human rights can be achieved at both the domestic and international level. There are many differences among jurisdictions in terms of legal structures, cultures, traditions and resources, all of which have implications for corporate accountability.⁴⁸⁸ However, approaching the question of what is accountability in this way will allow the development of a universal principle of corporate duty of care, which is based on the General Principle of Law.⁴⁸⁹ This would allow global application of the concept of duty of care and the liability of the corporation, as well as developing a practical and legal approach to remedial action across a range of different legal systems and contexts, while at the same time adopting and reflecting international law, international human rights law and its concept of accountability.

Lastly, this approach resolves the deficiencies of accountability which, in many cases, are rooted in wider social, economic, and legal challenges in holding corporations accountable for human rights abuses. The suggested accountability in this research in relation to tort law can all work together with international law and human rights law and would complement each other. However, some recommendations could be implemented on their own and still represent significant progress, such as a duty of care established by law and the automatic liability of a parent company. A possible implication of this is that this suggestion can also operate alongside a direct regulatory action by the state, and would help reinforce compliance. Similarly, international law and human rights law implemented in relation to all these recommendations dealing with private claims under tort/non-contractual liability law should be observed by both

⁴⁸⁸ Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World hHistory, 1400-1900* (Cambridge University Press 2002).

⁴⁸⁹ Chapter 8. "General Principles of Law are basic rules whose content is very general and abstract, sometimes reducible to a *maxim* or a simple concept. Unlike other types of rules such as enacted law or agreements, general principles of law have not been "posited" according to the formal sources of law. Yet, general principles of law are considered to be part of positive law, even if they are only used as subsidiary tools. They constitute necessary rules for the very functioning of the system and, as such, are inducted from the legal reasoning of those entitled to take legal decisions in the process of applying the law, notably the judiciary". Marcelo Kohen and Bérénice Schramm, *General Principles of Law* (Oxford University Press 2013).

domestic and international court. It encompasses linking accountability to sanction and enforcement actions related to human rights abuses by corporations, legal developments, and improvements to the functioning of judicial mechanisms. The duty of care allows the legal system to establish a practical law enforcement mechanism for corporate liability at both the domestic and international level, which has the ability to connect corporate activities closely to international human rights obligations and specifically to the concept of human dignity. Analysing this essential ingredient of accountability will also allow victims of human rights abuses access to justice and remedy for business-related human rights abuses.

1.13. Definition of the Concept of Liability

Although the extensive definition of accountability has been highlighted in the literature and is partly explained in the sections above, this study will revisit this concept and adopt a twofold approach to accountability. The first definition is the common meaning found in the Oxford Advanced Learner's Dictionary: "The fact or condition of being accountable; responsibility".⁴⁹⁰ This definition is limited in that, for the purposes of this thesis, it means the duty of a corporation or corporate officials to account for their undertakings and accept responsibility for their actions, as well as justifying their actions in an appropriate, fair, and honest manner in a business context without expecting other actors to be accountable. Accountability has also expanded beyond the basic definition which does not take into consideration other elements. Moreover, accountability cannot exist without vigorous mechanism and procedures.⁴⁹¹ In other words, a lack of accountability means an absence of responsibility. Furthermore, the notion of accountability should be followed by responsibility, an effective sanction, and a remedy that leads to deterrence,⁴⁹² whereby the abuser could face a tribunal, court, or authorised judicial body. Also, the concept of accountability should result in effective reparations for the victims.⁴⁹³

⁴⁹⁰ Albert Sydney Hornby and Sally Wehmeier, *Oxford Advanced Learner's Dictionary* (Vol. 1428 Oxford University Press 1995).

⁴⁹¹ Andreas Schedler, *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999).

⁴⁹² The purpose of deterrent here is to punish the corporation, is to prevent future corporate human rights abuse by virtue of the unpleasantness of consequences of accountability. While it bears some resemblance to retribution, deterrence is a purpose with measurable utility, and would seem to have different origins than retribution. If deterrence seeks to injure the corporation, it is primarily with the aim of impressing the corporate with the undesirability of a life of crime compared to a law-abiding existence.

⁴⁹³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International*

This analysis suggests that the common definition cannot be used in this study even though it has explained the generic meaning of accountability. This is because it does not 1. communicate clearly the different modes and degrees of contribution to the harms perpetrated by the corporate and the subsidiary that will give rise to subordinate legal liability; and 2. take into account the extent to which the principles for assessing subsidiary liability are applicable to corporations. Moreover, it does not give clear principles used to attribute knowledge, intentions, actions, and omissions to the corporation for the purposes of assessing corporate legal liability on the basis of theories of subordinate liability and neither does it treat causes of action based on theories of subordinate liability as distinct causes of action, conceptually, and procedurally separate from any breaches of law committed by the primary offender. Such third-party liability, furthermore, is not contingent, in the definition of accountability here nor in practice, on any judicial finding of liability on the part of the primary offender.

Brooks provides the following definition of traditional accountability within Western organisations: “Accountability is a mechanism to ensure that individuals can be called to account for their actions and that sanctions are incurred if the account is unsatisfactory”.⁴⁹⁴ The author goes on to stress that the following words in the traditional definition show accountability as a procedural activity because the individual activity focuses on individuals, while also acknowledging that the collective characteristic of the term is that it is reasonable and essential, and that sanctions are the core element of accountability. Therefore, accountability should bring in the personal element of holding offenders to account. The author further argues that “the purpose of sanctions is not to act as a threat to you but as a guarantee of protection to the individual”.⁴⁹⁵ This means that it is imperative for accountability to have an element of deterrence and sanction; without this, accountability for misconduct is incomplete. Shotter contributes to the debate by stating that “accountability is seen as a way of accounting for things that have a coercive quality to them”. Therefore, if one makes sense of things in certain permitted rules and regulations then it can be said that a person is to be accounted by others in the society as a capable, responsible member of the community.⁴⁹⁶

Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.
<<http://www.refworld.org/docid/4721cb942.html>> accessed 19 November 2016.

⁴⁹⁴ Theo Brooks, *Accountability: It All Depends on What You Mean* (Akkad Press 1995).

⁴⁹⁵ *Ibid.*

⁴⁹⁶ John Shotter, ‘Social Accountability and Selfhood’ (1984) <<http://philpapers.org/rec/SHOSAA>> accessed 20 November 2016.

Following both authors' definitions, accountability should give rise to effective measures by the corporation to identify, prevent, and mitigate the adverse human rights impacts of their activities on individuals and society. Both authors also indicate that a corporation should take appropriate account of effective measures to supervise their officers and employees to prevent and mitigate adverse human rights impacts. Therefore, accountability should ensure appropriate use of strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts because the corporation has a duty of care to the society and the environment. In this respect, accountability should allow the international legal system, domestic, or international tribunals/courts to have access to and take proper account of robust, credible and, where appropriate, sector-specific liability as to the technical requirements of human rights accountability in different business operating contexts.

Consequently, accountability in this context will allow the distribution of evidential burdens of proof between the victims of human rights abuse and the defendant. Therefore, the concept of corporate accountability under this definition is contingent, in law and in practice, upon a prior finding of corporate legal liability under any legal regime (for example, finding corporate criminal liability or its functional equivalent). In contrast, the affected victims of human rights can be prevented, in law and in practice, from bringing an action against the corporation because of the existing deficiencies in both international law and domestic law. *Kiobel* is an example of the deficiencies in accountability at the domestic and international level.⁴⁹⁷ Additionally, these deficiencies in corporate accountability cannot be justified because a corporation but can be involved with human rights abuse in many different ways. This includes the adverse impacts that business operations may cause or contribute through their own activities or by virtue of their business relationships.⁴⁹⁸ Therefore, the relationships mentioned above create an obligation to account to the government, judiciary, and society. This theoretical concept of accountability will ensure the legal accountability of business operations, and access to effective remedy for victims affected by such abuses is a vital part of a state's duty to protect against business-related human rights abuse.⁴⁹⁹

⁴⁹⁷ David P Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) *Law 107 (3) American Journal of International* 601, 621.

⁴⁹⁸ Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (2013) *Report Prepared for OHCHR* 103.

⁴⁹⁹ The Principle 25 and Commentary of The Guiding Principles on Business and Human Rights: Implementing The United Nations 'Protect, Respect and Remedy' Framework (A/HRC/17/31).

Scott and Lyman also took part in the debate by arguing that “(a) account is a linguistic device employed whenever an action is subjected to evaluative inquiry”.⁵⁰⁰ The point they are making is that “an account is not called for when people engage in routine, common-sense behaviour in a cultural environment that recognises that behaviour as such”.⁵⁰¹ The authors’ understanding of accountability is that it is a concept that regulates the misconduct of individuals in society and organisations but are not mere guidelines. Therefore, “evaluative inquiry” is not an essential element of accountability. This implies that accountability only happens after a breach of rule or misconduct behaviour indicates a punitive position.⁵⁰² Hence, the authors’ views could seem to be referring to a constructive disobedience or nonconformity to accountability as a separate conduct that is not acceptable in an organisation or society. Additionally, Scott and Lyman did take into consideration the broader concept of accountability. The authors argued that the concept of accountability and evaluation are a process that happen after something has gone wrong. If one conducts a detailed analysis of accountability in this manner, the potential conclusion could be that accountability does create sanctions and enforcement, and so creates an implicit and/or explicit constraint on virtually everything that is done in the society; a corporation should not be exempted from these rules.

As a critical observation, viewing accountability as an implicit and/or explicit constraint on either the individual or actor in society will address the challenges that are exacerbated in cross-border corporate human rights violations cases, such as *Chiquita*,⁵⁰³ *Lundin*

⁵⁰⁰ Marvin B Scott and Stanford M. Lyman, ‘Accounts’ (1968) *American Sociological Review* 46, 62.

⁵⁰¹ *Ibid.*

⁵⁰² Klaus J Beucher and John Byron Sandage, ‘United States Punitive Damage Awards in German Courts: The Evolving German Position on Service and Enforcement’ (1990) 23 *Vanderbilt Journal of Transnational Law* 967. *Exxon Shipping Co. v Baker*, 554 US 471, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008). “In 1989, petitioners’ (collectively, Exxon) supertanker grounded on a reef off Alaska, spilling millions of gallons of crude oil into Prince William Sound. The accident occurred after the tanker’s captain, Joseph Hazelwood who had a history of alcohol abuse and whose blood still had a high alcohol level 11 hour after the spill inexplicably exited the bridge, leaving a tricky course correction to unlicensed subordinates. Exxon spent some \$2.1 billion in cleanup efforts, pleaded guilty to criminal violations occasioning fines, settled a civil action by the United States and Alaska for at least \$900 million, and paid another \$303 million in voluntary payments to private parties. Other civil cases were consolidated into this one, brought against Exxon, Hazelwood, and others to recover economic losses suffered by respondents (hereinafter Baker), who depend on Prince William Sound for their livelihoods. At Phase I of the trial, the jury found Exxon and Hazelwood reckless (and thus potentially liable for punitive damages) under instructions providing that a corporation is responsible for the reckless acts of employees acting in a managerial capacity in the scope of their employment. In Phase II, the jury awarded \$287 million in compensatory damages to some of the plaintiffs; others had settled their compensatory 2609 2609 claims for \$22.6 million. In Phase III, the jury awarded \$5,000 in punitive damages against Hazelwood and \$5 billion against Exxon. The Ninth Circuit upheld the Phase I jury instruction on corporate liability and ultimately remitted the punitive damages award against Exxon to \$2.5 billion.

⁵⁰³ Marco Were, ‘Implementing Corporate Responsibility The Chiquita Case’ (2003) 44 (2) *Journal of Business Ethics* 247, 260.

Petroleum,⁵⁰⁴ and *French Cement Company*.⁵⁰⁵ It will also aid many domestic legal regimes to focus primarily on the enforcement of human rights obligations on business activities in the host state that may have a significant impact on society and the environment. The realities of global supply chains, cross-border trade, investment, communications, and movement of people are placing new demands on domestic legal regimes and those responsible for enforcing them. Therefore, examining corporate accountability for human rights abuse this way will help to clarify the process of accountability and the theoretical and practical mechanism to employ to achieve an effective remedy in an alternate forum, such as a court. These are positive legal measures if implement and apply will improve accountability and redress for corporate human rights violation.

Goffman's study on accountability pays particular attention to the frames of accounts. According to Goffman's frames, the concept can be understood as a specific form of accountability and liability in the context in which the act occurs; this conduct provides the basis for making an action sensible and meaningful.⁵⁰⁶ Hence, this thesis argues that an account (frame) can be a motivation/justification for action that makes it part of how people conduct themselves in society and the implications of their actions. Therefore, it is clear here that the purpose of the concept of accountability is to have a sanction, remedy, and enforcement element. However, the question is the extent to which the scope of legal accountability or the principles for determining corporate legal liability enforce human rights remedies on an actor (for example, whether enforcement is carried out by judicial authorities). Another question is whether accountability responds adequately to the challenges of investigation and enforcement of human rights and environmental damages in cross-border human rights violations cases.⁵⁰⁷ It is also important to determine whether the judicial regimes provide the necessary coverage and the appropriate range of approaches with respect to business-related human rights impacts in the light of evolving circumstances and state obligations under international human rights treaties to which the country in question is a member. These questions allow one to examine

⁵⁰⁴ Jennifer C Leary, '*Talisman's Sudanese Oil Investment: The Historical Context Surrounding Its Entry, Departure, and Controversial Tenure Diss*' (2007).

⁵⁰⁵ Nadia Bernaz, '*Criminal Complaint Against French Cement Company for Terrorism Financing, Complicity of Crimes against Humanity and War Crimes in Syria*' (2016).

⁵⁰⁶ Erving Goffman, *Frame Analysis: an Essay on the Organization of Experience* (Harvard University Press 1974).

⁵⁰⁷ Stéphanie Lagoutte, 'New Challenges Facing States within the Field of Human Rights and Business' (2015) 33 (2) *Nordic Journal of Human Rights* 158, 180.

the essential elements of accountability, which include state, judiciary, society, and corporate obligations to respect human rights law and standards.

Although the definition of accountability in the Oxford Advanced Learner's Dictionary is narrow, restrictive, and cannot be accepted in this study, there are alternative definitions of accountability that do seem to be aligned with the notion of liability and enforcement. The concept of accountability should be broad enough to incorporate liability, control, justification, sanction and some sort of legal remedy, whether criminal or civil. Likewise, accountability sanctions and remedy should arise directly from the relationship between the corporation and society and environment where it operates. Hence, giving an appropriate definition to accountability will enable the tribunal or court to create a measure of remedy after the actor has violated the rights of a particular segment of society. Therefore, to establish accountability for corporations, there is a need to move this theoretical foundation of accountability to a broad legal framework, which supports liability and remedy. The notion of accountability should perhaps aid in understanding the purpose of corporate accountability but not the method of enforcement. The idea is that it will allow sanctions and other remedies to be ordered following a finding of corporate legal liability for adverse human rights impacts of business activities. It will also allow applicable international standards with regard to the components and procedural requirements of an effective remedy to be included in corporate accountability.

In this context, corporate accountability will acknowledge corporate duty and the possibility of a corporate legal liability for human rights violations. This study does not dispute that there are differences from jurisdiction to jurisdiction, in the kinds of violations for which a corporation can be liable and the types of legal liability that a corporation can attract, the legal concept of accountability, as well as administrative liability. However, in some jurisdictions such as UK⁵⁰⁸, accountability may attach to individuals as natural persons. Therefore, the concept of accountability here is that it will make it possible for other kinds of public law regime liability and sanctions (such as regulatory, administrative or quasi-criminal) to play a vital role in holding corporations accountable for human rights abuses committed, either in a home or host state. For these reasons, the study is not confined to the common definition of accountability but potentially encompasses a variety of definitions of

⁵⁰⁸ Stephen Griffin and Jon Moran, 'Accountability for Deaths Attributable to the Gross Negligent Act or Omission of a Police Force: The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007' (2010) 74 (4) *Journal of Criminal Law* 358, 381.

accountability applicable to the corporation, including regulatory, administrative and quasi-criminal liability.

1.14. Legal Definition of Accountability

Jowitt's Dictionary of English Law defines liability:

(1) The condition of being answerable in law, or actually or potentially subject to a civil obligation, either generally, as including every kind of obligation, or, in a more special sense, to denote inchoate, future, unascertained or imperfect obligations, as opposed to debts, the essence of which is that they are ascertained and certain. Thus, when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result. The term can also mean the condition of being actually or potentially subject to a criminal sanction.

(2) The obligation itself for judicial and statutory definitions and constructions in different contexts.⁵⁰⁹

Yarwood states that accountability means "accountability under international law: holding states accountable for a breach of *jus cogens* norms".⁵¹⁰ The Black's Law Dictionary gives the definition as: "the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility".⁵¹¹

The Black's Law and Yarwood definitions of accountability relate directly to state accountability under public international law,⁵¹² which perfectly adequate because states and corporations have different levels and standards of accountability. Both can be adopted and applied to the accountability of corporations under private law.⁵¹³ However, a note of caution

⁵⁰⁹ William Allen Jowitt, Clifford Walsh and John McDonald Burke, *Jowitt's Dictionary of English law* (Vol. 1. Sweet & Maxwell 1977).

⁵¹⁰ Lisa Yarwood, *State Accountability under International Law: Holding States Accountable for a Breach of Jus Cogens Norms* (Routledge 2010).

⁵¹¹ Henry Campbell, *Black's Law Dictionary* (St Paul Minn: West Publishing Co 1990).

⁵¹² Alina Kaczorowska-Ireland, *Public International Law* (Routledge 2015).

Public International Law is composed of the laws, rules, and principles of general application that deal with the conduct of nation states and international organisations among themselves as well as the relationships between nation states and international organisations with persons, whether natural or juridical. Public International Law is sometimes called the "law of nations" or just simply International Law. It should not be confused with Private International Law, which is primarily concerned with the resolution of conflict of laws in the international setting, determining the law of which country is applicable to specific situations.

⁵¹³ Martin Wolff, *Private International Law* (Clarendon Press 1950).

is due here because accountability of states and corporations are different and corporations, consequently, have no legal personality under international law.⁵¹⁴ Therefore, international human rights law cannot be enforced against corporations, though do have the ability to be enforced against states. Due to this, there is no international legal accountability mechanism for holding corporations either criminally or civilly liable for human rights abuses.

These definitions undoubtedly give an adequate explanation of the concept of accountability and how this can be applied in legal terms, but the question is how to apply this concept to non-state actors such as corporations. They are broad enough, include sanctions and remedies, and satisfy the constructive elements of state accountability. So, the indication is to apply this concept to corporate liability under international human rights law. Hence, following this rationale, this study supports this definition of a strict and broad hypothetical concept of finding a duty of care in a corporation's business activities.

Accountability exists when a relationship can be established between a corporation through its relationship with the government, so this relationship establishes accountability links between the society, the environment, and corporate conduct with the subsidiary through business activities and economic transactions. This can be observed through the corporate control of the business operations, so this control establishes the link to a prohibited conduct of the corporations and government of host nations. Making controlling businesses automatically subject to a legal claim for alleged abuses by a subsidiary or automatically liable for "proven" abuses by a subsidiary, regardless of their own fault, is justified in these circumstances. Lastly, the operation of the corporations is subject to corporate official oversight, and direction. In contrast, the problematic aspect of this approach is the relationship between the corporations and corporate misconduct, either through the subsidiary or the host government. This is because a parent company (in one country) and subsidiary (operating in another country) are treated as having separate legal personality, which have contributed to the obstacle of holding the corporation accountable for human rights.⁵¹⁵

Addressing these questions will allow the international legal system and domestic judiciary to ensure corporate human rights accountability and the fundamental human rights

Private International Law is the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context.

⁵¹⁴ John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 (6) *Yale law journal* 655, 673.

⁵¹⁵ Beth Stephens, 'Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45.

problem that is connected to their business operations to be dealt with. The basic element of human rights accountability is the provision of an effective sanction and remedy for victims of human rights abuses. Also, it can be argued that accountability extends the relationship between corporate responsibility and duty of care. This is a direct obligation of duty of care on the corporation and its subsidiary. As a result of this duty of care, a tort and civil liability should arise when a corporation violates human rights. Establishing corporate legal liability in this theoretical concept of tort and civil law approach will ensure the requisite standard of proof that all elements of corporate human rights violations are satisfied. In human rights violations that include a criminal element, that is likely to involve both mental and physical elements. The mental elements refer to the knowledge and intentions of the alleged offender. The physical elements refer to the offender's acts and whether they were the cause of the relevant harm. Taking this position is crucial because the corporation is a legal construction so the application of tests for establishing liability for human rights offences can be problematic in many jurisdictions. This is a particular problem in relation to human rights accountability in criminal law which requires proof that the corporation intended the harm or intended to commit the acts that caused the harm.

Consequently, the duty of care as a legal concept of accountability could aid in proving corporate intent and the identification of individuals working for or on behalf of the corporation who themselves intended the relevant harm and whose intentions can be attributed to the corporate act. This is referred to in this research as the fault-finding approach to corporate accountability. In addition, the principle of duty of care is widely applied as standard for assessing tort liability,⁵¹⁶ whereby corporations may be liable for the acts of certain employees. Agents on the basis that the corporate acts through those individuals, could play a vital role in establishing liability for a subsidiary act. While the tests for corporate liability vary from jurisdiction to jurisdiction, common limitations on this type of liability are that the corporate subsidiary that must have been operating within the scope of their business responsibilities and/or for the benefit of the corporation.⁵¹⁷ However, this can be rebutted in the process of liability finding for corporate accountability in the concept of tort and civil law.

⁵¹⁶*Lister v Hesley Hall Ltd* [2001] UKHL 22. also see; *Barker v Corus (UK) plc* [2006] UKHL 20, *Brazier v Dolphin Fairway Ltd* [2005] EWCA Civ 1469, Patrick Selim Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967).

⁵¹⁷ Ji Ma, 'Multinational Enterprises Liability for the Acts of Their Offshore Subsidiaries: The Aftermath of Kiobel and Daimler' (2015) 23 *Michigan State International Law Review* 397.

The notion of accountability from the explanation given above is on two distinctive levels: liability and enforcement.⁵¹⁸ Liability in this sense refers to the duty of corporations and corporate officials to be held accountable for corporate misconduct that is closely linked to their business operations which may violate human rights or cause harm to society and the environment. The principle of the duty of care through tort and civil law can be seen as a legal doctrine that will aid in resolving the difficulties surrounding corporate accountability and international law silence on corporate liability for human rights abuses.⁵¹⁹ For its part, enforcement indicates that an official body, domestic court, tribunal/arbitration, international court or judiciary, are responsible for accountability and can sanction a business entity that violates human rights or causes harm to society, livelihoods, and the environment. This sanction should give rise to an effective remedy, which under an accepted legal principle of accountability, should satisfy the eggshell skull rule, which should be based on the General Principle of Law.⁵²⁰ The eggshell skull rule or eggshell plaintiff rule states that someone “who harms another must pay for whatever damage the injured person suffered, even if it was much worse than anyone would have expected”.⁵²¹ Hence, evaluating the conduct of the corporation and imposing liability in such a manner will ensure accountability, enhance good business practice, protect the environment, and protect and prevent human rights violations in the short and long term. The indication behind this is that accountability is classified according to the type of accountability being exercised⁵²² by the corporations and corporate officials to give a justification to their actions.

The underlying principle behind this rationale is, will the victims have suffered the harm caused if a corporation misconducts itself? By this principle, the defendant’s conduct contributed to the result if and only if it was a necessary element in a set of conditions jointly sufficient to produce the harm caused,⁵²³ also known in tort law by the acronym, the NESS⁵²⁴

⁵¹⁸ Dennis Arroyo and Karen Sirker, ‘Stocktaking of Social Accountability Initiatives in the Asia and Pacific Region’ (2005) *World Bank Institute Working Papers*.

⁵¹⁹ *Development in The Law Corporate Liability for Violations of International Human Rights law* (2001) 114 *Harvard Law Review* 2025, 2030, 31.

⁵²⁰ Chapter 8.

⁵²¹ Stanley J McQuade, ‘Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in The Law of Torts’ (2001) 24 *Campbell Law Review* 1.

⁵²² Ewan Ferlie, Laurence E. Lynn and Christopher Pollitt, *The Oxford Handbook of Public Management* (Oxford University Press USA 2005).

⁵²³ Herbert Lionel Adolphus Hart and Tony Honoré, *Causation in the Law* (OUP Oxford 1985).

⁵²⁴ Euan West, ‘The Utility of the NESS Test of Factual Causation in Scots Law’ (2013) 4 *Aberdeen Student Law Review* 39.

The traditional legal model of "but-for" causation (necessary condition causation), while fundamental to the idea of causation in general, is insufficient to account for causation in overdetermined causation cases. Therefore, the NESS test [necessary element of a sufficient set] is needed in these overdetermined

(Necessary Element of a Sufficient Set) test.⁵²⁵ How does the test apply to corporations and the misconduct of its subsidiaries? If one replaces the careless conduct of one corporation with the conduct of the subsidiary. Will it be necessary for the sufficiency of a set of existing antecedent conditions which contained it, but not the other careless misconduct of the subsidiary? That resulted in the human rights violations and the environmental damage?

It is very difficult to think of anything in the physical world which alone is a sufficient cause of anything else, save perhaps God or the Big Bang Theory.⁵²⁶ Once this includes things which are absent in the sufficient set, finding liability for corporate human rights abuses becomes obvious. An almost infinite number of things need to be absent for something else to occur. Perhaps starting a fire is not sufficient to burn down a house. It is necessary for it to not be raining and for the fire brigade not to arrive on time and so on. When describing something as sufficient to cause something else, what this means is that it is sufficient with respect to the circumstances at hand, or in combination with a number of elements, to cause harm to the victim.⁵²⁷ A rebutted presumption therefore exists that, but for the corporation's business operations with the supply chain or subsidiary, the harm should not have occurred. The conceptual application of this theory of accountability should use the term behavioural approach, which implies that people are motivated and shaped by forces external to themselves. As Gibson points out, "in the presence of some external factors, individuals may not actively reason at all, but work according to habit, or obedience without a thought".⁵²⁸

Applying this to the concept of corporate accountability means that corporations and corporate officials that have a systematic knowledge of business operations have the potential to benefit or have a negative impact on the economic performance of the business because they work according to the business objectives of the corporations and are responsible for the corporation misconduct through their decision-making. In the ordinary and legal interpretation, corporate officials such as senior managers and directors are the mind of the corporation and

cases, which comprise preemptive causation and duplicative causation situations. The key idea here is that one's action can be a contributing causal condition, even if the "but for" test is not met.

"But for" causation (necessary condition): an act or omission was a cause of an injury if and only if, but for the act, the injury would not have occurred. That is, the act must be a necessary condition for the occurrence of the injury. The test reflects a deeply rooted belief that a condition cannot be a cause of some event unless it is, in some sense, necessary for the occurrence of the event. Comment: This is analogous to the concept of "decisiveness" in voting studies: Your vote makes your candidate get 50% + 1 of the vote, pivotally determining the vote outcome. But for my vote, my candidate would not have won.

⁵²⁵ Robbert Stevens, *Torts and Rights* (OUP Oxford 2007) pp 140,144.

⁵²⁶ John J Mackie, *The Cement of The Universe: a Study of Causation Clarendon* (Oxford Press 1974).

⁵²⁷ John G Fleming, *The Law of Torts* (Vol. 1. Law Book Company for New South Wales Bar Association 1987).

⁵²⁸ Kevin. Gibson, 'Excuses, Excuses: Moral Slippage in the Workplace' (2000) 43 (3) *Business Horizons* 65, 72.

therefore have control over what the corporation does; this makes them accountable for human rights violations or vicarious liability. Thus, a corporation is accountable for the subsidiary conduct if that conduct is motivated at least in part by a desire to serve the corporation, but this need not be the sole motivation.⁵²⁹ If the supply chain or subsidiary acted with intent to benefit the corporation in some way, the act is imputed to the principal whether the corporation benefitted or not, or even if the result adversely affected the corporation's interest.⁵³⁰

Accordingly, after this detailed examination of the notion of accountability, it is suggested that that a corporation has the capacity and freedom to self-regulate decisions.⁵³¹ They are also capable of choosing their own operational standards,⁵³² responsible for the business direction of the corporation, decision-making, and economic adjustments of the corporation's business, with the supply chain and subsidiary.⁵³³ Hence, looking at the notion of accountability as a behavioural approach will bridge the gap between the concept of international legal personality in the traditional view and the orthodox theory that stresses the position and capacity of the state as the sole bearer of international legal duties. Bridging the gap between corporate international legal personality and the duty of care will enable the judicial system to enforce human rights standards on all individuals, actors, and business organisations under international law through their domestic legal system or an alternate legal mechanism.

The corporation officials' ability to choose the process, the standards of business operations, the corporation's decision-making, the ability to control the business conduct and to demand operational information allow corporations and their officials to meet the legal definition of accountability and duty of care for liability for corporate misconduct. As Dobbs states, "a duty of care refers to the circumstances and relationships which the law recognises as giving rise to a legal duty to take care. A failure to take such care can result in the defendant being liable to pay damages to a party who is injured or suffers loss as a result of their breach of the duty of care".⁵³⁴ Hence, it is suggested here that state, non-state actors, and individual

⁵²⁹ *United States v Gold*, 743 F.2d 800, 813-14 (11th Cir. 1984).

⁵³⁰ *Standard Oil Company of Texas v United States*, 307 F.2d 120 (5th Cir. 1962).

⁵³¹ Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2002).

⁵³² Pratima Bansal, 'The Corporate Challenges of Sustainable Development' (2002) 16 (2) *Academy of Management Executive* 122, 131 <<http://amp.aom.org/content/16/2/122.short>> accessed 6 July 2016.

⁵³³ Richard Locke, Thomas Kochan, Monica Romis and Fei Qin, 'Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers' (2007) 146 (1) *International Labour Review* 21, 40. <<http://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2007.00003.x/abstract>> accessed 15 July 2016.

⁵³⁴ Dan B Dobbs, *The Law of Torts* (Vol. 2. West Group 2001).

entities operating in the international community and national states that satisfy the following requirement of accountability and remedy for human rights abuses laid out in Table 1,⁵³⁵ be held accountable for their behaviour. However, the key point of finding liability for corporate human rights violation depends on the corporation ability to show that its comply with human rights law and standards. Merely, having standards of conduct that prohibit human rights violations and environmental damages is not good enough. A possible key indicated for an effective adherence to human rights law and standards could include:

- A duty of care to detect and prevent human rights violation and environmental damages, otherwise promote an organisational culture, for instead, creating and enforcing human rights standard in business operations that encourage ethical conduct and comply with the law;
- Oversight of the compliance standards by senior management;
- Responsible business practice and delegation;
- Promote and adequate investigation of complaints and remediation of deficiencies, including self-disclosure and consistently applied discipline when appropriate; and
- A robust monitoring and auditing process that sufficiently addresses the key areas for corporation.

Examining accountability in this way helps to link the theoretical framework suggested in Table 1, to the Black Law, Yarwood and Anglo-Saxon conception of liability, which involves an element of responsibility, effective sanction and remedial action.⁵³⁶ Therefore, it is established here that the outline in Table 1 will allow both the domestic and the international legal system to hold corporations to account for business decisions that have rippling effects through affiliate business activities. Accountability should arise in a situation when such corporate decisions do not exist, but the parent companies are still connected to the subsidiary company that violated human rights. This is a fault-finding element of liability that establishes a corporate duty of care by differentiating the parent corporation's behaviour from the impact of its decision on the subsidiary's business operations and the influence it has on the supply chain or subsidiary by directly or indirectly controlling the business operation. The Court of Appeal in the UK address this issue with regard to the enforceability of a foreign judgment in

⁵³⁵ Appendix.

⁵³⁶Albert Jacob Meijer, *De Doorzichtige Overheid: Parlementaire en Juridische Controle in Het Informatietijdperk* (Eburon 2002).

England, in *Adams v Cape Industries Plc*.⁵³⁷ In this case the subsidiary company in South Africa employed the claimants. The complaint was relating to health hazards caused to the employees by asbestos. The complaint was filed against the Parent Company for personal injury.

It is equally well established in the law of tort that companies are liable for torts committed during the course of their business by their employees. Whilst a company will not be liable for the acts of its subsidiary by reason and only of its shareholding, it may owe its own duty of care towards the employees of the supply chains and subsidiaries. In these circumstances, the court does not pierce the corporate veil but instead identifies a free-standing duty of care owed by the parent company to the claimant arising out of the relationship between the parent and subsidiary or the supply chain companies.⁵³⁸ However, for a free-standing duty of care to be owed, the question that the court needs to ask is whether the corporate entity had proper systems and controls to prevent the human rights violation from occurring. Such systems and controls can either operate to: (i) show there was no intent to commit the human rights violations on part of a corporate, (ii) provide a defence, (iii) be a mitigating factor upon finding liability or (iv) impact on decisions of the court and on penalties impose if the corporate is find liable. There has been a recent raft of English case law which explores whether a wronged party can pursue a parent company for the actions of its subsidiary in tort; a tool used by some to their advantage where the parent company is located in a more favourable

⁵³⁷ *Adams v Cape Industries plc* [1990] Ch 43. “This *Adams v Cape Industries plc* case modified the attitude of the courts on the question of lifting the veil to establish a controlling interest or an economic entity. Prior to *Adams v Cape Industries*, the method for establishing that a group of companies was in reality one economic entity was somewhat vague but a number of cases (such as *Holdsworth & Co v Caddies* (1955) or *DHN Food Distributors Ltd v Tower Hamlets LBC* (1976)) suggested that an economic entity could be established where the holding company exerted a substantial degree of control over the affairs of the subsidiary company, to the extent that the holding company controlled and dictated the corporate policy of its subsidiary. Since the case *Adams v Cape Industries*, a company's ability to control the overall policy structure of another company is unlikely, of itself, to be sufficient to justify the lifting of the corporate veil. To dislodge the corporate veil of the subsidiary, the courts have demanded something more: "namely, in addition to a holding company's control over the policy structure of its subsidiary, the finding of a façade is required in relation to the incorporation of the subsidiary company". The courts changed their attitude and strengthened the Salomon principle with the case *Adams v Cape Industries*. Since this case, it seems that the only circumstances in which the courts are likely to lift the veil are: firstly, when the court is construing a statute, contract or other document which requires the veil to be lifted; secondly when the court is satisfied that the company is a “mere façade”, so that there is an abuse of the corporate form; and thirdly when it can be established that the company is an authorised agent of its controllers or its members, corporate or human. The changes of case *Adams v Cape Industries* have been more recently affirmed in cases such as *Ord v Belhaven Pubs Ltd* (1998) or *Williams v Natural Health Foods Ltd* (1998).

⁵³⁸ See Chapter 7.

jurisdiction.⁵³⁹ In summary, the principle of accountability illustrates that even if the corporation's misconduct is the subsidiary's own misconduct, the corporation should be responsible for its decision for conducting business with the subsidiary. When the corporate has the requisite knowledge of a potential human rights violation by the subsidiary through their business operation. This is also the case if the liability of the corporation or words spoken to someone else is an impermissible fiction. It is no less of a fiction in the case of control and the exercise of influence over business operations in the host state.

Finally, the concept of accountability as explained above can take the form of a single person's conduct outside of the rules imposing liability on the whole corporation.⁵⁴⁰ Also, if the words or actions of another person are attributed to the defendant, and those actions infringe the claimant's rights, then the defendant will be liable. The principle of corporate accountability is like a game of football; it has rules which determine player's accountability. The principle of corporate liability presupposes that what is being imputed is the responsibility for the wrongdoer and not the act itself. Therefore, the corporation must take responsibility for the action of its subsidiary against the rest of the world but not against the corporate itself. To put it another way, the position between the parties as to their relationship is not determined by the position of third parties to the relationship. The concept of accountability indicates that it does not matter whether it is the action of the corporation, supply chain, subsidiary or the liability which is attributed to the human rights violation and the environmental damage. What this means is that the parent corporation should not be exempt from accountability just because its action does not touch and concern the home state.

⁵³⁹ See Chapter 7. *Chandler v Cape* [2012] EWCA 525. "LJ listed the following four factors, the presence of which bring a case more closely within the scope of a duty of care owed by a parent company:

- The businesses of the two are in a relevant respect the same.
- The parent had or ought to have superior or specialist knowledge compared to the subsidiary.
- The parent had knowledge of the subsidiary's systems of work.
- The parent knew or ought to have foreseen that the subsidiary was relying on it to use that superior knowledge to protect the claimants.

⁵⁴⁰ In that case, a court must find all elements of the offense (including fault) in one individual. In cases of institutional liability, on the other hand, it is not necessarily required to prove which or whether any employee indeed had knowledge or intent. Rather, courts can establish corporate liability on the basis of the "collective knowledge" or foreseeability doctrine, which merely requires that the members of the company had knowledge or foresaw in the aggregate. This mental fiction would lower the evidentiary bar for the prosecution significantly. The standards for attributing corporate liability vary across different jurisdictions. This notion of corporate blameworthiness, which is associated with corporate entity liability and requires establishing corporate guilt and intent, has its own conceptual problems because a corporation as a legal person has no conscience of its own. Despite those inherent conceptual challenges that will need to be addressed, attaching liability to the corporate entity, rather than merely the individual managers or officers involved, can be considered a more accurate reflection of the nature of corporate malfeasance, particularly at the scale of atrocity crimes involvement.

Where there is a violation or environmental damage as a result of the corporate or corporate misconduct, liability should be found according to the principle of accountability explained above. If A's actions infringe B's right by carelessly injuring B, for example, if A's actions are inputted to C, C and A are both tortfeasors. The attribution of A's acts to C means that C has control or contributed to the infringement of B's rights. This means that the corporation could be held liable for the act of the subsidiary or the corporate official that it has control over. Thus, the corporate is as guilty of infringing the rights of the claimant as the person physically acting. So, A and C become joint tortfeasor, just as both Geoff Hurst and England scored the final goal of the game. If the corporate official and subsidiary action cause another loss, but are not wrongful, the corporate should be liable. The duty of care will enable the punishment of corporate misconduct that could not previously be sanctioned due to the difficulty in identifying the individual responsible in circumstances where the collective body of a corporate entity adopts a decision. It will also help to prevent individuals being held liable whilst the corporate entity escapes liability and continues its misconduct. The level of sanction and remedy contemplated under the duty of care (tort law) could severely affect the continued operation and profitability of corporate entities. However, it is hard to judge at this point whether the duty of care will prove to be an effective deterrent to human rights violations. Thus, the following chapter will analyse the definition of accountability, the mechanism of accountability, and its components.

Chapter II

2. Aims and Objectives

Following the analysis and definition of accountability, and the mechanism of accountability, it is now vital to extricate its components, which will allow a better understanding of the practical concept of accountability (responsibility, answerability, blameworthiness, liability and sanctions). The aims and objectives of this chapter are to examine the key elements that are required for establishing accountability for non-state actors. A diagram will then be used to explain the components of the various forms of accountability and how accountability creates a legal duty of care for non-state actors, such as corporations.

2.1. Components of Accountability (The Link to Establish a Duty of Care)

Koppell perceives five different dimensions of accountability: transparency, liability, controllability, responsibility and responsiveness. Each of these forms the practical concepts of accountability in this thesis.⁵⁴¹ What is clear from the explanation by Koppell is that accountability is indeed an inclusive concept and one with different branches. In order to establish accountability and effective remedy, all the branches must be addressed. As explained above, the concept of accountability has provided some indication of this notion. However, such an explanation makes it difficult to establish empirically whether a corporation or corporate officials can be subject to accountability for a corporation's misconduct in relation to business operations under international law. This is due to the fact that the different elements of accountability need widespread operationalisation to establish liability for the corporation's misconduct because the different fundamentals of accountability cannot be measured along the same scale. For example, transparency may not carry the same effect as liability for human rights violations. Likewise, the difference between a corporation and its officials makes it difficult to pinpoint the level of liability of either the corporate or the official's misconduct in the course of the business operation.

⁵⁴¹ Jonathan GS Koppell, 'Pathologies of Accountability: ICANN and the Challenge of Multiple Accountabilities Disorder' (2005) 65 (1) *Public Administration Review* 94, 108. <<http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6210.2005.00434.x/abstract>> accessed 3 July 2016.

Nonetheless, some dimensions, such as transparency,⁵⁴² are a mechanism for accountability but are not constitutive of accountability, while others, such as responsiveness, are more evaluative instead of representing the analytical dimension of accountability. Arguably, international criminal law accountability could be seen to possess elements of transparency, but this does not constitute accountability. One cannot incorporate transparency into the core aspect of accountability, such as liability and remedy, because liability and remedy arise as a result of one misconduct, i.e. corporate or corporate official misconduct and corporate subsidiary and supply chain. As a result, accountability is an evaluation of corporate operations and its implications but not an analytical concept view of corporate accountability under international law. This also means that accountability should be based on the outcome of the evaluation of corporate business operations, which has a significant impact on human rights and the environment, and not on an analytical view of corporate activities. Viewing accountability in this conceptual premise will help to qualify positively the state of affairs⁵⁴³ of the corporation, such as regulating the conduct of corporate activities that is based on its economic output, control, relationship with the subsidiary, and the impact it has on human rights and the environment. This could be the basis for establishing an effective accountability and remedy for victims of human rights abuses.

These conceptual premises are closely connected to responsiveness, in the sense of the responsibility of the corporation and its officials in directing the business operations, as well as the willingness of the corporation to act in a fair, honest, just, transparent, and equitable way. Following this explanation of accountability, the notion of responsibility in this dimension will enable corporations to respect human rights and the environment because it will be assumed that the corporation owes a duty of care, which gives rise to liability and remedy. This is

⁵⁴² Transparency, in a business or liability context, is honesty and openness. Transparency and accountability are generally considered the two main pillars of good corporate governance, however, not accountability on its own. The implication of transparency is that all of an organisation's actions should be scrupulous enough to bear public scrutiny not legal liability

⁵⁴³ State of affairs – This conduct is defined not in the sense of the defendant doing a positive act but consisting in the defendant "being found", "being in possession" or "being in charge" etc. In such cases all the prosecution needs to prove are the existence of the factual circumstances which constitute the crime, the existence of the state of affairs. For state of affairs crimes the *actus reus* consists of "being" rather than "doing". E.g. "being" drunk in charge of a vehicle. *Duck v Peacock* [1949] 1 All ER 318. Lord Goddard CJ: This is a question, not of driving, but of being in charge of a car. If what is suggested here were a special reason, it would mean that a man who had taken too much to drink so that he was unfit to manage the car or be in charge of it could escape the penalty of disqualification merely by stopping and going to sleep in the car. The court is not going to give any countenance to such a reason as that. In this opinion, on the facts found by the magistrate there was no ground for saying that any special reason existed for not imposing the disqualification which Parliament has decreed shall otherwise be imposed.'

because the liability and remedy arise through corporate conduct, such as the exercise of its control over the business operations and working procedures. However, in this parameter, there is no general agreement about the acceptable standard for corporately accountable behaviour and the difference from role to role, time to time and place to place from a different legal concept of accountability.⁵⁴⁴ However, it is vital to stress that in a legal definition of accountability the main components are liability, remedy, and enforcement. These elements moreover are a crucial aspect of accountability and should not be exchanged for a less regulatory approach to accountability for human rights violations and environmental damages. The exemplification of corporate accountability in a legal and conceptual definition of accountability. This should be closely linked with corporate business operations but should be wider when it comes to imposing accountability on them. As this will enable the court to find liability in a relationship and the control that the corporate exercises in its business operations. Corporate accountability should have a relationship with the impact of the corporate business operation on society and the responsibility that is derived from this relationship gives rise to a duty of care not to cause harm. Hence, if the components of corporate accountability include liability, remedy, and enforcement, then the question is what is the scope of accountability? How does the definition of accountability aid corporate responsibility and sanctions in practice?

To answer these questions, it is vital to first look back at the definitions of accountability in duty of care, which help explain and justify conduct and sanctions. This implies a relationship between the state, corporate entities, and a forum, such as a tribunal, court, or society.⁵⁴⁵ In addition, the answer could be found in the root of the etymological and historical definition of accountability that is related to specific social relations.⁵⁴⁶ In this ideological concept, accountability will be seen as the relationship between actors, such as governments and corporations, and a forum, i.e. a judicial system, society, and the international community. Viewing accountability as a relationship gives rise to obligations to explain and justify one's conduct. Moreover, the forum will have the mandate to pose questions and pass

⁵⁴⁴ Elizabeth Fisher, 'The European Union in the Age of Accountability' (2004) 24 (3) *Oxford Journal of Legal Studies* 495, 515. <http://www.jstor.org/stable/3600565?seq=1#page_scan_tab_contents> accessed 3 July 2016.

⁵⁴⁵ Christopher Pollitt, *The Essential Public Manage* (McGraw-Hill Education 2003).

⁵⁴⁶ Patricia S Atkins, 'Regionalism' in JM Shafritz (ed), *International Encyclopaedia of Public Policy and Administration* (Boulder Westview Press 1998).

judgment on corporate human rights abuse cases. Indeed, the corporation may face criminal or civil sanctions, specifically where it is found that a duty of care is owed.

This theoretical definition incorporates different actors, such as individuals, and situations in which corporate officials are involved in human rights violations. The forum in this rationale refers to the relationship between the domestic and international judicial system and the actor, which is the corporation, and this can have the nature of a principal-agent relation, with the judicial system acting as the principal. Observing accountability in this ideology permits defining whether the implication of a sanction is a constructive element of accountability.⁵⁴⁷ It also allows identifying different levels of accountability for all the actors involved. This is crucial because effective accountability, sanctions, and remedies should in theory be based on the type and nature of accountability imposed on a particular actor through the actor's duty of care. This is purely due to the fact that accountability could fail on theoretical and practical interpretations if the essential elements are not taken into consideration when deciding whether an actor could be held accountable for its conduct or not.

Furthermore, transparency is about being easy to understand, and being open and honest in all communications, transactions and operations. An implication of this is the possibility that the process of transparency is a form of business accountability in its sense. In this view, it can be argued that accountability and transparency go hand-in-hand and involve being aware of who one is accountable to,⁵⁴⁸ what the important pieces of information are, and how they can be communicated most effectively.⁵⁴⁹ Transparency is about shedding light on rules, plans, processes and actions. It is knowing why, how, what, and how much. Transparency ensures that public officials, civil servants, managers, board members and businessmen act visibly and

⁵⁴⁷ Mark Bovens, Robert E. Goodin and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (OUP Oxford 2014).

⁵⁴⁸ Ella Armstrong, 'Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues' (2005) *United Nations, Department of Economic and Social Affairs* 1,10.

Why Transparency and Accountability? Formal and informal mechanisms of transparency and accountability encourage officials to act in the public interest, or in the case of companies, in the interests of their shareholders. Without public access to records of governance and other information, scarce resources may be squandered or mismanaged. Example, in the agricultural trade environment, producers require transparent systems of land ownership and transfer and access to public resources (such as water for irrigation and roads for transport), as well as consistent, predictable treatment by officials charged with licensing, inspecting, or otherwise regulating their work. Processors and traders require clarity and consistency in how they are regulated by government, as well as accuracy in the information provided by government. Potential suppliers, customers, and investors need to trust the representations of firms with which they do business to equip themselves adequately to trade on world markets.

⁵⁴⁹ Antonino Vaccaro and Peter Madsen, 'Transparency in Business and Society: Introduction to the Special Issue' (2009) 11 (2) *Ethics and Information Technology* 101,103.

understandably, and report on their activities. And it means that the general public can hold them to account. It is the surest way of guarding against corruption and helps increase.⁵⁵⁰ Transparency and accountability are considered critical not only to the workings of business and government but also to the success of the commercial enterprise, including in the agriculture sector. Through the practice of internationally established standards of corporate governance, private and state-owned enterprises can support robust foreign investment in agribusiness, along with economic growth.⁵⁵¹ The present study raises the possibility that transparency in the concept of accountability refers specifically to the substantive and administrative procedures through which institutions perform their functions, and whether they are documented, accessible, and where the government and publicly held companies are concerned open to public scrutiny.

Accountability pertains to the relationship between citizens and government officials or, in the commercial context, shareholders and boards of directors along with a sense of obligation and a public service ethos among officials and the power of citizens or shareholders to sanction, impose costs, or remove officials for unsatisfactory performance or actions.⁵⁵² The concept of transparency in this view might involve two distinct stages: answerability and enforcement. Answerability refers to the obligation of the government, its agencies and public officials to provide information about their decisions and actions and to justify them to the public and those institutions of accountability tasked with providing oversight. Enforcement suggests that the public or the institution responsible for accountability can sanction the offending party or remedy the contravening behaviour. What this means is that, for one to achieve accountability, there should exist transparency as a facilitated procedure for corporate responsibility.

This finding, while preliminary, suggests that transparency is also used in ways that are closer to the scientific usage of transparency: transmission without distortion in its social terms.⁵⁵³ Thus, the term transparency can be used to describe the way light passes through something (like glass or Perspex) as if there were nothing there.⁵⁵⁴ In other words, transparency

⁵⁵⁰ USAID, 'Transparency and Accountability' (2013) *The US Government's Hunger & Food Security Initiatives*.

⁵⁵¹ Marcel Van Marrewijk, 'Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion' (2003) 44 (2) *Journal of business ethics* 95, 105.

⁵⁵² Andrew Crane and Dirk Matten, *Business Ethics: Managing Corporate Citizenship and Sustainability in The Age of Globalization* (Oxford University Press 2016).

⁵⁵³ Raymond T Hebert and Paul A. Conrotto, 'Laser Scanner with Rotating Mirror and Housing Which is Transparent to the Scanning Radiation' (1989) 4 *US Patent* 870, 274.

⁵⁵⁴ Akira Fujishima and Kenichi Honda, 'Electrochemical Photolysis of Water at a Semiconductor Electrode' (1972) 238 (5358) *Nature* 37, 38.

can actually suggest concealment (of an intervening medium). This is the case in information technology where transparency usually refers to the operation of programs and applications that are not apparent to the user, as when the domain names system resolves authorised domain names into Internet protocol addresses.⁵⁵⁵

In this case, transparency shields the user from the complexity of the system, rather than reveals it. References to network transparency are common in the literature of computing and they too carry this sense that the user works in an environment where there seem to be no barriers or intervening changes of the system.⁵⁵⁶ It is important to be aware that this usage contrasts directly to the common tendency to refer to open source applications in computing as transparent.⁵⁵⁷ Open source is transparent because one is permitted to see through the surface and examine what is inside (the source code).⁵⁵⁸ It is the type of transparency represented by an open source that concerns here in this part of the thesis, rather than network transparency and other instances of transparency that contrive to make the user unaware, rather than aware, of the functioning of systems. The definition of transparency here is referred to clarity and unambiguous conclusion. Even though this definition has clarified the scientific meaning of transparency, it cannot be used in the legal context. This is because for transparency to serve as an element of accountability, it must have a legal meaning.⁵⁵⁹

Florini, for example, expresses it precisely that “put simply, transparency is the opposite of secrecy. Secrecy means deliberately hiding your actions; transparency means deliberately revealing them.”⁵⁶⁰ This is a pretty effective definition, except for the suggestion that transparency is always deliberately offered. Types of involuntary or imposed transparency undoubtedly exist in the definition. In addition, some definitions go further than merely contrasting transparency with secrecy and refer to it as the opposite of privacy. A crudely administered regime of transparency can damage privacy, but this is not usually the ostensible intent behind its introduction. The overwhelming weight of use of the word transparency is not to indicate that it throws light into legitimate privacy, but that it exposes the kind of secrecy

⁵⁵⁵ Floyd Backes, ‘Transparent Bridges for Interconnection of IEEE 802 LANs’ (1988) 2 (1) *IEEE Network* 5, 9.

⁵⁵⁶ LP Pitaevskii, ‘Electric Forces in a Transparent Dispersive Medium’ (1961) 12 (5) *Journal of Experimental and Theoretical Physics* 1008, 1013.

⁵⁵⁷ Giulio Giunta et al, ‘A GPGPU Transparent Virtualization Component for High Performance Computing Clouds’ (Springer Berlin Heidelberg 2010) *European Conference on Parallel Processing*.

⁵⁵⁸ Andrian Marcus and Jonathan I Maletic, ‘Recovering Documentation-to-Source-Code Traceability Links Using Latent Semantic Indexing’ (2003) *Software Engineering, 2003. Proceedings. 25th International Conference on*. IEEE.

⁵⁵⁹ Carolyn Ball, ‘What is Transparency?’ (2009) 11 (4) *Public Integrity* 293, 308.

⁵⁶⁰ Ann Florini, *The End of Secrecy: Power and Conflict in The Age of Transparency* (Palgrave Macmillan US 2000)

that is detrimental to society. In fact, the particular value of transparency is its ability to reveal corrupt practices and show citizens how they can limit the damaging effects of corruption in their own lives.⁵⁶¹ One author sums up the relationship between transparency and privacy by saying: “transparency is not about eliminating privacy. It is about giving us the power to hold accountable those who would violate it”.⁵⁶² Bosshard contributed to the debate by stating that transparency is the memorably layers a further trope on the basic representation as to indicate the ability of accountability through transparency to bring about change for the good. The author claims that “the sunshine is the best disinfectant” elegantly captures the cleansing potential of a regime of transparency, without yet explaining quite how that might work.⁵⁶³

Taken together, these definitions suggested that transparency is used in a context where a conduct required clarity, honest, obvious, explicit, unambiguous, unequivocal and responsible action. However, what is not clear in this definition is where transparency could give rise to a legal responsibility and liability. What is possible though, in this definition is that transparency as an element of business accountability does give rise to a legal duty. The legal duty of transparency as an element of business accountability can be noted in the UK government passing the Modern Slavery Act 2015, the first piece of UK legislation focusing on the prevention and prosecution of modern slavery and the protection of victims. After much debate, the government included a provision on transparency in supply chain.⁵⁶⁴ The new transparency in supply chains provision in the Modern Slavery Act aims to rout out the slavery lurking in many supply chains. The provisions increased transparency in the supply chains will push forced labour up the corporate agenda, but there are concerns it does not go far enough. Nonetheless, what is seen in this approach is that the UK recognised transparency as a legal tool to force corporation to respect human rights standards and adhering to international law. What this suggests is that the concept of transparency as an element of business accountability can be enforced in a court of law where a statute makes it explicitly clear in the law of the state. The Bribery Act 2010, is a legislation of great significance for companies incorporated in or carrying on business in the UK. It presents heightened liability

⁵⁶¹ Ivar Kolstad and Arne Wiig, ‘Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?’ (2009) 37 (3) *World development* 521, 532.

⁵⁶² Paul Sturges, ‘What is this Absence called Transparency?’ (2007) 7 (07) *International Review of Information Ethics* 1, 8.

⁵⁶³ Peter Bosshard, ‘The Environment at Risk from Monuments of Corruption’ (2005) *Global Corruption Report*

⁵⁶⁴ Modern Slavery Act 2015

The Modern Slavery Act will give law enforcement the tools to fight modern slavery, ensure perpetrators can receive suitably severe punishments for these appalling crimes and enhance support and protection for victims. It received Royal Assent on Thursday 26 March 2015.

risks for companies, directors and individuals. To avoid corporate liability for bribery, companies must make sure that they have strong, up-to-date and effective anti-bribery policies and systems, as transparency mechanism.

The Bribery Act 2010, unlike previous legislation, places strict liability upon companies for failure to prevent bribes being given (active bribery) and the only defence is that the company had in place adequate procedures designed to prevent persons associated with it from undertaking bribery.⁵⁶⁵ Foreign Corrupt Practices Act (FCPA) 1977,⁵⁶⁶ prohibiting US citizens and permanent residents, both public and private US companies and certain non-US individuals and entities from bribing foreign government officials in order to obtain a business advantage (*15 USC. §§ 78dd-1, et seq.*). Under some circumstances, the FCPA's jurisdiction extends to non-US individuals and companies, such as those who use the US capital markets, or those who use US communications or banking networks in furtherance of improper payment schemes. Taken together, these acts suggest that greater emphasis is placed on the corporation to act in a transparent manner in its business operations. What has become apparent in this research as well is that, both acts can rely on the concept of transparency to enforce legal duties, where the corporation have fall foul to its business dealing. This view marries what have been advocated in this thesis so far, that transparency as an element of business accountability give rise to a legal duty.

Also, certain aspects of the multi-faceted transparency principle are also founded in the “rule of law principle,” which can define as an “umbrella principle” which contains numerous (sub-) principles that aim at the rationale exercise of public power and protect qualified interests of its subjects.⁵⁶⁷ In particular, the aspect of transparency which relates to the legal

⁵⁶⁵ Bribery Act 2010.

The Bribery Act 2010 creates a new offence under section 7 which can be committed by commercial organisations which fail to prevent persons associated with them from bribing another person on their behalf.

An organisation that can prove it has adequate procedures in place to prevent persons associated with it from bribing will have a defence to the section 7 offence.

⁵⁶⁶ The Foreign Corrupt Practices Act of 1977.

The Foreign Corrupt Practices Act (FCPA), enacted in 1977, generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining business. The FCPA can apply to prohibited conduct anywhere in the world and extends to publicly traded companies and their officers, directors, employees, stockholders, and agents. Agents can include third party agents, consultants, distributors, joint-venture partners, and others.

The FCPA also requires issuers to maintain accurate books and records and have a system of internal controls sufficient to, among other things, provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorisation.

⁵⁶⁷ Armin von Bogdandy, ‘Doctrine of Principles, Jean Monnet Working Paper 9/03’ (2003) *Max Planck Institute for Comparative Public Law and International Law* <<http://centers.law.nyu.edu/jeanmonnet/archive/papers/03/030901-01.pdf>> accessed 20 August 2017.

clarity in terms of setting clear, simple and understandable laws, can be founded, even indirectly, on the “rule of law” principle. This is due to its close relationship with the principle of legal certainty, which is recognised as an integral part of the rule of law principle and contributes to the creation of a “foreseeable” legal environment.⁵⁶⁸ Furthermore, the duty to give reasons, which is also recognised as a specific aspect of transparency, can be conceived both from the perspective of the “rule of law” and the principle of democracy, because the knowledge of motives (of the legislator) is fundamental both as a guarantee to the exercise of public power and as a prerequisite for effective democratic control by the citizens. In conclusion, it should be underlined that the different aspects of transparency can be founded on the two most fundamental principles of EU law.⁵⁶⁹ What has to be examined though is whether the common core of these different aspects can constitute a new self-standing principle of business accountability.

Also, transparency is a concept that is applied at all possible levels from international organisations, states, private corporations, civil society organisations, individuals and groups of individuals. Regulations for transparency abound at all these levels and the technology by which transparency can be enforced is hard to avoid. Business can no longer easily conceal the movements of their misconduct or offer misleading estimates of their business output when records and data can reveal what the corporation is doing. Thus, it is possible to distinguish a number of levels at which the word is generally used in this broad sense, transparency and accountability.

Furthermore, there are a number of words that are regularly associated with transparency or are used in ways that share some of the meaning of the term. It is worth identifying the main ones here. They can be grouped according to what Oliver,⁵⁷⁰ identifies as the three elements in transparency: the observed, the observer and the means or method of observation. Broadly speaking, the observed include government, the corporate sector, and also those responsible for the dissemination of knowledge, who might be referred to as the knowledge sector. A driving principle behind transparency in the public sphere is to allow the government to set the context for transparency in the sphere of governance.⁵⁷¹ Systems of open government will usually include facilities for observation of official meetings by members of the public, public

⁵⁶⁸ Takis Tridimas, *The General Principles of EC law* (Oxford University Press USA 1999).

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Richard W Oliver, *What is Transparency?* (New York: McGraw-Hill 2004).

⁵⁷¹ Jeannine E Relly and Meghna Sabharwal, ‘Perceptions of Transparency of Government Policymaking: A Cross-National Study’ (2009) 26 (1) *Government Information Quarterly* 148, 157.

consultation processes for planning and decision making, and statutory rights of access by the public to official information, usually expressed in freedom of information laws. Open government is also furthered by regulatory systems the state's favoured method of intervening in both the business and public service provision environments in the latter part of the twentieth century.⁵⁷²

These form part of what is sometimes termed a national integrity system: a set of institutions and procedures that offers to check corporate accountability and its various forms.⁵⁷³ A national integrity system includes at the most basic level the institutions of a democratically elected legislature, an executive answerable both to the legislative body and to an independent judiciary. More than this, however, it should also include a supreme audit institution, regulatory bodies, ombudsmen, and independent anticorruption agencies. The private sector is observed because of the need for business integrity and corporate social responsibility, which represents an ethical and accountable approach to corporate governance.⁵⁷⁴ Corporations that embrace the concept monitor and offer up for audit their social performance, environmental impacts, employee relations and a range of other ethically sensitive aspects of business.⁵⁷⁵ Formal reporting of non-financial matters complements the financial accounting already required by national laws and international agreements. This reporting is usually on an annual basis, and is often verified by independent and external third parties. It represents a considerable contribution to corporate transparency.⁵⁷⁶

The analysis of the multi-faceted principle of transparency indicates that although there is still a way for this principle in its general appearance to be recognised as a general principle of accountability, it has exerted significant regulative influence on the way that the state, businesses, institutional organs, bodies and agencies function.⁵⁷⁷ The general contribution of the notion of transparency goes, though, further than ensuring openness of the decision-making processes and widest possible access to the relevant documents in a multi-level governance

⁵⁷² Barack Obama, 'Transparency and Open Government' (2009) *Memorandum for The Heads of Executive Departments and Agencies*.

⁵⁷³ Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System* (Transparency International 2000).

⁵⁷⁴ ASX Council, Corporate Governance. *Principles of Good Corporate Governance and Best Practice Recommendations* (Australian Stock Exchange Limited 2003).

⁵⁷⁵ Pamela Bloomfield, 'The Challenging Business of Long-Term Public-Private Partnerships: Reflections on Local Experience' (2006) 66 (3) *Public Administration Review* 400, 411.

⁵⁷⁶ Martin Lipton and Jay W Lorsch, 'A Modest Proposal for Improved Corporate Governance' (1992) *Business Lawyer* 59, 77.

⁵⁷⁷ Adrienne Héritier, 'Composite Democracy in Europe: The Role of Transparency and Access to Information' (2003) 10 (5) *Journal of European Public Policy* 814, 833.

model.⁵⁷⁸ It also relates to (some) qualities that a legal duty of transparency should have, such as the cognoscibility of their context and the visibility of the motives of the legislator (though the statement of the reasons for their adoption), qualities that can be seen as preconditions for both the acceptability and the effective application of the business standard itself.⁵⁷⁹ In conclusion, it should be underlined that although the multi-faceted principle of transparency builds upon well-established legal values, such as the rule of law and legal certainty, the elaboration of its elements in an integrated manner and in accordance with the particularities of business accountability gives it a new dynamic, although not yet fully crystallised, concerning the “qualities” of the responsibility and business governance at national level. Such developments are also of importance for the accountability and liability for corporations at both domestic and international law level. This thesis has identified that transparency is an accountability concept, but, only enforceable if it is included in business accountability or when it is explicitly stated in the domestic law. On this point, this study argues that transparency can be a legal instrument to hold corporation accountability for business misconduct. However, this by all means inconclusive and require further studies to prove the validity of the point.

Under this view, it can be said that accountability arises when the essential elements derived from the notion of accountability are met, such as liability, remedy and enforcement. Also, in regard to this concept, a tribunal and court can hold an actor accountable for its conduct. Therefore, the consequences that flow from these elements of this notion are also determined by transparency, international standards and international norms. Hence, under wider moral and legal obligations, the tribunal or court must exercise extensive discretion to impose accountability on an actor, with an enforcement procedure either at the domestic or international level. This could include the freezing of company assets through consensus with the home state government or the state in which the headquarters of the corporation is located but only if it was established that a duty of care is owed, and this duty of care was breached. The corporation sanction by fine or seizure of its property should be imposed by an execution order issued by the court either domestic or international level. The fact that the sanction provided for the violation of international and human rights law is a fine or imprisonment of a corporate official in the discretion of the court, does not render it inapplicable to a corporate human rights violation. Also, under these circumstances, the corporate officials may also be

⁵⁷⁸ Liesbet Hooghe and Gary Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield 2001).

⁵⁷⁹ Ann Kolk, ‘Sustainability, Accountability and Corporate Governance: Exploring Multinationals' Reporting Practices’ (2008) 17 (1) *Business Strategy and the Environment* 1, 15.

subject to liability for any violation of human rights law and standards under the theory that they failed to prevent the violation “by neglecting to control the misconduct of those subject to their control”. Under this concept of liability, a corporate official is liable based on his/her “responsible relation” to the human rights violation regardless of whether he/she has any knowledge of the misconduct. The same rule can be applied where the duty of care creates the offence provides for punishment if the fine imposed is not paid. Similarly, the duty of care should provide that the penalty for a violation of human rights law and standards may be read in conjunction with a general legal rule of remedy under tort law that allows the imposition of a fine, and the fine may be imposed on the corporation in civil and tort law.

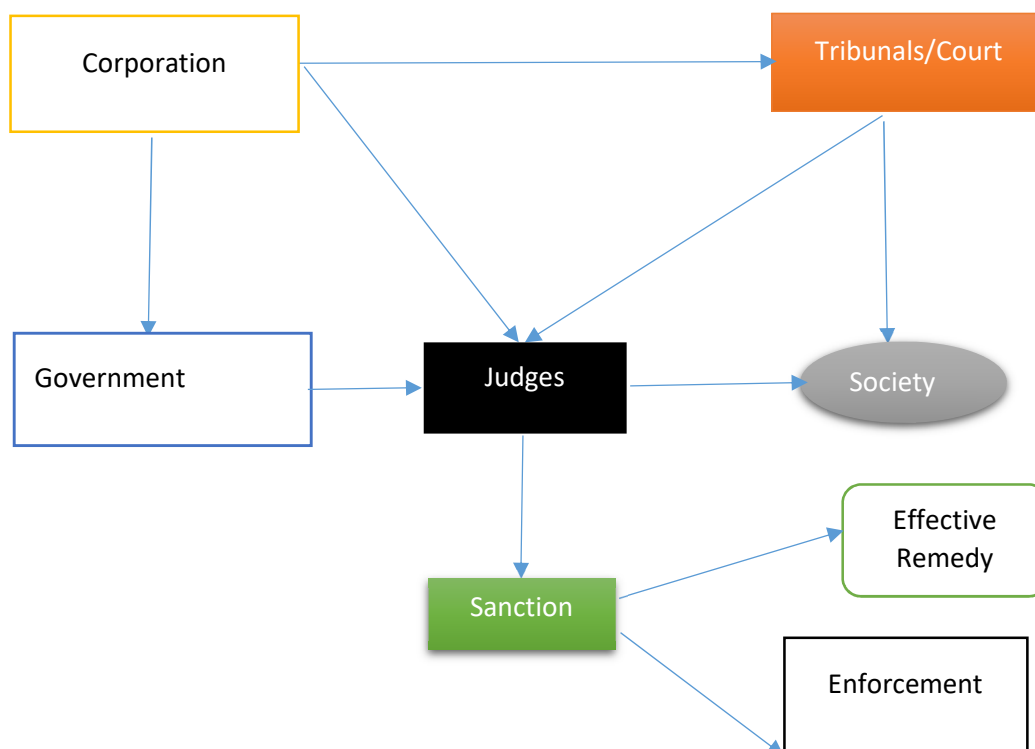
Lastly, this research suggests that even an exercise of voluntary instruction such as stages of corporate report writing constitute a practical element of accountability. Also, this research concurs with Mulgan⁵⁸⁰ and Strom⁵⁸¹ that sanctions form the main part of a practical element of accountability and on a broader spectrum are part of the conceptual component of accountability. Therefore, effective sanction and effective remedy should be the core element of accountability in a legal proceeding involving a state and a non-state actor. It is argued here that a tribunal or court has a moral and legal obligation to apply the conceptualisation of the practical element of accountability. The present study raises the possibility that the practical element of accountability should be a legal theory that is used to extend accountability to situations where corporation has no hands-on supervision of the subsidiary conduct, but, have direct or indirect control over the business operations.

It is now important to look at what is meant by the component of accountability and how this is linked with the corporate obligations that give rise to a duty of care. Diagram 1 illustrates this concept by demonstrating how the various elements contained in the notion of practical corporate accountability ought to work in a broader concept to impose a legal duty of care on the corporation.

⁵⁸⁰ *Ibid.*

⁵⁸¹ Kaare Strøm, ‘Delegation and Accountability in Parliamentary Democracies’ (2000) 37 (3) *European Journal of Political Research* 261, 290. <<http://link.springer.com/article/10.1023/A:1007064803327>> accessed 3 July 2016.

Diagram 1. Components of Accountability



2.2. The Link between Government and Corporations

The link between government and corporations shows the law and regulation aspect of the corporation's duty of care; the company law, the government trade policy, as well as the business influence on the government by personal conduct and lobbying, forming trade unions, political action committees and large investments of the corporation. Breaking this down, the link between government and business is required for the welfare of the economy and the state. This link, which is established through government laws and regulation, establishes accountability. This means that the corporation is required to be accountable to the government for its business operations through regulations and the corporate law of the state. Likewise, the link also means that the government has a responsibility to shape business practices through both the implementation of rules and regulations (in) directly. This indicates that the link between government and corporations creates two dimensions of accountability: the first is the government regulatory mechanism for human rights conduct and the second is the corporation's duty not to violate human rights.

Therefore, the government must establish laws and rules that dictate what the business can and cannot do, such as implementing or enacting legislations that will either control or monitor some aspects of corporate business activities or enable courts to hold the corporation accountable for misconduct under some form of binding regulation. This could be either through environmental protection law, a labour commission, implementation of conventions⁵⁸² and treaties⁵⁸³ into domestic law or a governmental department for corporate human rights violations. However, it should be noted that this is just an illustrative view of binding regulations that is required to enforce human rights standard at domestic level. This will allow the governmental bodies to implement the law and monitor its application on business. To put it briefly, the link between the government and business are the legal regulations, enforcement, and the ability of the state to hold corporations accountable for human rights violations within its jurisdiction. The link establishes a corporate duty of care to the government, with the corporation's duty arising under this link to respect human rights standards both at the international and national level. It therefore follows that the corporation's international businesses operation gives rise to a duty of the corporation to respect international human rights law.

What this means is that the corporation should be liable, where it is at fault, for causing the claimant's injury or damaging the environment during the course of its business operations, unless there is a compelling human rights reason not to hold it liable. This doctrine is a core aspect of the duty of care principle, which was set out by Lord Wilberforce in *Anns v Merton London Borough Council*⁵⁸⁴ as a two-stage test for the existence of a duty of care. The

⁵⁸² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. <<http://www.refworld.org/docid/3ae6b3aa0.html>> accessed 6 July 2017], UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195. <<http://www.refworld.org/docid/3ae6b3940.html>> accessed 6 July 2017, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 6 July 2017, UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 6 July 2017.

⁵⁸³ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 6 July 2017.

⁵⁸⁴ *Anns v Merton London Borough Council* [1978] A.C. 728. This will be discussed in detail later.

The claimants were tenants in a block of flats. The flats suffered from structural defects due to inadequate foundations which were 2ft 6in deep instead of 3ft deep as required. The defendant Council was responsible for inspecting the foundations during the construction of the flats. The House of Lords held that the defendant did owe a duty of care to ensure the foundations were of the correct depth. Lord Wilberforce introduced a two stage test for imposing a duty of care. This has since been overruled by *Caparo v Dickman*.

Lord Wilberforce's two stage test:

reasoning behind the recommendation of the common law approach of duty of care is that the test created the standard of duty of care, which undoubtedly can be applied in the international arena through the concept of the General Principle of Law⁵⁸⁵ and Positive Law.⁵⁸⁶ Thus, the question should rather be, is there a sufficient relationship of proximity and foreseeability? If so, a *prima facie* duty of care should exist. Are there any considerations which could reduce or limit the scope of corporate liability?⁵⁸⁷

2.3. The Link between Corporations and Society

This type of link establishes the responsibility of the corporation in the society in which it carries out its business activities. It is argued that a corporation is part of a system that is affected by and effects other elements in society.⁵⁸⁸ This means that corporate business operations are connected or form part of society so that where the corporation violates human rights and the environment, a duty of care is owed in law to that society. Therefore, corporations need to work within the rules and regulations of society, as well as within international law and norms, in pursuit of economic goals in a way that will benefit both the corporation and society. This link demonstrates the practical accountability for corporate business activities on society, and so there exists a reputable presumption of a duty of care for the corporation not to cause harm to the society and the environment. This also means that corporations should be accountable to their stakeholders (shareholders, government, society, customer/clients and

“In order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise”.

⁵⁸⁵ Chapter 8.

⁵⁸⁶ Natural law theory exaggerates the relation of law and morality. Positive law is a reaction against particularly that aspect of Natural law theory. It insists on a distinction between human law, which they call positive law and moral and scientific laws. Human laws are posits of human society while scientific laws are independent of what we take them to be. Positive law refers to the body of man-made laws enacted within a political entity. It is a reaction against natural law theory. Positive law includes all those laws that have been duly enacted by a properly instituted and popularly recognised branch of government. In the U. S. for example positive laws come in a variety of forms at both the state and federal levels, including legislative enactments, judicial orders, executive decrees, and administrative regulations. John Austin, *Lectures on Jurisprudence: Or, the Philosophy of Positive Law* (J. Murray 1875) and Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press 2001).

⁵⁸⁷ Chapter 8.

⁵⁸⁸ V Balachandran, *Corporate Governance, Ethics and Social Responsibility* (PHI Learning Pvt. Ltd 2011).

future generations)⁵⁸⁹ in order to achieve improved economic, environmental, and human rights standards.⁵⁹⁰ Thus, the corporation can be liable for a corporate act that may either harm society or destroy the environment, regardless of whether it is caused by a corporate official, supply chain or the subsidiary if a duty of care is established.

2.4. The Link between the Judicial System, Government, and Corporations

Society influences law and so law is a reflection of society. Therefore, the government is accountable to society through the judicial system and the law of the state, (this is also known as the doctrine of separation of power),⁵⁹¹ while a corporation is accountable to society either through the government or its judicial system. Of course, it is adequate that the doctrine of separation of powers is based on the acceptance of the constitutional doctrine of the separation of powers which is typically found in Western societies. It may not apply however in every jurisdictions where it is not possible to find separation between judicial, legislative, and executive powers. However, this study adopts a positive approach to this argument. The study suggests under the General Principle of Law and international law, that the separation of power is recognised by most judicial systems and can be applied in the concept of corporate liability here. Thus adopting it in this thesis is not a deviation from the disparities in domestic and international legal system. This concept establishes an absolute duty of care for all the actors expressed in diagram 1. Hence, the link between corporate, the judicial system and society can

⁵⁸⁹ Mark Bandsuch, Larry Pate and Jeff Thies, 'Rebuilding Stakeholder Trust in Business: An Examination of Principle-Centered Leadership and Organizational Transparency in Corporate Governance' (2008) 113 (1) *Business and Society Review* 99, 127.

⁵⁹⁰ Doreen J McBarnet, Aurora Voiculescu and Tom Campbell, eds. *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009).

⁵⁹¹ Separation of Powers are also pillars of rule of law, where government by the law not based in single power Monarchy alone could bring tyranny, aristocracy alone could bring oligarchy, and Democracy could bring anarchy. Liberty exist not only from personal freedom and rights but with limitations in accordance to law so there would not be abuse of powers on other individual liberty as Lord Acton says power corrupts and absolute power corrupts absolutely. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits. This is the importance of check and balance. Visibly this may seem absolute and fundamental rights and liberties of individual are secure in hands of Constitution but in reality only some of them are while others are subjected to various qualifications which make them more illusory than in reality. Rights and liberties of people are upheld not only by application of this doctrine of separation of powers but in parallel with Bill of rights. Through this legislation by legislative body it guarantees protection of basic human rights when implemented by executive with controls and definition given by judges and courts. In order to understand application of separation of power in pertaining to human rights, there is a need to know other sections of constitution itself, because most of bill of rights are not only empowered by these sections but also limited by them. Maurice John Crawley Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 2012).

simply be explained as a system of accountability for the corporation in stakeholders point of view, government, and judicial system in the cases of corporation misconduct.

2.5. The Practical Extent of Accountability

The diagram 1 illustrates the practical link between the components in the concept of corporate accountability that give rise to a duty of care. This part has broadened the concept of accountability from a restrictive concept of liability to a wider one. Also, as shown in the diagram 1, this study argues that the principle of corporate accountability extends to the various components in the chain of liability, such as government, judiciary, and society, and not only to the corporation's business stakeholders. Therefore, the assumption is that where the court can establish a relationship and control, it can be inferred that corporate accountability exists through the duty of care it owes to the government, judicial system, and society. The government and society in the chain can seek to hold the corporation accountable for its misconduct, specifically, where there is a substantial violation of human rights and environmental damage.

This further supports the fact that the corporation and corporate officials will have some relationship with and a degree of control over the corporation's business operations. Therefore, the degree of the relationship and control constitutes the guiding mind of the corporation.⁵⁹² As a result, there is a presumption that a corporation should be held accountable to the government and society that suffered from its business misconduct, including human rights violations⁵⁹³

⁵⁹² *Tesco Supermarkets Ltd v Natrass* [1971] UKHL. "Lord Reid said: 'Where a limited company is the employer difficult questions do arise in a wide variety of circumstances in deciding which of its officers or servants is to be identified with the company so that his guilt is the guilt of the company. I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability'. *Lennard's case* [1915] AC 705 was one of them.' Viscount Dilhorne set out the test: "a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders".

⁵⁹³ Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2000) 24 *Hastings International and Comparative Law Review* 339.

and environmental damages.⁵⁹⁴ This is because it can be inferred that the corporation has an unwritten obligation to act in a manner that benefits society as a whole and not the contrary. Likewise, the corporation has an obligation to be accountable to its stakeholders. In other words, one's government and society arguably fall under the stakeholder definition. Thus, where it can be assumed that a corporation owes a duty of care to the government and society, there must be effective sanction and remedy.

As a practical observation, the link also shows how corporations have a duty of care. In the section of sanction on diagram 1, the two distinctive subdivisions of sanction part will be discussed further in this research. The diagram also shows the interaction between the concept of accountability, the procedure of accountability and the mechanism which society could rely on to hold a corporation accountable for its actions. Also, the theoretical concept deriving from this diagram is that corporate accountability is a step-by-step process, and at each stage, the corporation can be called to account for its misconduct. The concept of a practical corporate accountability is an inclusive concept, which requires the corporation to be accountable to various actors, to whom they have legal and moral obligations.

The first theoretical question regarding the diagram is, what is the relationship between the actors and to whom is one made accountable to, which in law is the proximity and foreseeability of the harm caused to the claimant. This question is addressed by the diagram with the connection between each actor. This question regarding the diagram also yields a procedural query about the type of tribunal or court to which the actor is obliged to render account to. The second theoretical question asks, who should the corporate be made accountable to? Is the corporation obliged to appear before the tribunal or court of either the host state or the home state? In this rationale, the corporation's relationships to society makes it clear who the corporation is to be made accountable to: the government, judiciary, judicial bodies, and any appropriate tribunal or court. In practice, however, this has proven to be a more complex question to answer. Therefore, the correct way to do this is to follow the argument in a systematic approach to accountability that ensures corporations and other actors know to whom they are accountable to. This systematic approach will also allow victims of corporate misconduct to address their problems to a specific body on the link of corporate accountability, such as a tribunal or court. Therefore, to know whom to account to is part of the concept behind

<http://heinonline.org/HOL/LandingPage?handle=hein.journals/hasint24&div=20&id=&page=>>
accessed 6 July 2016.

⁵⁹⁴ William B Werther Jr and David Chandler, *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (Sage Publications 2010).

the diagram. Likewise, this diagram gives a perfect suggestion about the systematic approach to accountability in terms of knowing your role as an actor. The diagram can be used to develop a cohesive accountability system which will ensure corporate conduct is checked and accounted for.

By applying this concept to corporate accountability, it can be argued that, in light of the above-mentioned, the primary aims pursued in corporate accountability should closely conform to the notion of legal accountability, which meets the changing sociological circumstances on the domestic and international scene. Therefore, a rebuttable presumption arises already on the basis of the *de facto* influential position the corporation has in a domestic legal system and society. The actor, such as a corporation, is subject to the applicable legal obligations with regard to the promotion of community interests such as the protection of human rights, the environment, and the core labour and social standards. This, furthermore, is part of its business relationship with government and society. The position this thesis shall adopt here in conjunction with the diagram 1 above is that there exists a presumption that a corporation is legally accountable to the government and society in the way it carries out its business operations due to corporations owing a duty of care to society. This approach will ensure that the imposition of accountability by the state through the domestic civil legal system, which has the capacity to enforce treaty or customary international law, are a result of the interaction between state, society, and corporations. Therefore, there is a *prima facie* case that the corporation is subject to domestic law, international law and human rights, as well as other human rights treaties and is obliged to be held accountable for its misconduct.

This will enable the state through its judicial system to fulfil its central purpose of comprehensively civilising relations between corporations, government and society in an effective way,⁵⁹⁵ which is link to the state duty to protect its citizens, aliens and to punish perpetrators of human rights violations. Attaching accountability to the types of corporate conduct should impose upon them a positive obligation to take reasonable steps to ensure that such misconduct does not occur. In addition, any query about regulating corporate conduct in relation to human rights violations shall be first addressed through the judicial system established by the host government and, possibly, in the international system as a last resort. This is because under international law, a victim must first absorb all its rights in a domestic

⁵⁹⁵ Stephen Tully, ed. *Corporations and International Lawmaking* (Brill 2007).

court before seeking judicial remedy at an international court.⁵⁹⁶ An implication of this is that the victim “must first have an opportunity to redress the situation complained of by its own means and within the framework of its own domestic legal system. The international court or tribunal may only deal with the matter after all domestic remedies have been exhausted”⁵⁹⁷ or if the court suspected that the victims may not be provided with adequate remedy or justice at the domestic court.

Moving on, the final question related to this diagram concerns itself with the type and level of liability required, the type of transparency and cooperation required to establish a corporate duty of care. This particular question relates to corporate business operations, corporate conduct in society, and corporate dealings with the government. This accountability should be in the form of providing information about corporate financial relations, procedure of corporate operations, programmes, risk assessment, environmental risk assessment, economic impact on livelihood of the people, trades, and steps taken to ensure the company adheres to human rights law (what is termed “pragmatic accountability”).⁵⁹⁸ This means that in business operations, the corporation should have an obligation to provide information about its conduct when it is asked or required to do so either by the authorising domestic body or an international body. However, it should be noted as well that under domestic law, international law and human rights law, that corporations may have a “right to silence”.⁵⁹⁹ Nonetheless, the proposed duty of care advocated here should allow both domestic and international judicial

⁵⁹⁶ Silvia d'Ascoli and Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in The Specific Context of Human Rights Protection* (2007). “The rule of exhaustion of local remedies started as an international law principle relating to diplomatic protection. The idea was that a measure of respect should be accorded to the respondent state and its legal rules. In human rights law, the rule of local remedies is based on the principle that states should be primary enforcers of Convention rights. In the judicial field, the principle has found expression, procedurally, in the exhaustion of domestic remedies rule and, substantively, in the margin of appreciation and similar deference-granting doctrines. These judicial manifestations of the subsidiarity principle should particularly likely to appear in the context of courts exercising jurisdiction over individual human rights complaints”.

⁵⁹⁷ Martin Kuijter, *Effective Remedies as a Fundamental Right* Seminar on *Human Rights and Access to Justice in The EU, Barcelona* (2014).

⁵⁹⁸ Amanda Sinclair, ‘The Chameleon of Accountability: Forms and Discourses’ (1995) 20 (2) *Accounting, Organizations and Society* 19, 237.

⁵⁹⁹ Origins of Right to Silence. In the nineteenth century, a defendant in criminal proceedings was not allowed to give evidence on his own behalf. The privilege against self-incrimination embracing the right to silence grew up to protect him in case he said anything to incriminate himself when he was arrested, but was unable ever to put it right. The privilege has however been eroded in certain circumstances by statute. The right to remain silent is a legal right recognised, explicitly or by convention, in many of the world's legal systems. The right covers a number of issues centered on the right of the accused or the defendant to refuse to comment or provide an answer when questioned, either prior to or during legal proceedings in a court of law. This can be the right to avoid self-incrimination or the right to remain silent when questioned. Gregory W O'reilly, ‘England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice’ (1994) 85 (2) *Journal of Criminal Law and Criminology* 402, 452.

systems to override the right to silence, where it is established that the corporation has intentionally violated human rights for business benefits. A possible explanation for this might be that the judicial institution at both domestic and international legal system can impose a duty of care on the corporation to provide information about its business operations. Corporate duty of care is also about generating and disclosing information. The evaluation of the adequacy of a corporation's human rights duty of care should include an assessment of its disclosure practices. An adequate human rights duty of care process should require the disclosure of information about human rights policies, processes and their outcomes, as well as information about actual and potential adverse human rights impacts of specific activities or projects. Timely access to activity or project-specific information that is reliable, useful and accessible is critical to ensure genuine engagement and consultation with potentially affected individuals and communities. This, in turn, is essential for an accurate assessment of risk. Human rights duty of care and disclosure are intrinsically connected to accountability and indispensable for each other.

The last question regarding the diagram is why is the corporation obliged to render account to the appropriate authority (i.e. the domestic court, tribunal or international court)?⁶⁰⁰ This particular question is linked to the nature of the relationship between the corporation, government, society, and the tribunal or court. This obligation arises from the relationship between the corporation and the country it operates in because corporations should be responsible for their actions.⁶⁰¹ This also means that where the corporation is engaged in business misconduct, it is obliged to be accountable to that host state court or any judicial body created for the purposes of regulating corporate conduct (through referral). If this is not possible, then there must be an international mechanism to hold the corporation accountable for its misconduct.

The rationale behind this conceptualisation is that the connection between the corporation, the government, the judicial system, and society gives rise to accountability. There are several possible explanations for this, however, the main reasoning for this is that corporations are part of society. This establishes a special relationship between the corporation and society through the business operation. Therefore, the corporation can be held accountable where its act has violated domestic or international law and human rights law in the country in

⁶⁰⁰ Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford University Press 2008).

⁶⁰¹ Gabriel Moran, *A Grammar of Responsibility* (Crossroads 1996).

which it operates. Similarly, the relationship between the corporation, the government, the judicial system and society give rise to an effective, appropriate remedy, and sanction for the victims whose rights have been violated.

Therefore, the links establish that corporate accountability includes liability, which constitutes legal accountability, because legal accountability is a formalisation of social relations.⁶⁰² The corporate social relations in this thesis is a blanket term for interactions between business, government, or more people, groups, or organisations. Corporate social relationships are composed of an immense number of business operations, physical presence in a country, and environmental interactions that create a climate for the exchange of goods and service in the global economy. The diagram has an element of social relations to prove this. Thus, the suggestion in this particular section of accountability is clear on the established relationship between the corporation and the other actors such as government and society. This relationship has created the legal concept of accountability. However, the question is how the diagram can be used to plot accountability in such a way that the corporations can be held accountable for their actions in a host state judicial system or international tribunal or court.

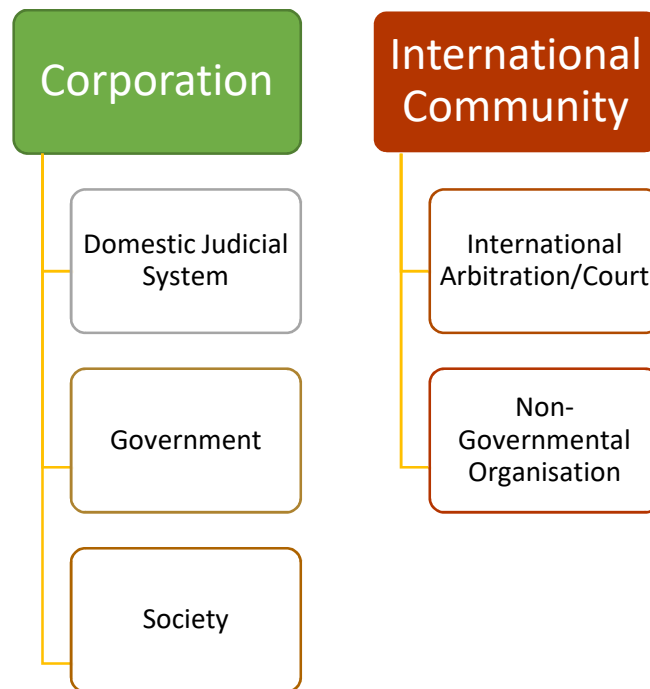
2.6. Plotting Accountability

Understanding the diagram above requires a mapping exercise. This is done by plotting accountability that closely matches the diagram 1 above. This procedure is the relationship between the corporation, the government, judicial system, and society. This is a dichotomous exercise that must follow a rationale of either/or.⁶⁰³ Therefore, in following the diagram, the main question that needs to be asked when plotting accountability is whether the corporation in question qualifies for legal corporate accountability (i.e. duty of care) or whether there is something else, such as the participation of other entities (supply chain/subsidiaries) or the responsibility of another entity. The next question is concerns itself with the type of accountability. The diagram below illustrates this view in a hierarchical order.

⁶⁰² Lawrence M Friedman, *Total Justice* (Russell Sage Foundation 1985).

⁶⁰³ Giovanni Sartori, 'Concept Misformation in Comparative Politics' (1970) 64 (4) *American Political Science Review* 1033,1053
<<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8935058&fileId=S0003055400133325>> accessed 4 July 2016.

Diagram 2. Plotting Corporate Accountability



The theoretical conception behind the diagram is that accountability takes the form of social relations and business operations. It may be the case therefore that these diagrams show that corporate accountability may have both horizontal and vertical interactions. This means that the corporate interaction is a relationship between the government and society. Therefore, the concept of accountability is derived from the corporate relationship. This relationship forms the foundation of legal accountability and the basis for analysing corporate conduct, government, and society. Hence, the concept as explained above confirms that accountability exists when corporations, government and society, are operating within social relations. It is argued that where there exist social relations and that it does not matter whether there are other elements that aid or give rise to misconduct of the corporation or 'human rights violations'.⁶⁰⁴

⁶⁰⁴ *R v White* [1910] 2 KB 124. The defendant put some poison in his mother's milk with the intention of killing her. The mother took a few sips and went to sleep and never woke up. Medical reports revealed that she died from a heart attack and not the poison. The defendant was not liable for her murder as his act of poisoning the milk was not the cause of death. He was liable for attempt. This case established the 'but for' test. ie would the result have occurred but for the actions of the defendant? If the answer is yes the defendant is not liable

Causation refers to the enquiry as to whether the defendant's conduct (or omission) caused the harm or damage. Causation must be established in all result crimes. Causation in criminal liability is divided into factual causation and legal causation. Factual causation is the starting point and consists of applying the 'but for' test. In most instances, where there exist no complicating factors, factual causation on its own will suffice to establish causation. However, in some circumstances it will also be necessary to consider legal causation. Under legal causation the result must be caused by a culpable act, there is no requirement that the act of the defendant was the only cause, there must be no *novus actus interveniens* and the defendant must take his victim as he finds him (thin skull rule)

The corporation should be accountable to the society through the government and judicial system.⁶⁰⁵ This is based on the principle of separation of power,⁶⁰⁶ however, the study also recognised that corporations can also be held accountable through both the government and judicial system. Therefore, the social relation is an approach which allows society or the state to build accountability mechanisms which establish a duty of care to hold corporations liable for their misconduct.

In this explanation, it can be said that corporate accountability is the ability to ask the corporations and their officials, stakeholders, supply chain and subsidiaries to provide an answer for their policies, actions, human right violations, and environmental damage that arise due to their misconduct. In summary, the duty of the state is to make sure that corporations are held accountable to the government and citizens, which stems from the concepts: citizen rights, information rights, and human rights.⁶⁰⁷ Accountability should offer mechanisms to monitor and protect human rights and the environment. The concept of accountability highlights citizens' rights to expect the government to act in the best interests of the people and to ensure that it does so in conjunction with other actors. Nonetheless, as interesting as this may sound, without domestic enforcement by government, accountability will not be successful. Therefore, the question is what is the role of international law in enforcing human rights accountability in domestic jurisdictions? What legal principle can be applied to hold the corporation accountable for its misconduct?

2.7. Analysing International Law Accountability for Multinational Corporations Human Rights Violations across Different Jurisdictions

The International Criminal Court shows international community's attempt to create an architecture of international criminal accountability through a national and international

⁶⁰⁵ This point is reach because international law and human rights law can only be enforce against the state. Therefore, International human rights law lays down obligations which states are bound to respect. 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, unless the corporation who have no legal duty under international law to protect human rights... Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Vol. 126 Cambridge University Press 2016).

⁶⁰⁶ William B Gwyn, *The Meaning of The Separation of Powers: an Analysis of The Doctrine from Its Origin to The Adoption of The United States Constitution* (Vol. 9. Tulane University 1965).

⁶⁰⁷ Jack Donnelly, *Universal Human Rights in Theory and Tractice* (Cornell University Press 2013).

mechanism presents an opportunity to enforce human rights in the most effective and direct way, by imposing a legal duty on those who violate human rights in the belief that they can do so with impunity. Examples of these actors are Multinational Corporations (MNCs), governments and governmental institutions, and non-state actors.⁶⁰⁸ However, as a matter of history, the evidence does not easily support such a legal concept. What maybe clear from this development is that the duties of states, international community, and Non-Governmental Organisation (NGOs) regard corporate human rights accountability as indeterminate.⁶⁰⁹

Corporate liability has been introduced in most jurisdictions enabling courts to sanction corporate entities for their criminal acts; but that there is also a general trend in most countries towards bringing corporate entities to justice for their human rights violations or the criminal acts of their officers.⁶¹⁰ In those countries where there is no corporate liability per se, there is either quasi-criminal liability or the introduction of corporate criminal liability is being considered. A notable exception is Germany, where the strong feeling is that imposing corporate criminal liability would offend against the basic principles of the German Criminal Code.⁶¹¹ Nevertheless Germany's regulators have taken robust regulatory action against various German companies as a result of their criminal conduct, imposing large fines which have caused significant reputational damage. Arguably, this has been as effective as any criminal sanction.⁶¹² In all jurisdictions where the concept of corporate, or quasi-corporate, criminal liability exists, it is, with the exception of the UK and the Netherlands, a relatively new concept.⁶¹³ Those countries apart, France was the first European country to introduce the concept of corporate criminal liability in 1994,⁶¹⁴ followed by Belgium in 1999, Italy in 2001, Poland in 2003, Romania in 2006 and Luxembourg and Spain in 2010. In the Czech Republic, an act creating corporate criminal liability has become law as of 1 January 2012.⁶¹⁵ Even in the UK where criminal liability for corporate entities has existed for decades, many offences

⁶⁰⁸ Michael J Kelly, 'Ending Corporate Impunity for Genocide: The Case Against China's State-Owned Petroleum Company in Sudan' (2011) 90 *Oregon Law Review* 413.

⁶⁰⁹ David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 (4) *American Journal of International Law* 901, 922.

⁶¹⁰ Clifford Chance, 'Corporate Liability in Europe' (2016). <
https://www.cliffordchance.com/briefings/2016/04/corporate_criminalliability.html> accessed 20 June 2017.

⁶¹¹ *The German Criminal Code: a Modern English Translation* (Bloomsbury Publishing 2008).

⁶¹² *Ibid.*

⁶¹³ James Gobert and Ana-Maria Pascal, eds. *European Developments in Corporate Criminal Liability* (Taylor & Francis 2011).

⁶¹⁴ Guy Stessens, 'Corporate Criminal Liability: a Comparative Perspective' (1994) 43 (3) *International and Comparative Law Quarterly* 493, 520.

⁶¹⁵ Clifford Chance (n 608)

focussing on corporate criminal liability have been created in recent years. In the Netherlands, until 1976 only fiscal offences could be brought against corporate entities.⁶¹⁶

For instant, in Belgium, except for offences of strict liability, a corporate entity can avoid criminal liability altogether by proving that it exercised proper due diligence in the hiring or supervising of the person that committed the offence and that the offence was not the consequence of defective internal systems and controls; whilst in Germany, a corporate entity's owner or representatives can be held liable (within the regulatory context) if they fail to take adequate supervisory measures to prevent a breach of duty by an employee, but it is a defence for the owner and the representatives to show that they had taken adequate preventative measures.⁶¹⁷ In Italy, the corporate entity has an affirmative defence if it can show that it had in place and effectively implemented adequate management systems and controls. Likewise, in Spain, corporate entities will not be criminally liable if they enforce appropriate supervision policies over their employees.⁶¹⁸ In Poland the corporate entity is only liable if it failed to exercise due diligence in hiring or supervising the offender or if the corporate entity's representatives failed to exercise due diligence in preventing the commission of an offence; and in Romania, the corporate is only liable if the commission of the offence is due to the latter's lack of supervision or control.⁶¹⁹

In some jurisdictions, measures taken by a corporate entity to prevent the commission of offences may be mitigating factors upon sentence. For example, in Italy a fine imposed on a corporate entity will be reduced by 50% if, prior to trial, a corporate has adopted necessary and preventative internal systems and controls.⁶²⁰ Even where it is not an express defence or it is not taken into account expressly as a mitigating factor, the adequacy of a corporate entity's processes and procedures is likely to be relevant both to regulators, prosecutors and courts in determining whether to prosecute and, if prosecuted, in deciding what penalty to apply. For instance, in France, the existence of adequate compliance procedures and control systems may be taken into account by the courts in considering the context of the offending, even though compliance procedures, of themselves, do not constitute an affirmative defence.⁶²¹ A possible view of these legal systems is that the importance placed on adequate legal systems and controls

⁶¹⁶ Sally S Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press 2002).

⁶¹⁷ Clifford Chance (n 608)

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

⁶²⁰ *Ibid.*

⁶²¹ *Ibid.*

by applicable legislation, and more broadly by prosecuting authorities and courts, demonstrates the importance of having such an effective corporate accountability system in place at the corporate level, domestic level and international level.

On the other hand, the work of other states, international institutions and NGOs since the 1980s has yielded an impressive body of treaties, conventions, self-regulatory mechanisms, judicial opinions and doctrines on corporate accountability.⁶²² Even though there is a lack of coherent codification of international accountability for corporate human rights violations, domestic courts, international, and hybrid tribunals for international crime, and the investigatory commission has created significant case law that elaborates the substantive norms of human rights accountability.⁶²³ However, these findings cannot be extrapolated to all corporate human rights violations due to the fact that the mechanism, while of great variety and now quite active, do not work with full vigour and regularity. Examples of this include the Alien Tort Act,⁶²⁴ *Kiobel v Royal Dutch Petroleum*,⁶²⁵ and *Sosa v Alvarez-Machain*.⁶²⁶ This approach while similar to the European States criminal liability mechanism, has the potential to leave corporate accountability inconsistent and in many ways exceptional. An interesting conclusion can be drawn from the evidence above. This development means that to accelerate the prospects for corporate human rights accountability needs national and international community decision-makers ought to take action based on developments that date back to Nuremberg,⁶²⁷ and the European States concept of corporate criminal liability. This is because the burden of enforcing international law, human rights law, and promoting corporate human rights accountability, should remain partly on governments and the international community⁶²⁸

⁶²² John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights (Norton Global Ethics Series)* (WW Norton & Company 2013).

⁶²³ Tawhida Ahmed and Israel de Jesús Butler. 'The European Union and Human Rights: An International Law Perspective' (2006) 17 (4) *European Journal of International Law* 771, 801.

⁶²⁴ The Alien Tort Statute (28 USC. § 1350; ATS)

⁶²⁵ *Kiobel v Royal Dutch Petroleum*, No. 10–1491 (US Apr. 17, 2013). The Supreme Court's concerns about extraterritoriality bore strong echoes of another recent Supreme Court decision, *Morrison v National Australia Bank*, 561 US (2010), in which the Court held that United States statutes (in that case, federal securities laws) were subject to a "presumption against extraterritoriality".

⁶²⁶ *Sosa v Alvarez-Machain* 542 US 692, "The Supreme Court reversed. It clarified that the ATS did not create a cause of action, but instead merely "furnish[ed] jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Such actions must rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th century paradigms we have recognised. Although the scope of the ATS is not limited to violations of international law recognised in the 18th century, with respect to recognising contemporary international norms, the court's opinion stated that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door keeping".

⁶²⁷ Telford Taylor, *The Anatomy of The Nuremberg Trials: A Personal Memoir* (Knopf 2012).

⁶²⁸ Michel Rocard, "What is The International Community?" (2013). "The term refers, more pragmatically, to all countries when they decide to act together. Still another, more accurate definition encompasses all countries with international influence that is, any country whose identity and sovereignty is recognised,

(which include international courts and tribunals, but not necessarily treaties). The international community, international courts, and domestic courts should also seek to codify human rights violations and develop strategies, enforcement and remedies through the tort and civil law mechanism.

However, there are other possible explanations for the argument of corporate accountability dating back to Nuremberg in 1945 and 1946.⁶²⁹ Two possible reasons that can be observed in this study in addition to international corporate accountability doctrine are explained here. The first is that a domestic court, through a judicial panel implementing international norms, must include corporate obligations (the duty of care) and definitions of remedies from treaties as well as a universal jurisdiction⁶³⁰ that will allow international human rights violations to be heard in the domestic judicial system and international court. It must also be made clear that this will require national states' willingness in addition to a meaningful sanctions process against corporations involved. The second is that international law, through treaties on human rights and crimes against humanity, must permit the application of universal jurisdiction in tort law and should require states to extradite corporate official or bring proceedings against corporations for human rights abuses committed abroad. Nonetheless, this thesis acknowledges that the application of universal jurisdiction⁶³¹ can be problematic in domestic courts. However, this study reinforces the notion that international human rights law should have a universal application.⁶³² This will pave the way to a greater emphasis on activating the international mechanism in those situations where domestic courts cannot or will not function effectively.

In addition, in regard to MNCs' human rights accountability, what this research is advocating here is for a corporate liability that is based purely on the current principle of tort and civil law accountability that has its liability and enforcement through negligence and the eggshell skull rule. The present study raises the possibility that tort and civil law will provide a better mechanism for corporation human rights violation than criminal law, because the tort

and that chooses to participate in global discussions and decision-making. Beyond semantics lies the more consequential, but equally ambiguous, question of the international community's role and responsibility".

⁶²⁹ Gwynne. Skinner, 'Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in US Courts under the Alien Tort Statute' (2008).

⁶³⁰ Schachter Oscar, *International Law in Theory and Practice* (Vol. 13. Martinus Nijhoff Publishers 1991)

⁶³¹ Cherif M Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice' (2001) 42 *Virginia Journal of International Law* 81.

⁶³² Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press 2002).

and civil law may shift the burden of proof to the corporation. However, it is imperative to note that there is not much distinction between liability under tort law and criminal law, as their liability in legal principle coexists.⁶³³ This study favours the tort and civil law system, because the requirement of intention and burden of proof is less substantial than criminal law. Therefore, in principle, the concept of MNCs' accountability for human rights abuses should be a discrete subject that must consist of the four interrelated bodies of law (such as; tort and civil law, international criminal law,⁶³⁴ humanitarian law,⁶³⁵ and human rights law⁶³⁶). A possible explanation for this might be that to pay too much attention to only one or two of these bodies of law, for the sake of clarifying a legal concept, will miss the full picture of MNC's accountability and remedy under international law, and human rights abuses committed in either the host or home state.

In relation to corporate liability, no uniform regulation exists at the international level. As explained above, some countries, such as Germany, do not provide for corporate liability at all, while other countries do have this provision (Switzerland for instance). However, in the case of Switzerland, existing regulations have rarely been put into practice.⁶³⁷ Although some countries have successfully provided civil remedies for human rights violations caused by corporations, including the UK, US and the Netherlands,⁶³⁸ this remains limited. Consequently, in a broad analysis of corporate accountability, it is contested that corporate accountability does not exist and, where it is present, it is ineffective and lacks coherence.⁶³⁹ This study argues that the current concept of corporate accountability is outdated, unrealistic and it does not conform with the current expansion of the global economy. Therefore, there is a need for a concept of

⁶³³ Criminal law and civil law overlap because they address different issues that arise from the same events. The criminal law is designed to protect the community generally but civil law allow redress to be made to those individuals that are directly harmed by a person's actions.

⁶³⁴ Jordan L Paust, Michael P Scharf, Leila Sadat, Cherif M Bassiouni, Jimmy Gurulé, Bruce Zagaris, and Sharon A Williams, *International Criminal Law* (Durham NC Carolina Academic Press 2000).

⁶³⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Vol. 1. Cambridge University Press 2005). International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.

⁶³⁶ Paul Sieghart, *The International Law of Human Rights* (Oxford University Press 1983).

⁶³⁷ Art. 102 Schweizerisches Strafgesetzbuch, BBl. 2002 (Schweizerisches Gesetzesblatt).

⁶³⁸ P.M. Maduna, 'Declaration by Justice Minister Pennell Maduna on Apartheid Litigation in The United States', 11 July 2003. <www.info.gov.za/otherdocs/2003/apartheid.pdf> 15 November 2016. It should be mentioned though, that the South African government just recently gave up this position and now supports the lawsuit openly. Minister Justice and Constitutional Development. 'Re South African Apartheid Litigation' (MDL 1499). <http://www.kosa.org/documents/09~09~OJ_MinJusticeRSAto_JudgeBcheidlin.pdf> 15 November 2016, also see; Magdalena Bexell, 'Distribution of Responsibility for Human Rights Protection: The Public-Private Distinction' (2004) *Die Friedens-Warte* 103, 118

⁶³⁹ Steven R Ratner, 'Corporations and Human Rights: a Theory of Legal Responsibility' (2001) 111 (3) *Yale Law Journal* 443, 545.

corporate accountability, which implements a notion of social relations. This means moving the legal notion of corporate personality and impunity to a duty of care not to harm one's neighbour.

It is possible, therefore, that the examinations of MNC's liability for human rights violations can be looked in international human rights law, international humanitarian law, and international criminal law. This study will suggest future research in this area as this will help to measure MNC's accountability in the obligations that arise from these bodies of law. Having said that, this research will limit this part of the study to only international human rights law accountability as this notion is to develop corporate accountability and remedy through tort and civil law by applying the tort of negligence as the foundation to establish corporate liability for human rights abuses.

2.8. Summary

Emerging findings from this chapter thus far state that corporations should be held accountable to the different players in the environments in which they operate, such as governments, judicial systems, and society. It is also clear that the government, corporation, society, and the court are key actors in what has been termed "the concept of accountability". However, it has also been found that for the corporation to be held accountable, it must meet the legal relationship laid down in the diagrams; there must be a social relationship between the government, the corporation and society.⁶⁴⁰ Thus, if these relationships are established then there is accountability and there must be a legal implication as a result of this accountability. Lastly, it was also observed that where there exists accountability, there must exist sanctions and effective remedies for victims that have suffered through the principle of a duty of care. This is because of the particular act that arises from corporate business practice or corporate officials' conduct that is connected to the business purpose.

Furthermore, corporate accountability for human rights violations in international legal systems has proven to be a watershed. This is because there exist inadequacies in the existing

⁶⁴⁰ Zoltán Farkas, 'The Concept and Types of Social Relationship' (2014) 32 (1) *Társadalomkutatás* 10, 23. Broadly defined, social relationships refer to the connections that exist between people who have recurring interactions that are perceived by the participants to have personal meaning. This definition includes relationships between family members, friends, neighbours, co-workers, and other associates but excludes social contacts and interactions that are fleeting, incidental, or perceived to have limited significance (e.g., time limited interactions with service providers or retail employees).

accountability mechanisms as well as several other legal problems and factual obstacles that hinder the enforcement of human rights law and international criminal law.⁶⁴¹ This is also attributed to the problematic issues that persist, particularly with respect to the following: corporate criminal liability, the extraterritorial application of law, the attribution of criminal actions to specific agents, the requirements of accountability, the difficulties of extraterritorial investigations, and obtaining sufficient evidence for human rights violations.⁶⁴² Hence, looking at corporate accountability in this concept of the duty of care will help to breach the gap that has existed in corporate liability for human rights abuses and environmental damages.

2.9. Accountability in Relations to International Law and Human Rights Law

From the explanations above, it appears that the bodies of laws such as international law and UNCHR 1948, the UN Covenant on Civil and Political Rights 1966 and UN Covenant on Economic, Social, and Cultural Rights 1966, cohesively connects international criminal law with the social relations of humanity. Thus, the scope and extent of the international criminal law and human rights law has generated much debate in the academic world.⁶⁴³ However, there has been less debate on the concept of corporate duty of care not to harm your neighbour. Determining the extent to which international law acknowledges corporate accountability demands an inquiry that incorporates and elaborates the accountability of corporate human rights violations and prescribes the extensive and vigorous role for the state through the duty to act, but not merely a voluntary mechanism. It may be the case, therefore, that these could be explained through procedures which involve investigating the three subsidiary issues that in essence correspond to different strategies for providing corporate accountability and remedy in tort law:

1. To what extent does international human rights law directly provide corporate accountability for human rights violations?

⁶⁴¹ Wolfgang Kaleck and Miriam Saage-Maaß, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes The Status Quo and Its Challenges' (2010) 8 (3) *Journal of International Criminal Justice* 699, 724.

⁶⁴² Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive industries, Human Rights, and The Home State Advantage* (Routledge 2014).

⁶⁴³ Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007).

2. To what extent does international human rights law obligate some or all states or the international community to try vigorously and sanction, or otherwise punish, perpetrators of human rights abuses?
3. To what extent does international human rights law authorise these same actors to try to extensively sanction and punish perpetrators of human rights violations within their control?

A typical example is noted in the Genocide Convention 1948,⁶⁴⁴ where international law explicitly allows a state to make a criminal act under the Convention a crime under domestic law. The Genocide Convention also obligates a state or an international court to carry out prosecutions or sanctions, as with the Genocide Convention, or to extradite or prosecute the offender, as with the Torture Convention.⁶⁴⁵ Applying this to corporate accountability

⁶⁴⁴ UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277. <<http://www.refworld.org/docid/3ae6b3ac0.html>> accessed 4 October 2016.

⁶⁴⁵ Thomas E Baker, 'A Primer on The Jurisdiction of The US Courts of Appeals' (2009) 09 (01) *Florida International University Legal Studies Research Paper*, UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. <<http://www.refworld.org/docid/3ae6b3a94.html>> accessed 8 July 2017. "The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46). The Convention entered into force on 26 June 1987 after it had been ratified by 20 States. The Torture Convention was the result of many years' work, initiated soon after the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Declaration") by the General Assembly on 9 December 1975 (resolution 3452 (XXX)). The Torture Declaration was intended to be the starting-point for further work against torture. In a second resolution, also adopted on 9 December 1975, the General Assembly requested the Commission on Human Rights to study the question of torture and any necessary steps for ensuring the effective observance of the Torture Declaration (resolution 3453 (XXX)). Two years later, on 8 December 1977, the General Assembly specifically requested the Commission on Human Rights to draw up a draft convention against torture and other cruel, inhuman or degrading treatment or punishment, in the light of the principles embodied in the Torture Declaration (resolution 32/62)". Most of the provisions of the Torture Convention deal with the obligations of the States parties. These obligations may be summarized as follows:

- (i) Each State party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture. The prohibition against torture shall be absolute and shall be upheld also in a state of war and in other exceptional circumstances (article 2);
- (ii) No State party may expel or extradite a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture (article 3);
- (iii) Each State party shall ensure that acts of torture are serious criminal offences within its legal system (article 4);
- (iv) Each State party shall, on certain conditions, take a person suspected of the offence of torture into custody and make a preliminary inquiry into the facts (article 6);
- (v) Each State party shall either extradite a person suspected of the offence of torture or submit the case to its own authorities for prosecution (article 7);
- (vi) Each State party shall ensure that its authorities make investigations when there is reasonable ground to believe that an act of torture has been committed (article 12);
- (vii) Each State party shall ensure that an individual who alleges that he has been subjected to torture will have his case examined by the competent authorities (article 13);

allows states or international courts to try and punish MNCs and their officials for a specific act, irrespective of normal jurisdictional limits.⁶⁴⁶ The approach by the international communities is observed in the strategies adopted by the UN Security Council's statutes for the *ad hoc* tribunals in Yugoslavia and Rwanda and the Statute of the International Criminal Court⁶⁴⁷ to address the crimes under the Genocide Convention.⁶⁴⁸

Although there is a substantial flaw in the principles of the Genocide Convention and the definition of these crimes, as well as its context and application,⁶⁴⁹ this study does not dispute or ignore this flaw but argues that this principle can form the basis of the universal application of a tort law norm. It can, therefore, be assumed that the methods by which the law provides for individual criminal responsibility can form the basis for a varied list of corporate accountability for human rights violations as well, though not the solution for liability and remedy. This is partly because tort law addresses individual rights to claim remedies, despite such rights for individual redress not existing under criminal law. Referring to the International

(viii) Each State party shall ensure to victims of torture an enforceable right to fair and adequate compensation (article 14).

⁶⁴⁶Yoram Dinstein, 'International Criminal Law' (1985) 20 *Israel Law Review* 206.

⁶⁴⁷ UN Security Council, *Resolution 827 (1993) Adopted by the Security Council at Its 3217th Meeting, On 25 May 1993*, 25 May 1993, S/RES/827 (1993) <<http://www.refworld.org/docid/3b00f21b1c.html>> accessed 4 October 2016.

⁶⁴⁸ *Darfur, Prosecutor v Al Bashir (Omar Hassan)*, Decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, Case no ICC-02/05-01/09-139, ICL 912 (ICC 2011), 12th December 2011, International Criminal Court [ICC]; Pre Trial Chamber I [ICC]. "The warrants of arrest for Omar Al Bashir list ten counts on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co)perpetrator including: Five counts of crimes against humanity: murder (article 7(1)(a)); extermination (article 7(1)(b)); forcible transfer (article 7(1)(d)); torture (article 7(1)(f)); and rape (article 7(1)(g)); Two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (article 8(2)(e)(i)); and pillaging (article 8(2)(e)(v)); and Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c)".

⁶⁴⁹ Jongsok Oh, 'The Prosecutor's Dilemma-Strengths and Flaws of The Genocide Convention' (2003) 10 *Murdoch University Electronic Journal of Law* 4, David Chuter, *War Crimes* (Lynne Rienner Publishers 2003). "Chuter specifically uses the nuclear weapon analogy to refer to genocide as being useful politically in terms of rhetoric; a "term of abuse" to thrust at someone when you want to decry their actions as evil and horrifying (perhaps similar to the use of the word "terrorist"). In the political sphere, strenuous efforts were made by the Clinton administration to avoid use of the word genocide with respect to the situation in Rwanda. There was fear that use of the term would open the door to a legal obligation and that they might have to "do something". Samantha Power, 'Raising the Cost of Genocide' (2003) *Dissent Magazine*. <<http://www.dissentmagazine.org/article/raising-the-cost-of-genocide>> accessed 8 July 2017 However, there has not been any form of accountability for the inaction. Similarly, when the Bush administration declared that there was genocide in Darfur, it led only to a referral to the UN Security Council (UNSC) and a commission of inquiry despite the hopes of campaigners. Peter Quayle, 'Unimaginable Evil: The Legislative Limitations of the Genocide Convention' (2005) 5 (3) *International Criminal Law Review* 363, 372 and David Chuter, *War Crimes: Confronting Atrocity in the Modern World* (Lynne Rienner Publishers 2003).

Criminal Tribunal for Rwanda (ICTR) Statute, Article 6 “1. A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime. 2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”.⁶⁵⁰ On the other hand, tort law implicitly concerns itself with individual responsibilities that people have with one another, as opposed to those responsibilities laid out in criminal law. Tort law provides legal remedies, often with the payment of money, to those who have been damaged by someone else's failure to meet these implicit responsibilities, while criminal law exists to punish an individual for criminals and not to provide remedies for individuals who have been inflicted with harm.⁶⁵¹

The international community's dependence on all three international law bodies⁶⁵² indicates that a violation of international law becomes an international crime if the international community agreed through any of these laws⁶⁵³ (regardless of whether they are implemented through treaty, custom, or another prescriptive method) to hold individuals or any actors accountable⁶⁵⁴ for human rights violations. A consequence of this is the possibility that MNCs may be held accountable if these principles are to be adopted and enforced via tort or civil law. This is because the presumption here is that fundamental human rights are part of all domestic law.⁶⁵⁵ In a critical analysis, it can be assumed that accountability shares some of the goals and

⁶⁵⁰ UN General Assembly, *Rome Statute of The International Criminal Court (Last Amended 2010)* (1998). <<http://www.refworld.org/docid/3ae6b3a84.html>> accessed 8 July 2017

⁶⁵¹ Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2003) 72 *Fordham Law Review* 1811.

⁶⁵² International law, International Humanitarian Law and International Criminal Law.

⁶⁵³ International Criminal Tribunal for former Yugoslavia, *Prosecutor v Kunarac*, Judgment of 22 February 2001, para. 467: “Because of the paucity of precedent in the field of international criminal law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of human rights law and humanitarian law. With regard to certain of its aspects, international criminal law can be said to have fused with human rights law and humanitarian law. *Coard et al. v United States*, Case No. 10.951, 29 September 1999, para. 39. “First, while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of international criminal law, human rights, and humanitarian law because they share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity”, and “there may be a substantial overlap in the application of these bodies of law”.

⁶⁵⁴ Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) *American Journal of International Law* 554, 577.

⁶⁵⁵ Andrew Z Drzemczewski, *European Human Rights Convention in Domestic Law: a Comparative Study* (Oxford University Press 1985). Using the United Kingdom as an example in this study, “The Human Rights Act 1998 (the Act or the HRA) sets out the fundamental rights and freedoms that everyone in the UK is entitled to. In practice, the Act has three main effects: 1. it incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. This means that if your

methods of international human rights, so holding MNCs liable under this principle of tort and civil law is an evolutionary process rather than a new developing concept. This assumption is reached because human rights law, obligations and accountability of these violations are incorporated into international law.⁶⁵⁶ Therefore, the fact that this study uses the term ‘rights’ to describe this civil wrong, rather than the language of a duty, indicates nothing important. Likewise, the duties of care acknowledged under the law of negligence can be said to be just as much about human rights as the rights derived from tort law. This means that the duty of care arising under the neighbourhood principles exists to protect the rights of people and the environment. Hence, a rebuttable presumption exists that where there is a duty of care to protect people and the environment, there exists an effective remedy.

What this means is that corporate accountability gives rise to two duties of care. These duties are divided into duties that are owed to other people and duties that are owed to no one in particular. The first is private duties⁶⁵⁷ and the second set of duties that are owed to no one, in particular, is public duties.⁶⁵⁸ So, a given duty is owed to someone else if it was imposed for the benefit of that someone else, and a given duty is owed to no one in particular if it was imposed for the benefit of the community as a whole or for the benefit of some section of the community. Arguably, the corporate duty of care falls into both categories of duties of care imposed for the benefit of the individual or the community, in order to not violate their rights through a negligent conduct.⁶⁵⁹ The tort of negligence imposes a duty of care on the corporation for the benefit of the community in which the corporation is conducting its business operations.

human rights have been breached, you can take your case to a British court rather than having to seek justice from the European Court of Human Rights in Strasbourg, France. 2. It requires all public bodies (like courts, police, local authorities, hospitals and publicly funded schools) and other bodies carrying out public functions to respect and protect your human rights. In practice it means that Parliament will nearly always seek to ensure that new laws are compatible with the rights set out in the European Convention on Human Rights (although ultimately Parliament is sovereign and can pass laws which are incompatible). The courts will also where possible interpret laws in a way which is compatible with Convention rights.

⁶⁵⁶ Anthony D'Amato, 'Human Rights as Part of Customary International Law: a Plea for Change of Paradigms' (1995) 25 *Georgia Journal of International & Comparative Law* 47.

⁶⁵⁷ James D Barnett, 'The Foundations of The Distinction between Public and Private Functions in Respect to The Common-Law Tort Liability of Municipal Corporations' (1936) 16 *Oregon Law Review* 250.

⁶⁵⁸ Joseph W Glannon, 'Liability for "Public Duties" Under The Tort Claims Act: The Legislature Reconsiders The Public Duty Rule' (1994) 79 *Massachusetts Law Review* 17.

⁶⁵⁹ Negligent torts are the most prevalent type of tort. Negligent torts are not deliberate actions, but instead present when an individual or entity fails to act as a reasonable person to someone whom he or she owes a duty to. The negligent action found in this particular tort leads to a personal injury or monetary damages. The elements which constitute a negligent tort are the following: a person must owe a duty or service to the victim in question; the individual who owes the duty must violate the promise or obligation; an injury then must arise because of that specific violation; and the injury causes must have been reasonably foreseeable as a result of the person's negligent actions. Brenda Mothersole and Ann Ridley, 'Tort of Negligence' *A-Level Law in Action* (Macmillan Education UK 1995) pp. 211, 230.

In contrast, if one takes two given individuals, A and B, A will have a duty under international law and human rights law not to pursue a course of conduct that will harm their (a) human rights and the environment which they live in and (b) the harm which they know or ought to know may have amounted to a violation of international law and human rights law. A's duty is owed to B; it is imposed on A for the benefit of a particular individual, B.

Equally, this research has found that international criminal law cannot be viewed as an alternative to substitute or enforce international human rights law on corporations, as demonstrated above in the concept of a duty of care and below in the Khmer Rouge case study.⁶⁶⁰ Thus, findings here may help us to understand the relationship between the corporate duty of care, international law procedure, and human rights. The notion here is that tort and civil law can address a variety of acts⁶⁶¹ beyond the current human rights law, such as forced labour, other environmental-related acts, human rights offences, organised crime, corruption, mercenaries, and the initiation of an aggressive war through indirect corporate conduct.⁶⁶² This is because tort law is based on a reasonable conduct so that no one can be held liable in negligence for acting reasonably. It can also be argued that the tort of negligence may not apply to organised crime, corruption, or money laundering, however, if it can be established that the requirement of a negligence conduct exists (duty of care). This is also the case if one can prove that there exists an assumption that the corporation acted negligently, and that liability should be imposed on the corporation for breaching its duty of care. It is therefore not possible for the court to find that A owed B a duty to not cause harm if it was reasonable for A to act in such a way. In contrast, the fact that A acted reasonably will not always prevent them from being held liable for committing a tort. This duty of care may be explained by the fact that a corporation

⁶⁶⁰ Ben Kiernan, *The Pol Pot Regime: Race, Power, and Genocide in Cambodia under The Khmer Rouge, 1975-79* (Yale University Press 2014).

⁶⁶¹ There is two reasoning behind this approach, the first is that the standard of prove and intention required to establish liability in tort of negligence is law and the second is that as a general rule, in a criminal case, the financial harm suffered by the victim as a result of a crime is not the issue. Instead, there is an assumption in criminal law that tort law exists to compensate the victim for the victim's financial harm. Tort case, the plaintiff must prove two things: (1) the defendant committed the tort and (2) as a result of the tort, the plaintiff or the plaintiff's property was injured. If a plaintiff can prove both, she is entitled to recover money damages from the defendant to compensate for the injury. The defendant is liable, which means he is responsible for paying the damages. In effect, criminal law provides a way of punishing people who commit crimes. It acts to protect all citizens from such wrongdoing. Criminal law is not concerned with the individual victim. The law of torts, on the other hand, provides a way to compensate victims of wrongful acts. Prosecutors must prove the guilt of a defendant beyond a reasonable doubt to obtain a conviction in a criminal case. If expressed in terms of probability of certainty of guilt, beyond a reasonable doubt would be around 97 percent. This means that prosecutors must introduce evidence to establish around a 97 percent certainty of the fact that the defendant committed the crime for which he or she is charged in order to obtain a guilty verdict from a jury

⁶⁶² Jordan L Paust, Michael P Scharf, Leila Sadat, Bassiouni M Cherif, Jimmy Gurulé, Bruce Zagaris and Sharon A Williams, *International Criminal Law* (Durham NC: Carolina Academic Press 2000).

is an artificial legal person,⁶⁶³ as noted by Lord Diplock, in *Tesco Supermarket Ltd v Natrass* that “it is incapable itself of doing any physical act or being in a state of mind”.⁶⁶⁴ If a corporation is to act, then it can only do so through a natural person, specifically, of course, through people who are capable of performing physical actions. Therefore, this creates a problem when one wishes to determine whether or not a corporation breached its duty of care owed to someone else.⁶⁶⁵ Hence, the question arises as to whose actions should the court look towards in order to determine whether or not that duty of care was breached. The facts in *Tesco Supermarkets*⁶⁶⁶ illustrate the problem.

In the *Tesco Supermarkets* case, a customer at a Tesco store was charged 3s 11d for a packet of washing powder when posters in the window of the store advertised that brand washing powder were on special offer at 2s 11d per packet. The general manager of the store, Mr. Clement, was at fault for this; he had failed to take reasonable steps to ensure that the store was stocked with some packets with the mark of a lower price. Tesco was charged with committing an offence under s 11 (2) of the Trade Descriptions Act 1968 which provided that “if any person offering to supply any good gives any indication likely to be taken in fact being offered he shall, subject to the provision of this Act, be guilty of an offence”. In their defence, Tesco sought to rely on s 24(1) of the Act which provided that “[i]n any proceedings for an offence under this Act, it shall be a defence for the person charged to prove (a) that the commission of the offence was due to the act or default of another person and (b) that he took reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control”.

Tesco could establish that (a) was true; the crime was committed because of Clément’s default. However, could it establish that (b) was true and that it took all reasonable care to ensure that its goods were not sold at a price higher than the advertised price? Clearly, Clement did not take such care, but did that mean that Tesco, Mr. Clément’s employer, did not take such care? More generally, whose actions should be looked at to determine whether Tesco took reasonable care to ensure that its goods were not sold at a price higher than the advertised price? The House of Lords’ answer was that one should look at the actions of those who represented

⁶⁶³ The incorporation of a company is an artificial entity recognised by the law as a legal person that exists independently with rights and liability. This means that a company is treated as a separate person from its participants.

⁶⁶⁴ *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

⁶⁶⁵ *Ibid.*

⁶⁶⁶ *Ibid.*

Tesco's guiding mind or will. Only if they failed to take care to ensure that Tesco's goods were not sold at a price higher than the advertised price would it be proper to say that Tesco failed to take care in ensuring that its goods were sold at a price higher than the advertised price. Clement, the House of Lords held, did not "function as the directing mind or will of the corporation" but he was being directed.⁶⁶⁷

The principle endorsed in *Tesco* that the court could ascertain what a corporation did at a particular time by looking at the acts of those who represented the guiding mind or will of the corporation at that time is well established.⁶⁶⁸ However, this principle has recently been brought into question at the highest level as it has been suggested that how the court ascertains what a corporation did depends very much on the nature and purpose of the legal rule which requires one to find out what that corporation did. In *Re Supply of Ready Mixed Concrete (No.2)*,⁶⁶⁹ four corporations which were engaged in the supply of ready mixed concrete entered into agreements with each other which fixed the prices at which they would supply ready mixed concrete to customers and determined what share each corporation would enjoy on the market for ready mixed concrete in the area in which the four corporations operated. These agreements were unlawful under s 35(1) of the Restrictive Trade Practices Act 1976. The Director General of Fair Trade obtained an injunction against the four corporations which required them not to enter into or give effect to any such agreement in future.

In a subsequent Privy Council Case, *Meridian Global Funds Management Asia Ltd v Securities Commission*,⁶⁷⁰ Lord Hoffmann, who gave the only judgment, endorsed the result in *Re Supply of Ready Mixed Concrete (No.2)* and reconciled it with the decision in the *Tesco* case by arguing that applying a particular legal rule to a company requires the courts to find out what that company did. The courts, furthermore, should adopt the approach of finding out what the company did that the creators of the legal rule in question intended them to adopt for the purpose of applying that rule. This is always a matter of interpretation: given that [the rule

⁶⁶⁷ *Ibid.*

⁶⁶⁸ It traces its origin to the judgement of Viscount Haldane LC in *Lennard's Carrying Co, Ltd v Asiatic Petroleum Co. Ltd* [1915] AC 705, 713. In *HL Bolton (Engineering) Co. Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159, 172. [a] company may in many ways be likened to a human body. It has a brain and a nerve centre which control what it does. It also has hands which hold the tools and act in accordance with direction from the centre. Some of the people in the company are mere servants or agents who are nothing more than hands to do work and cannot be said to represent the mind or will. Other are directors and managers who represent the directing mind or will of the company, and control what it does. The state of mind of these managers is the state of mind of the company as a condition of liability in tort, the fault of the manager will be the personal fault of the company.

⁶⁶⁹ *Supply of Ready Mixed Concrete* ([1992] QB 212).

⁶⁷⁰ *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] UKPC 5.

in question] was intended to apply to a company, how was the application of the rule applied? One finds the answer to this question by applying the usual canons of interpretation and by taking into account the language of the rule (if it is a statute) and its content and policy.⁶⁷¹ What this means is that in every case where an artificial legal person owed someone else a duty of care, the courts are confronted with the problem of whose actions should be looked at to determine whether or not that person breached that duty.

In the case of corporate accountability, that problem is solved by adopting the guiding mind or will principle according to whether the court determines what a corporation did at a particular time by looking at those who represent that corporation's guiding mind or will at that time. It can thus be suggested that elaborating on corporate accountability is derived directly from tort and civil law. The notion of a duty of care will pave the way to holding a corporation accountable for its misconduct(s). However, the question still remains, under what circumstance will international law hold corporations accountable for their human rights violations through the duty of care? The question of which violations of international law, including human rights law, do require accountability mechanisms is somewhat unsettled in the current literature.⁶⁷²

This present study raises the possibility that corporate accountability in tort and civil law overlaps with international human rights law, and so corporate accountability should follow the same concept when implementing international law and human rights obligations on non-state actors in the international arena, which include a corporation's duty of care to protect and respect human rights in the environment in which they operate. The explanation above supports the hypothesis that international human rights law is interrelated to other bodies of tort and civil law. Thus, international criminal law, international human rights, international humanitarian law⁶⁷³ and corporate accountability should not be considered separate but should be seen as part of one mechanism of enforcing human rights obligations in the international arena through tort and civil law mechanism. Likewise, it is argued that human rights obligations in the international arena have their foundation in the duty of care principle. Therefore, the corporate duty of care forms part of this correlation of international human rights. One of the emerging findings from this illustration is that when MNC's accountability and remedy is

⁶⁷¹ *Ibid.*

⁶⁷² Nguyen Quoc, Dinh Daillier, Patrick Pellet, Alain Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit International Public* (No. 341.1/. 8. Librairie Générale de Droit et de Jurisprudence (1975).

⁶⁷³ See the section above for the definition of the three international bodies of law.

viewed in the concept of tort and civil liability, it will provide international legal systems and domestic legal systems accountability and remedy procedures to follow.

Linking these accountability and remedy procedures to tort and civil law will ensure effective accountability and remedy for victims of human rights violations. Thus, tort and civil accountability should arise whenever a corporate violates human rights, damage the environment, or state fails to comply with applicable international human rights law, whether by violating human rights through corporate acts, failing to provide appropriate remedies for human rights abuse victims, or refusing to hold corporations accountable for human rights violations. Likewise, tort and civil law recognise exceptions of accountability for third-party behaviour, thus drawing on this legal principle will put pressure on the corporation to make sure that its operation conforms to human rights duties. This approach is also further supported by international law that acknowledges group civil responsibility (or tort liability) for human rights abuses, in particular for organised non-state actors such as guerrilla or secessionist movements.⁶⁷⁴ Indeed, international law has also acknowledged the determination of individual states to impose individual civil responsibility for human rights abuses through civil liability under the national law.⁶⁷⁵

With respect to the first research question set out in this thesis, it was found that the international criminal law, specifically that the Statute of Rome provides some sort of accountability for an act against human dignity, the Nuremberg trials and other prosecutions of Axis defendants clearly established individual and corporate accountability for human rights abuses, but this is limited in regards to awarding liability and remedy. Also, the most important proven relevant finding in the Nuremberg principle was that it allows corporate officials to be held accountable for corporate misconduct. An implication of this is the possibility that Nuremberg established a semi perfect platform for MNCs' liability for human rights violations under international law. Therefore, enforcing human rights accountability through the tort and civil law concept forms the other part of international human rights accountable. The principle of international criminal law as a platform, in conjunction with tort and civil law principle, ensures fairness and justice for victims of human rights abuses. This is because some of the issues emerging from this study relate specifically to the failure of the international criminal law to provide a direct remedy for the victim of human rights violations and environmental

⁶⁷⁴ Gerald G Fitzmaurice, 'Third Report on the Law of Treaties' (1958) 2 *Yearbook of the International Law Commission* 20.

⁶⁷⁵ Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press USA 2001).

damages. The failure in international criminal law is also a fundamental gap in international criminal law remedy, thus, including tort law remedy in this spectrum of corporate liability will fulfil this long standing injustice in remedy for victims under criminal law.

Chapter Three will examine accountability in the context of international criminal law. It will critically analyse whether tort law could provide a jurisdiction over all corporate human rights violations rather than international criminal law, such as summary executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association and assembly, environmental damage, forced labour, torture, unfair trial, aiding and abetting domestic government to violate rights, damage to livelihood, complicity in the commission of torture, extrajudicial killing, as well as all the fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights,⁶⁷⁶ specifically:

- forcibly evicting people from their homes (the right to adequate housing);⁶⁷⁷
- contaminating water, for example, with waste from state-owned facilities (the right to health);⁶⁷⁸
- minimum wage (rights at work);⁶⁷⁹

⁶⁷⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 24 September 2016.

⁶⁷⁷ *Ibid.* The obligation of States to refrain from, and protect against, forced evictions from home(s) and land arises from several international legal instruments including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (art. 11, para. 1), the Convention on the Rights of the Child (art. 27, para. 3), the non-discrimination provisions found in article 14, paragraph 2 (h), of the Convention on the Elimination of All Forms of Discrimination against Women, and article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. Forced evictions are often linked to the absence of legally secure tenure, which constitutes an essential element of the right to adequate housing. Forced evictions share many consequences similar to those resulting from arbitrary displacement, including population transfer, mass expulsions, mass exodus, ethnic cleansing and other practices involving the coerced and involuntary displacement of people from their lands and communities. Forced evictions constitute gross violations of a range of internationally recognised human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, freedom from cruel, inhuman and degrading treatment, and freedom of movement.

⁶⁷⁸ *Ibid.* A violation of economic, social and cultural rights occurs when a State fails in its obligations to ensure that they are enjoyed without discrimination or in its obligation to respect, protect and fulfil them. Often a violation of one of the rights is linked to a violation of other rights. This include contaminating water, for example, with waste from State-owned facilities (the right to health

⁶⁷⁹ *Ibid.* Violations of economic, social and cultural rights include:

- Failure to ensure a minimum wage sufficient for a decent living (rights at work)
- Failure to prevent starvation in all areas and communities in the country (freedom from hunger)
- Denying access to information and services related to sexual and reproductive health (the right to health)
- Systematically segregating children with disabilities from mainstream schools (the right to education)
- Failure to prevent employers from discriminating in recruitment (based on sex, disability, race, political opinion, social origin, HIV status, etc.) (The right to work)

- failure to prevent employers from discriminating in recruitment (based on sex, disability, race, political opinion, class, social origin, HIV status, etc.) (the right to work);⁶⁸⁰
- destroying or contaminating food and its source, such as arable land and water (the right to food);⁶⁸¹
- failure to provide for a reasonable limitation of working hours (rights at work);⁶⁸²
- banning the use of minority or indigenous languages (the right to participate in cultural life); and arbitrary and illegal disconnection of water for personal and domestic use (the right to water).⁶⁸³

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- Failure to prohibit public and private entities from destroying or contaminating food and its source, such as arable land and water (the right to food)
 - Failure to provide for a reasonable limitation of working hours in the public and private sector (rights at work)
 - Banning the use of minority or indigenous languages (the right to participate in cultural life)
 - Denying social assistance to people because of their status (e.g., people without a fixed domicile, asylum-seekers) (the right to social security)
 - Failure to ensure maternity leave for working mothers (protection of and assistance to the family)
 - Arbitrary and illegal disconnection of water for personal and domestic use (the right to water)

⁶⁸⁰ *Ibid.*

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.*

Chapter III

3. Aims and Objectives

The objective of this chapter is to examine to what extent international criminal law can influence international human rights law for use in tort law and civil law remedies. This chapter examines the current international criminal law principles and covenants to measure their efficacy at protecting human rights in relation to corporation human rights abuses in tort and civil law settings. It also examines the effectiveness of the international criminal law system in prosecuting individual crimes under the doctrine of state responsibility and international crime in the international community. This study then moves on to argue that even though the international criminal system has been effective at prosecuting individuals for international crimes prohibited under international law, it cannot similarly help to achieve tort and civil remedies for corporations' human rights violations when these mainly occur in a host country. It furthermore achieves this by explaining the differences between international human rights⁶⁸⁴ law, international humanitarian law,⁶⁸⁵ and international criminal law,⁶⁸⁶ as well as explaining

⁶⁸⁴ Javaid Rehman, *International Human Rights Law* (Pearson education 2010). Human rights law is defined as: "Human rights are rights inherent to all human beings, regardless of gender, nationality, place of residency, sex, ethnicity, religion, colour or and other categorisation. Thus, human rights are non-discriminatory, meaning that all human beings are entitled to them and cannot be excluded from them. of course, while all human beings are entitled to human rights, not all human beings experience them equally throughout the world. Many governments and individuals ignore human rights and grossly exploit other human beings .There are a variety of human rights, including: Civil rights (such as the rights to life, liberty and security), Political rights (like rights to the protection of the law and equality before the law), Economic rights (including rights to work, to own property and to receive equal pay), Social rights (like rights to education and consenting marriages), Cultural rights (including the right to freely participate in their cultural community), and Collective rights (like the right to self-determination).

⁶⁸⁵ Hans-Ulrich Baerand and Peter Hostettler, 'International Humanitarian Law: an Introduction' (2002) 167(8) *Military Medicine* 7. International humanitarian law is defined as: International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict. International humanitarian law is part of international law, which is the body of rules governing relations between States.

⁶⁸⁶ Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Press 2013). International criminal law is defined as: International criminal law is the part of public international law that deals with the criminal responsibility of individuals for international crimes. There is no generally accepted definition of international crimes. A distinction can be made between international crimes which are based on international customary law and therefore apply universally and crimes resulting from specific treaties which criminalise certain conduct and require the contracting states to implement legislation for the criminal prosecution of this conduct in their domestic legal system. The international core crimes, i.e., crimes over which international tribunals have been given jurisdiction under international law, are: genocide, war crimes, crimes against humanity, and aggression. International criminal law finds its origin in both international law and criminal law and closely relates to other areas of international law. The sources of international criminal law are the same as those of general international law mentioned in article 38(1) of the Statute of the International Court of Justice: treaties, international customary law, and general principles of law, judicial decisions and writings of eminent legal scholars.

the model of the International Criminal Court (ICC)⁶⁸⁷ that is used as a model of international criminal law accountability.

3.1. International Criminal Law⁶⁸⁸ and the Concept of Accountability

The Nuremberg trials⁶⁸⁹ established accountability as an important concept, stating that humanity would be guarded by an international legal shield and that even Head of State would be held criminally responsible and punished for aggression and crimes against humanity.⁶⁹⁰ This established critical concept of accountability stated that regardless of the status of an entity, there is a possibility that all the players in the international community could be held liable for human rights abuses under the Principle of Nuremberg, The International Criminal Tribunal⁶⁹¹ for the former Yugoslavia (ICTY).⁶⁹² This definition supports the concept of accountability explained in Chapter One, which observed that: accountability should define, interpret, and enforce the formal legal norms and regulatory rules of the international human rights. In this rationale, accountability should consist of a system of governance, which are standards and legal rules that should be respected by all actors and all individual and state officials operating in the international arena and at domestic level.⁶⁹³

The relationship between the development of the critical concept of corporate accountability in Chapter One and the Nuremberg Principle⁶⁹⁴ may partly be explained by the

⁶⁸⁷ William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011). The International Criminal Court (“the ICC” or “the Court”).

⁶⁸⁸ Ilias Bantekas and Susan Nash, *International Criminal Law* (Routledge 2009).

⁶⁸⁹ After the war, some of those responsible for crimes committed during the Holocaust were brought to trial. Nuremberg, Germany, was chosen as a site for trials that took place in 1945 and 1946. Judges from the Allied powers Great Britain, France, the Soviet Union, and the United States presided over the hearings of twenty-two major Nazi criminals.

⁶⁹⁰ Robert H Jackson, ‘Nuremberg in Retrospect: Legal Answer to International Lawlessness’ (1949) *American Bar Association Journal* 813, 887.

⁶⁹¹ Rachel Kerr, *The International Criminal Tribunal for The Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford University Press on Demand 2004). The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990’s. Since its establishment in 1993, it has irreversibly changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced. In its precedent-setting decisions on genocide, war crimes and crimes against humanity, the Tribunal has shown that an individual’s senior position can no longer protect them from prosecution. It has now shown that those suspected of bearing the greatest responsibility for atrocities committed can be called to account, as well as that guilt should be individualised, protecting entire communities from being labelled as “collectively responsible”.

⁶⁹² *Ibid.*

⁶⁹³ Chapter I.

⁶⁹⁴ George A Finch, ‘Nuremberg Trial and International Law’ (1947) 41 *American Journal of International Law* 20. <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/ajil41&div=6&id=&page=>> accessed 21 September 2016

fact that the liability and the enforcement of international human rights law remain an exclusively national responsibility. This also means that the failure of exclusive dependence on the national court and legal process to control corporate human rights abuses and award effective remedies for victims is the single most compelling argument in this study for an effective international corporate accountability system, by applying a tort and civil law concept. However, this research is not suggesting that the international community needs an effective international legal system to replace or supplement domestic court duties and process. Rather, what it is suggesting is an effective international corporate accountability mechanism that supplements the domestic court system and process; in other words, a multilateral institutional framework to hold corporations accountable while simultaneously providing a catalyst for more effective national enforcement of international human rights law.

3.2. The Concept of the International Criminal Law Trial

The horrifying legacy of World War II forced the creation of a mechanism that would ensure individual accountability for crimes under international law.⁶⁹⁵ However, the establishment of a permanent international criminal court did not get far due to tensions arising in the Cold War (the concept in this thesis is referred to a state of conflict between two nations that does not involve direct military action.⁶⁹⁶ The Cold War was a state of geopolitical tension between powers in the Eastern Bloc (the Soviet Union and its satellite states) and powers in the Western Bloc (the United States, its NATO allies and others) that followed World War II. The conflict is primarily pursued through economic and political actions, including propaganda, espionage and proxy wars, where countries at war rely on others to fight their battles).⁶⁹⁷ This

⁶⁹⁵ Report of the Committee on International Criminal Jurisdiction, 1-31 August 1951, UN Doc. A/2645 (1954).

⁶⁹⁶ Walter LaFeber, *America, Russia, and the Cold War* (Knopf 1985).

⁶⁹⁷ Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56 (3) *Netherlands International Law Review* 333, 366. In the past, civil and common law jurisdictions were divided on the issue of corporate criminal liability in terms of entity liability. While in the United States, criminal liability of corporations has been a long-established concept confirmed by the US Supreme Court as early as 1909, a tentative shift towards corporate criminal liability occurred in Europe only in 1988 when the Council of Europe urged member states to consider changing their criminal codes to include corporate criminal liability.

Edward B Diskant, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure' (2008) *Yale Law Journal* 126, 176. During the last decades, civil law nations have increasingly introduced corporate criminal liability schemes in their domestic criminal codes, including in Europe. These civil law nations are: the Netherlands (1976), Indonesia (since the 1980s), Portugal (1983), Norway (1991), France (1992), Iceland (1993), Finland (1995), Denmark (1996), China (1997), Belgium (1999), South Africa, Switzerland (2003), Argentina, Austria (2006). For example, Spain (June 2010)¹⁶³ and Luxembourg (March 2010) joined their European neighbours and now recognise criminal liability for legal entities.

is not to say that corporate criminal liability has developed into a norm of customary international law, but it means that the complementarity concern, as one of the major impediments to including corporate criminal liability into the Rome Statute in 1998, is increasingly disappearing. Yet, there are still major practical issues to address when holding corporations criminally liable. As such, international human rights law expanded quickly during the Cold War and its observed mechanism at the international stage remains principally a political or quasi-judicial debate. For many decades, there was hardly any progress, until 1993 and 1994 when the two *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were created to bring to trial individuals for crimes against humanity,⁶⁹⁸ such as

According to a 2006 survey covering sixteen countries from different regions of the world, eleven of those countries apply criminal liability to legal persons. Ley Organica 5/2010 art. VII (B.O.E. 2010, 152) (Spain). According to a 2006 survey covering sixteen countries from different regions of the world, eleven of those countries apply criminal liability to legal persons. Anita Ramasastry and Robert C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: a Survey of Sixteen Countries: Executive Summary* (Fafo 2009). The increasing number of domestic laws prescribing liability of corporations for international crimes can be attributed to the increase in international and regional agreements that mandate states to adjust their domestic legal systems accordingly and adopt provisions for corporate liability for certain crimes.

Olivier De Schutter *The Accountability of Multinationals for Human Rights Violations in European Law* (2005). On a global scale, however, there is an increasingly universal trend across domestic legal systems to incorporate provisions for corporate liability for legal entities. Moreover, experts talk about an “expanding web of liability for business entities implicated in international crimes.

⁶⁹⁸ The term “crimes against humanity” was used for the first time in 1915 by the Allied governments (France, Great Britain and Russia) when issuing a declaration condemning the mass killings of Armenians in the Ottoman Empire. However, it was only after World War II in 1945 that crimes against humanity were for the first time prosecuted at the International Military Tribunal (IMT) in Nuremberg. Both the Charter establishing the IMT in Nuremberg as well as that establishing the IMT for the Far East in Tokyo included a similar definition of the crime. Since then, the notion of crimes against humanity has evolved under international customary law and through the jurisdictions of international courts such as the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Many States have also criminalized crimes against humanity in their domestic law; others have yet to do so.

Article 7. Crimes Against Humanity.

1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - a. Murder;
 - b. Extermination;
 - c. Enslavement;
 - d. Deportation or forcible transfer of population;
 - e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - f. Torture;
 - g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - i. Enforced disappearance of persons;
 - j. The crime of apartheid;

genocide and war crimes.⁶⁹⁹ Irrespective of their jurisdiction and procedure the work of both courts will be assessed from a historical perspective. Thus, the precedential value of the *ad hoc* tribunals will clearly not be disputed. Both tribunals were created by the United Nations Security Council (UNSC), which follows the Charter of United Nations 1945, specifically Charter VII. This gives the UNSC the power to create a judicial body with which all UN Member States are legally bound to cooperate with. What is evident in the development of the tribunals is the international adjudicatory mechanism to resolve future disputes, such as the Permanent International Criminal Court.⁷⁰⁰

Ever since the creation of the ICTY and the ICTR, the court has clarified and expanded on the key notion of international law and made an invaluable contribution to the legal differences between regimes applicable to international law and non-international armed conflicts. This was distinguished in the *Tadic* decision⁷⁰¹ which was vital in establishing that there was a common core of international law rules applicable to armed conflicts *per se*, irrespective of their character. Following this development, it has been argued that the concept of accountability was crucial in the creation and during the proceedings of the ICTY and ICTR. Therefore, the principle of the international court does establish an effective accountability system for crimes against humanity. However, the question is whether this could be applicable to corporations? The answer is that this is yet to be tested due to the current flaw in the concept of international criminal law accountability, such as a lack of cooperation between states, politics, a lack of resources, threat to the peace and security and improper legal procedures.⁷⁰²

Accountability within international criminal law is limited to two dimensions. The first is restricted to a narrow class of specific serious crimes such as crimes against humanity,

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- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
 - 2. For the purpose of paragraph 1:
 - a. 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. Matthew Lippman, 'Crimes Against Humanity' (1997) 17 *BC Third World Law Journal* 171.

⁶⁹⁹ Madeline H Morris, 'Trials of Concurrent Jurisdiction: The Case of Rwanda' (1996) 7 *Duke Journal of Comparative & International Law* 349.

⁷⁰⁰ UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. <<http://www.refworld.org/docid/3ae6b3a84.html>> accessed 3 November 2016].

⁷⁰¹ Colin Warbrick and Peter Rowe, 'The International Criminal Tribunal for Yugoslavia: The decision of The Appeals Chamber on The Interlocutory Appeal on Jurisdiction in The Tadic Case' (1996) 45 (03) *International and Comparative Law Quarterly* 691, 701.

⁷⁰² Jelena Pejic, 'Accountability for international crimes: From Conjecture to Reality' (2002) 84 (845) *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 13, 33.

genocide, and ethnic cleansing,⁷⁰³ which may not include the fundamental human rights that are to be given to all of humanity, or environmental right which are linked to health problems. The second dimension is restricted by the Prosecutor's monopoly on the prosecution procedures which effectively dispenses private access to remedy. Nonetheless, this is not to say that the approach is ineffective, and as such, the prosecution of a corporation or corporate official itself should be highly visible to deter future human rights violations by corporations. It could be possible to hold corporations accountable under international criminal law because tribunals rely on the principles of international law and respect for human dignity. In particular, they rely on Article 3 of the Statute of the International Criminal Tribunal⁷⁰⁴ ("violations of the laws or customs of war"), construing it as the specific remaining basis of jurisdiction that may be applied to the specific crime, where the provision of the Statute does not apply,⁷⁰⁵ but it will not be able to provide effective remedy for victims of human rights violations. Similarly, the *Tadic* jurisdiction is a typical illustration of this approach, as it was "the first judgment that [was] made by an international tribunal confirming, in unequivocal terms, the criminal character of war crimes committed in [international armed conflicts]".⁷⁰⁶ The decision laid down the foundation for a number of judgments as well extended accountability to the substantive content of the law applicable to non-international armed conflict. This expanded

⁷⁰³ "Ethnic cleansing" has been defined as the attempt to get rid of (through deportation, displacement or even mass killing) members of an unwanted ethnic group in order to establish an ethnically homogenous geographic area. Though "cleansing" campaigns for ethnic or religious reasons have existed throughout history, the rise of extreme nationalist movements during the 20th century led to an unprecedented level of ethnically motivated brutality, including the Turkish massacre of Armenians during World War I; the Nazi Holocaust's annihilation of some six million European Jews; and the forced displacement and mass killings carried out in the former Yugoslavia and the African country of Rwanda during the 1990s. Benjamin Lieberman, 'Ethnic Cleansing' Versus Genocide?' (2010).

⁷⁰⁴ Virginia Morris and Michael P Scharf, *The International Criminal Tribunal for Rwanda* (1998). Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994. Article 3
Crimes against humanity. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment ;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

⁷⁰⁵ Article 2 of The ICTY's Statute, Grave Breaches of the Geneva Convention of 1949.

⁷⁰⁶ Sonja Boelaert-Suominen, 'Commentary: The Yugoslavia Tribunal and The Common Core of Humanitarian Law Applicable to all Armed Conflicts' (2000) 13 (3) *Leiden Journal of International Law* 619, 653.

and created the new concept of accountability, where criminal liability is covered in all the interpretations of international law and international human rights law.⁷⁰⁷

The most notable instance when the ICTY enforced accountability in practice was when the former Yugoslav President Slobodan Milosevic transferred to the Detention Unit at The Hague in June 2001.⁷⁰⁸ Milosevic was indicted by the Tribunal as the first Head of State to be held accountable for the violations of the laws or customs of war and crimes against humanity, which were committed against the Albanian citizens in Kosovo between 1998 and 1999.⁷⁰⁹ Milosevic was further indicted for a separate violation of the Geneva Convention, the violations of the laws or the customs of war and crimes against humanity committed against Croatian and other non-Serb populations in the Republic of Croatia, and for genocide and complicity in genocide during the war in Bosnia and Herzegovina.⁷¹⁰ The strength of accountability in the case is also clear from the fact that the court tried Milosevic on every aspect of the international crimes committed, without any exceptions. This also illustrates the significant strength in the tribunal's ability to investigate and thoroughly try a perpetrator of human rights violations. It is therefore argued here that the ICC and ICTY offer a good example of international criminal law accountability, which appears to be the only current mechanism that is capable of fighting impunity though it is not completely certain that this can be applied to corporate accountability for human rights violations because of the difficulties in establishing corporate liability under international criminal law, except strict liability offences. Also, proving the mental element of a crime for legal entities such as corporation is very difficult to establish in practice.⁷¹¹

One method of establishing the intention or recklessness of a legal entity is to use the knowledge and "identification principle, which requires attributing the intent of a crime to the 'directing mind' of the corporation (i.e. the directors or the senior management).⁷¹² A possible explanation for this is that an open-minded approach is required in corporate liability, whereby "corporate culture" exists "within the body corporate"⁷¹³ in question. "Corporate

⁷⁰⁷ Article 3 of the Geneva Convention.

⁷⁰⁸ Konstantinos D Magliveras, 'The Interplay Between The Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law' (2002) 13 (33) *European Journal of International Law* 661, 677

⁷⁰⁹ Louise Arbour, 'Crucial Years' (2004) 2 *Journal of International Criminal Justice* 396.

⁷¹⁰ Slobodan Milošević (IT-02-54). <http://www.icty.org/case/slobodan_milosevic/4> accessed 2 November 2016.

⁷¹¹ Olivier. Salas-Fouksmann, 'Corporate Liability of Energy/Natural Resources Companies at National Law for Breach of International Human Rights Norms' (2013) 2 *UCL Journal of Law and Jurisprudence* 201.

⁷¹² Oxford Pro Bono Publico: 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse' (University of Oxford 2008).

⁷¹³ Australia Criminal Code Act 1994, s. 12.3(2) (c).

culture” is defined in broad terms as “an attitude, policy, rule, course of conduct,”⁷¹⁴ thus, this generous approach is not allowed in criminal law settings. Likewise, in the majority of case, the attribution of intent for corporate criminal conduct is not obvious in practice.⁷¹⁵ There are also specific enforcement obstacles that make the conviction of corporations for violation of international human rights technically impossible.⁷¹⁶ For example, under English law, while torture, genocide, and crimes against humanity are criminal offences,⁷¹⁷ these crimes are only subject to custodial punishment.⁷¹⁸ Since corporations cannot be found liable for offences punishable by imprisonment.⁷¹⁹ In general, therefore, it seems that corporations cannot be convicted for violation of these specific international human rights. For instance, the *Trafigura case* did not result in any corporate criminal prosecution in UK Courts.⁷²⁰ However, there is no reason to say that corporate accountability should not follow multiple approaches to human rights liability. Though, in conclusion this thesis is not satisfied with the argument that international criminal principle⁷²¹ is an effective judicial system for corporate human rights abuses and environmental damage.⁷²²

⁷¹⁴ S. 12.3 (6). 123.

⁷¹⁵ Michael E Tigar, ‘It Does The Crime But Not The Time: Corporate Criminal Liability in Federal Law’ (1990) 17 *American Journal of Criminal Law* 211.

⁷¹⁶ Anca Iulia Pop, ‘Criminal Liability Of Corporations Comparative Jurisprudence’ (2006) *Michigan State University College of Law Review*.

⁷¹⁷ International Criminal Courts Act 2001 s 51-52.

⁷¹⁸ *Ibid*, s. 53.

⁷¹⁹ Halsbury’s Corporations’ Laws of England (2006).

⁷²⁰ Ejolt, ‘*The Trafigura Case*’ (2015). <<http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-45.pdf>> accessed 8 July 2017.

⁷²¹ The ICRC Advisory Services on international humanitarian law, ‘General Principles of International Criminal Law’ (2015). <<https://www.icrc.org/eng/assets/files/2014/general-principles-of-criminal-icrc-eng.pdf>> accessed 8 July 2017. International criminal law is the body of law that prohibits certain categories of conduct deemed to be serious crimes, regulates procedures governing investigation, prosecution and punishment of those categories of conduct, and holds perpetrators individually accountable for their commission. The repression of serious violations of international humanitarian law is essential for ensuring respect for this branch of law, particularly in view of the gravity of certain violations, qualified as war crimes, which it is in the interest of the international community as a whole to punish. There are several basic principles upon which international criminal law is based. Since international crimes increasingly include extraterritorial elements, requiring enhanced interaction between States, it is becoming more pressing to coordinate respect for these principles. States must uphold them while also respecting their own national principles of criminal law and any specific principles outlined in the instruments of the regional bodies to which they are party. The principles are

1. jurisdiction
2. Statutory limitations
3. The absence of statutory limitations for certain crimes in international law
4. *Nullum crimen, nulla poena sine lege*
5. *Ne bis in idem*
6. Forms of criminal responsibility
7. Impunity

⁷²² An analysis of corporate liability under the Rome Statute of the ICC in this thesis provides a useful test case to identify legal and practical challenges when holding corporations as legal persons accountable for atrocity crimes and complicity therein. There are key issues that courts would need to address before

3.3. International Tribunals

The international military tribunals established⁷²³ after World War II remains the most celebrated international criminal court in history.⁷²⁴ The Moscow Declaration of November 1943⁷²⁵ stated that “minor Nazi war criminals would be judged and punished in countries where they committed their crime, while the major war criminals, whose offence[s] have no particular geographical localisation, would be tried and punished by the joint decision of the governments of the Allies”.⁷²⁶ On 8 August 1945, the Allies signed the London Agreement adopting the Charter of the International Military Tribunal at Nuremberg.⁷²⁷ In addition to the Nuremberg Tribunal, several thousand Nazi war criminals were tried before the national courts or before tribunals administered by the Allies after World War II.⁷²⁸ In January 1946, the Allies created in Tokyo and in the International Military Tribunal for the Far East, were established by the unilateral proclamation of General Douglas MacArthur, the Supreme Allied Commander.

In conjunction with the work of the Tokyo Tribunal, national tribunals tried thousands of Japanese for their crimes.⁷²⁹ Observing the development of the Nuremberg Tribunal, the present indication and idea behind the court is to hold individuals who violate international law

they could hold any legal person criminally liable before the ICC or any criminal court, for that matter including the question of appropriate penalties against corporations when dealing with atrocity crimes, the most heinous offenses against humankind. The remainder of this Part focuses on the issues of attribution of responsibility and penalties in corporate criminal liability.

⁷²³ On December 17, 1942, the leaders of the United States, Great Britain, and the Soviet Union issued the first joint declaration officially noting the mass murder of European Jewry and resolving to prosecute those responsible for violence against civilian populations. Though some political leaders advocated summary executions instead of trials, eventually the Allies decided to hold an International Military Tribunal. In the words of Cordell Hull, “a condemnation after such a proceeding will meet the judgment of history, so that the Germans will not be able to claim that an admission of war guilt was extracted from them under duress”. The trials of leading German officials before the International Military Tribunal (IMT), the best known of the post-war war crimes trials, formally opened in Nuremberg, Germany, on November 20, 1945, just six and a half months after Germany surrendered. On October 18, 1945, the chief prosecutors of the IMT had read the indictments against 24 leading Nazi officials. The four charges brought against these officials were:

1. Conspiracy to commit crimes against peace, war crimes, and crimes against humanity
2. Crimes against peace
3. War crimes
4. Crimes against humanity

⁷²⁴ Remigiusz Bierzanek, ‘War Crimes: History and Definition’ (1986) 3 *International Criminal Law New York: Transnational Publishers* 29, 50.

⁷²⁵ Declaration Joint Four Nations, ‘The Moscow Conference; October 1943’ (1943).

⁷²⁶ John N Horne and Alan Kramer, *German Atrocities, 1914: a History of Denial* (Yale University Press 2001).

⁷²⁷ United Nations, *Charter of The International Military Tribunal – Annex to The Agreement for The Prosecution and Punishment of The Major War Criminals of The European Axis (“London Agreement”)* 8 August 1945 <<http://www.refworld.org/docid/3ae6b39614.html>> accessed 5 November 2016

⁷²⁸ Theodor Meron, ‘Reflections on the Prosecution of War Crimes by International Tribunals’ (2006) 100 (3) *American Journal of International Law* 551, 579.

⁷²⁹ John R Pritchard, ‘International Military Tribunal for the Far East and Its Contemporary Resonances’ (1995) 149 *Military Law Review* 25.

and commit crimes against humanity accountable. Likewise, in this context, one could argue that the development of the Nuremberg Principle marks the beginning of effective accountability mechanisms, sanctions, remedies, and deterrence, which could potentially be extended to another actor in the international arena, and not just to individuals, i.e. corporations as well.⁷³⁰

3.4. The Nuremberg Tribunal⁷³¹ and Other International Criminal Tribunals

The London Agreement⁷³² and IMT Charter⁷³³ set out the jurisdiction, substantive law and procedural principles of the Nuremberg Tribunal. Article 6 of the Charter granted the Tribunal jurisdiction over an individual who, as an individual or as a member of an organisation, committed crimes against peace, war crimes, or crimes against humanity. In addition, Article 6 imposed responsibility on leaders, organisers, instigators, and accomplices

⁷³⁰ Missing from the current debate, however, is a sophisticated contemporary account of changing state practice on corporate criminal liability for atrocity crimes. Also absent is an examination of the material elements of such corporate liability, particularly regarding questions of attribution of wrongdoing, culpability, and penalties. Concerns about complementarity. David Scheffer, 'Corporate Liability under The Rome Statute' (2016) 57 *Harvard International Law Journal* 35, 36. A number of issues need to be addressed when contemplating if and how corporate perpetrators can be prosecuted under the Rome Statute. While legal persons do not fall under the jurisdiction of the ICC under the Rome Statute's existing structure, it is important to note that corporate managers and executives can be prosecuted for complicit conduct in crimes against humanity, war crimes, and genocide. Like any other perpetrator, they are "natural persons" that are subject to the ICC's jurisdiction under Article 25(1) of the Rome Statute.¹²⁸ In this context, the individual's corporate affiliation is irrelevant and does not bar the ICC's jurisdiction over such individuals.

⁷³¹ On October 6, 1945, the formal indictment was completed and filed with the International Military Tribunal. 2 Indicted were the leaders of Nazi Germany still alive. They were charged with three basic war crimes: planning, preparing, and waging aggressive war; plunder and spoliation of the property of conquered countries; and slavery and mass murder. It had been planned to include among those indicted a prominent industrialist who typified the complicity of German business in Hitler's programs. Gustav Krupp von Bohlen und Halbach, head of the Krupp steelworks, was chosen to fill this role. Although I.G. had been far more important to Germany's military-economic war preparations, Krupp was the individual most associated by reputation with the war making power of Germany.

At the conclusion of this trial on August 31, 1946, the following were sentenced to death: Hermann Goering, Joachim von Ribbentrop, Wilhelm Keitel, Alfred Rosenberg, Ernst Kaltenbrunner, Hans Frank, Wilhelm Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur von Seyss-Inquart, and Martin Bormann (in absentia). All were hung except Goering, who committed suicide on the morning of the executions, and Bormann, who was never apprehended. Rudolf Hess, Walter Funk, and Erich Raeder were sentenced to life imprisonment. Albert Speer and Baldur von Schirach received twenty years' imprisonment; Konstantin von Neurath, fifteen years; and Karl Doenitz, ten years. Hjalmar Schacht, Franz von Papen, and Hans Fritzsche were acquitted on all counts. On April 5, 1946, with the trial nearing its end, the committee of chief prosecutors revived the plan to try a number of leading German industrialists before a second International Military Tribunal.

⁷³² Robert H Jackson, *Report of Robert H. Jackson, United States Representative to The International Conference on Military Trials* (Washington DC US GPO 1949).

⁷³³ John Cerone, 'The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes Against Humanity-The Evolution of The Nexus Requirement' (2007) 14 *New England Journal of International and Comparative Law* 191.

for all acts performed in execution of a common plan or conspiracy. The Agreement limited the Tribunal's jurisdiction to war criminals who had no specific location and stressed that the Tribunal work would not prejudice the jurisdiction of any of national or occupational courts. Therefore, the Nuremberg Tribunal arguably is the strongest and the most significant liability and enforcement mechanism ever established, as well as the most debatable accountability process ever since the end of World War II.⁷³⁴ The success of the Nuremberg Tribunal was partly because the representatives of the governments of the United States, Great Britain, the Soviet Union, and France were determined to punish the losers of the war.⁷³⁵ These world super powers attempted to establish an International Military Tribunal to prosecute the war criminals of Germany.⁷³⁶ Whether this makes the Nuremberg Tribunal the foundation of international human rights accountability in any way or form, it is a debate that is beyond this study. To those who support the tribunal, it marks the first effective recognition of accountability and the need for punishment of offenders who start wars or violate human rights. To critics, the creation of the Tribunal appears in many respects a negation of principles which can be regarded as the heart of any system of justice and the rule of law.⁷³⁷ However, when one views accountability based on the fundamental process taken to establish the Tribunal, it seems that the Tribunal meets not only the principles of legitimacy and transparency but also effective remedy and enforcement.

⁷³⁴ However, as a treaty-based statutory regime, Article 25(1) of the Rome Statute on "Individual Criminal Responsibility" would need to be amended to explicitly include jurisdiction over legal persons. Under Article 25(1) of the Rome Statute, the ICC explicitly exercises jurisdiction only over "natural person". The amendment R procedure is laid out in Article 121(5) of the Rome Statute: "Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory". Under the current structure, the ICC would hold only individual corporate managers and executives criminally liable under the Rome Statute. However, studies have shown that investigations and prosecutions against such individuals do not ensure optimal retribution and deterrence in the face of corporate criminality. Sun Beale, 'A Response to the Critics of Corporate Criminal Liability' (2009) 1481 (46) *American Criminal Law Review* 1484, 85.

⁷³⁵ Theodor Meron, 'Reflections on The Prosecution of War Crimes by International Tribunals' (2006) 100 (3) *American Journal of International Law* 551, 579.

⁷³⁶ Matthew Lippman, 'The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany' (1992) 3 *Indiana International & Comparative Law Review* 1.

⁷³⁷ The sharp division of opinion has not been fully aired largely because it relates to an issue of foreign policy upon which this nation has already acted and on which debate may seem useless or, worse, merely to impair this country's prestige and power abroad. This makes the foundations of the Nuremberg trial watershed of modern law, but, not a true effective system of accountability for one criminal conduct. Also, Nuremberg displayed selectivity in choosing defendants and the proceedings foundered on petty personal relations and acrimonious national arguments. The post-Nuremberg path of international law and justice has not been smooth, but that is not a case for the IMT to answer. Ultimately Nuremberg's "murder" did not materialise.

This is why it seems that there are valid reasons why several individuals, including many defendants at Nuremberg, are indicted, prosecuted, and held accountable for their crimes.⁷³⁸ Also, Nuremberg shows that the basic elements of accountability, such as prevention, deterrence, retribution, and indeed vengeance, are adequate motives for punitive action. In terms of Articles 46 and 47 of The Hague Convention of 1907, the United States and many other countries accepted the rules that in an occupied territory of a hostile state, a family's honour and rights, the lives of persons, and private property, as well as religious conviction and practice, must be respected. Private property cannot be confiscated, and pillaging is formally forbidden.⁷³⁹ This is consistent with the Supreme Court of the United States ruling, with the court acknowledging that The Hague Convention is part of national law. To put it another way, there is no doubt that the legal rights of the nation, before the signing of a peace treaty, is not a new concept. This is particularly true with respect to military tribunal for the purpose of trying and punishing Nazis. It is rather an extension mechanism that ensures individuals are held accountable for their crimes in any jurisdiction. For example, if an individual is charged with a crime in an occupied territory, such as murdering a Polish civilian, torturing a Czech person or raping a French woman, he could be held accountable at the tribunal for those crimes. In connection with a crime against humanity of this sort, there is only one question here, and it relates to liability and sanctions: who is responsible, and under what law can an individual be prosecuted to ensure effective accountability?⁷⁴⁰

To ensure the rule of law is maintained and in order to hold fast to the fundamental principle of human rights law, the Nuremberg Tribunal had four judges, one appointed by each major Allied power. Governed by its Charter and the Rules adopted by the Tribunal, the procedure before the Tribunal was based on the Anglo-American adversarial system.⁷⁴¹ The

⁷³⁸ Furthermore, research has shown that criminal liability of the corporate entity itself aligns more with the purposes of criminal punishment in terms of retribution, as well as deterrence. Ronald C Slye, 'Corporations, Veils, and International Criminal Liability' (2007) 33 *Brooklyn Journal of International Law* 955.

⁷³⁹ International Conferences (The Hague), Hague Convention (IV) Respecting The Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907. <<http://www.refworld.org/docid/4374cae64.html>> accessed 5 November 2016.

⁷⁴⁰ The leading literature on criminology and organisational behaviour suggests that optimal deterrence is achievable by holding criminally accountable the individual wrongdoer and the corporation itself. From a behavioural perspective, this provides a comprehensive approach to dealing with corporate criminality in its complex dimensions. Nonetheless, individual corporate officers may not be effectively incentivised when punishment is directed only against the legal person.

⁷⁴¹ What is certain in the Nuremberg Trail is that the basis of democracy is government of laws not of men, and this means that the law is known and applied to all. However, at Nuremberg not only did the judges applied ex post facto law but also stated that it applied only to Germans. This purse lots of questions about the actual motives and intention of the judges and the state that nominate them. According to the judgments of the United States tribunals at Nuremberg the will of the conquerors is absolute, and the

Charter afforded defendants certain rights, including the right to counsel, to present evidence, to testify on their own behalf, and to cross-examine the witness. Nonetheless, Article 12 authorised trials *in absentia*. The Tribunal ordered any punishment upon conviction, including restrictions on stolen property, imprisonment, and the death penalty. Judgment was final and not subject to review. An entity known as the Control Council carried out the sentences and had the power to reduce them.⁷⁴² The Tribunal initially indicted 24 defendants and ultimately tried 22 of them, one *in absentia*. Of the 22 tried, the Tribunal convicted 19.⁷⁴³

In an empirical analysis, it is difficult to pinpoint the exact flaw in the Nuremberg Tribunal as indictments and procedures were conducted by countries with strong judicial and governance systems⁷⁴⁴ and with a substantial similarity in the process of indictment. Thus, the question is, will this same principle, that is based on Western ideology, work effectively in countries in different continents, such as South America, Africa or Asia? There is not clear as the generalisation view and process adopted in the establishment of the Tribunal makes one doubt the universal application of human rights accountability. Likewise, the flaws indicated at the beginning of this chapter explain the gap in the international criminal law system, such as the biased approach of the system toward some developing countries. Having said that, the Allies prosecuted numerous defendants before occupation tribunals pursuant to Control Council Law (CCL) No 10⁷⁴⁵, which they had promulgated in order to ensure a uniform standard for the prosecutions. The IMT Charter,⁷⁴⁶ Article II of the CCL No 10, granted the occupation tribunals jurisdiction over crimes against peace, war, and crimes against humanity. It also stipulated that defendants were to be tried in the country or Allied occupation zone where they had committed their crime. After the conviction of a defendant, an occupation tribunal could order imprisonment, fine, forfeiture or the restitution of property, deprivation of civil rights, or death.⁷⁴⁷

vanquished have no right to appeal to international law, American law, or any other law against it. Instead of teaching the Germans that “crime does not pay,” the Nuremberg have enunciated the theory that the victors are entitled to do anything they please to the vanquished once the war is over.

⁷⁴² IMT Charter, Article 2, 4 (C), 14 16, 26-29.

⁷⁴³ Telford Taylor, *The Anatomy of The Nuremberg Trials: a Personal Memoir* (Knopf 201).

⁷⁴⁴ *Ibid.*

⁷⁴⁵ Steven R Ratner, ‘The Schizophrenias of International Criminal Law’ (1998) 33 *Texas International Law Journal* 237.

⁷⁴⁶ Naomi Roht-Arriaza, ‘Institutions of International Justice’ (1999) *Journal of International Affairs* 473, 491.

⁷⁴⁷ CCL No, Article II (3), IV, also see: United Nations War Crimes Commission. *Law Reports of Trials of War Criminals* (Vol. 13. United Nations War Crimes Commission 1949).

The Tokyo Tribunal consisted of eleven judges, all appointed by General MacArthur.⁷⁴⁸ The jurisdiction, power, and procedures of the Tokyo Tribunal were essentially similar to those of the Nuremberg Tribunal, although MacArthur⁷⁴⁹ exerted a significant influence over the trials to ensure that they would not threaten the success of the occupations.⁷⁵⁰ It is quite likely that the Tokyo trial would have left a positive legacy had the judgment of the court set important precedents to be cited in international and domestic war criminal tribunals. A measure of its small and ephemeral impact is that, when, in 1950, the International Law Commission of the United Nations adopted principles of international law recognised in the Nuremberg charter and judgment with no mention of Tokyo.⁷⁵¹ It's snubbing by the UN body and in recent war crimes tribunals can be ascribed to the fact that it adopted a theory of conspiracy and a principle of command responsibility more encompassing than at Nuremberg.⁷⁵²

The judges at Tokyo ruled that the defendants had engaged in a conspiracy to wage a war of aggression and that each of them had played a part in advancing a “common plan” yet the court’s interpretation of “the ambit of conspiracy liability was too broad, which [had] filtered in doubts about such an inchoate international crime”.⁷⁵³ Broad or not, the decisions written by the Tokyo Trial judges did constitute case law and established the fundamental principles (had they been recognised as such) for the theory of Joint Criminal Enterprise

⁷⁴⁸ Toyko Charter Article 2.

⁷⁴⁹ Frederick John Partington Veale, *Advance to Barbarism: The Development of Total Warfare from Serajevo to Hiroshima* (Mitre P 1968), Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), Yuki Tanaka, Tim McCormack & Gerry Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden Martinus Nijhoff Publishers, 2011). Within the office of General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), in whose name the Charter was promulgated, assessment of the Tokyo Trial’s value ran the gamut, from the opinion of prosecutor Solis Horwitz that the “proceedings [were] of utmost significance for the elimination of war,” to the view of General Charles Willoughby, MacArthur’s chief of counterintelligence, that they were “the worst hypocrisy in recorded history. MacArthur’s office went so far as to provide the defendants with the services of American lawyers: since the criminal law of modern Japan was modelled after Continental (specifically, German) law and most of the Japanese lawyers were not familiar with the Anglo-Saxon court procedures used at the trial, the defense requested, and was granted, the assistance of American attorneys, some of them selected from among those already functioning in the Tokyo area and others recruited in the US by the War Department.

[It must be noted here that no similar aid was extended to the German lawyers at Nuremberg although they had to labour under the same disadvantage.] Though acting on behalf of their enemies, the Americans fought hard in their defense, whether by challenging the court’s jurisdiction, requesting a recess in order to make adequate preparation, flying to Europe to obtain statements favourable to their clients from Allied diplomats (and, in one instance, from a Nuremberg prisoner on death-row on the eve of execution), or filing petitions for a writ of habeas corpus in the United States Supreme Court.

⁷⁵⁰ Richard H Minear, *Victors' Justice: Tokyo War Crimes Trial* (Princeton University Press 2015).

⁷⁵¹ Timothy P Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (University Press of Kentucky 2001).

⁷⁵² Zachary D Kaufman, ‘The Nuremberg Tribunal v The Tokyo Tribunal: Designs, Staffs, and Operations’ (2009) 43 *John Marshall Law School Law Review* 753.

⁷⁵³ Timothy P Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (University Press of Kentucky 2001).

(JCE).⁷⁵⁴ Nonetheless, when the International Criminal Tribunal for the Former Yugoslavia (ICTY) resurrected this doctrine in the trial of *Duško Tadić*, critics claimed there was no precedent of such a form of liability in international law, completely ignoring (or being completely ignorant of) the judgment at Tokyo.⁷⁵⁵ Thus, for this and other reasons, the Tokyo Tribunal never enjoyed the degree of attention and precedential authority of Nuremberg.⁷⁵⁶ Whether this is a cultural difference or a difference in the country's governance is not clear, though it does support the argument which doubts the universal application of the theory of international criminal law accountability and how effective it could be "universally". Nonetheless, the Tribunal tried 28 Japanese leaders and convicted 25. In addition, the Alien Tribunal tried over 5,000 other Japanese war crimes.⁷⁵⁷

The creation of the *ad hoc* tribunals opened the way not only for negotiating building another system of accountability but also on establishing the possibility for following the establishment of three other judicial mechanisms. The first, to deal with crimes committed decades ago in Cambodia; the second, dealing with crimes committed in Sierra Leone; and the third, dealing with crimes committed before the UN administered referendum on the independence of East Timor in 1999.⁷⁵⁸ It also gives the impression that a crime against humanity cannot go unpunished and accountability is the ultimate objective of the tribunal.

Following this element, it can thus be said that international criminal accountability satisfies the element of liability and enforcement of international law and international human rights law on individuals. However, tort and civil law protects the rights of individuals and property, thus, frames human rights violations as tort. In addition, it addresses some of the difficulties surrounding corporate accountability that help to fully capture corporate misconduct not covered under criminal law principles.⁷⁵⁹ Therefore, framing human rights

⁷⁵⁴ Neil Boister, 'The Application of Collective and Comprehensive Criminal Responsibility for Aggression at The Tokyo International Military Tribunal: The Measure of the Crime of Aggression?' (2010) 8 (2) *Journal of International Criminal Justice* 425, 447.

⁷⁵⁵ John R. Lewis, *Uncertain Judgment: A Bibliography of War Crimes Trials* (Santa Barbara ABC Clío Inc 1979).

⁷⁵⁶ Laurie A Cohen, 'Application of The Realist and Liberal Perspectives to The Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia' (1997) 2 *Journal of International Law & Foreign Affairs* 113.

⁷⁵⁷ John R Pritchard (n 726).

⁷⁵⁸ Jelena Pejic, 'Accountability for International Crimes: From Conjecture To Reality' (2002) 84 (845) *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 13, 33

⁷⁵⁹ Because a corporation is an association of individuals that act as agents of the fictional entity, it is necessary to specify when a legal person "commits" an international crime in terms of Article 25(2) of the Rome Statute. In a multi-country comparison, it is common in many domestic legal systems that only criminal acts of organs (as designated by law or the organisational documents) or representatives (that received delegation of power from an organ) can be imputed to the corporation. Anna F TriponeL, *Comparative Corporate Responsibility in The United States and France for Human Rights Violations Abroad* (2010)

violations under tort law may convey the gravity of the violations and the requisite level of accountability. Thinking along these lines will allow tribunals and courts to provide punitive and exemplary damages in tort law for corporate human rights violations. This is because, in tort law remedies, liability can arise even where the corporation has no knowledge as to the misconduct because tort law may hold that it should have known, that abuse is reasonably foreseeable. It appears that in applying tort law, the jurisprudence of tort law will potentially pierce the corporate veil.⁷⁶⁰

3.5. Other Tribunals

The Khmer Rouge Tribunal was composed of both Cambodian and international judges, and was arranged in three extraordinary chambers with the domestic court system. The subject-matter jurisdiction was over serious human rights violations, violations of international law and customs of Cambodia, and international violations committed against government officials during the period of Democratic Kampuchea from 1975 to 1979.⁷⁶¹ This Tribunal also strengthened the concept of accountability under international criminal law. However, the tribunal was far from being an effective accountability system.⁷⁶² One of its major drawbacks

and William S Laufer, 'Corporate Liability, Risk Shifting, and The Paradox of Compliance' (1999) 52 *Vanderbilt Law Review* 1341. Courts would attribute criminal offenses by directors and high-level managers to the corporate entity, while acts of low-level employees would generally not give rise to criminal liability of the corporate entity as a whole. Cristina De Maglie, 'Models of Corporate Criminal Liability in Comparative Law' (2005) 4 *Washington University Global Studies Law Review* 547. The standard of respondent superior, according to which corporations can be held liable for acts of any (even low-level) employee as long as the latter was acting within the scope of employment, is still applied in the context of corporate criminal liability in the United States, (The jurisprudence of US courts has confirmed this rule of attribution. *Egan v United States*, 137 F.2d 369, 379 (8th Cir. 1943), cert denied, 320 US 788 (1943)) but this approach is more the exception than the rule in an international context.

⁷⁶⁰ Robert B Thompson, 'Piercing The Corporate Veil: An Empirical Study' (1990) 76 *Cornell Law Review* 1036. *Salomon v Salomon and Co. Ltd* [1897] A.C. 22. From the juristic point of view, a company is a legal person distinct from its members. This principle may be referred to as the 'Veil of Incorporation.' The courts in general consider themselves bound by this principle. The effect of this Principle is that there is a fictional veil between the company and its members. That is, the company has a corporate personality which is distinct from its members. But, in a number of circumstances, the Court will pierce the corporate veil or will ignore the corporate veil to reach the person behind the veil or to reveal the true form and character of the concerned company. The rationale behind this is probably that the law will not allow the corporate form to be misused or abused. In those circumstances in which the Court feels that the corporate form is being misused it will rip through the corporate veil and expose its true character and nature disregarding the Salomon principal as laid down by the House of Lords. Broadly there are two types of provisions for the lifting of the Corporate Veil- Judicial Provisions and Statutory Provisions. Judicial Provisions include Fraud, Character of Company, Protection of revenue, Single Economic Entity etc. while Statutory Provisions include Reduction in membership, Misdescription of name, Fraudulent conduct of business, Failure to refund application money.

⁷⁶¹ Benny Widiono, *Dancing in Shadows: Sihanouk, the Khmer Rouge, and The United Nations in Cambodia* (Rowman & Littlefield Publishers 2007).

⁷⁶² Kathryn M Klein, 'Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing The Joint Tribunal

is the negotiation with governments and the UN which must include the procedure for issuing an indictment and reaching a verdict, amnesty provisions, rules on foreign defence counsel, rules of procedure and most recently,⁷⁶³ the official language to be used in the court⁷⁶⁴ (which was very difficult to implement in certain countries). This complexity highlights the difficulties surrounding accountability based on criminal jurisdiction, but it also shows the UN authority and advocacy on the rule of law and due process⁷⁶⁵ is fair treatment through the normal judicial system, especially a citizen's entitlement to notice of a charge and a hearing before an impartial judge)⁷⁶⁶ in the indictment of alleged offenders of human rights. Whether this is effective is subject to debate and vigorous research. Specifically, one must examine how much influence the international community and the UN should have or should not have in the procedure of international crime, as there are questions over the UN's fairness and the basic elements of their decision-making such as the selection of cases for prosecution. A typical example is the ICC focus on prosecuting Africa Head of State.⁷⁶⁷ This was clearly the case with the International Criminal Court (ICC) and its prosecutorial division, the Office of the Prosecutor (OTP), and an understanding of the Court requires an appreciation of the circumstances of their creation and first 11 years of operation. Critics claim that the OTP's focus on Africa has been inappropriate. The Chairman of the African Union Commission accused the OTP of African bias, exclaiming, "Why not Argentina? Why not Myanmar...Why not Iraq?" Rwandan President Paul Kagame has dismissed the Court, saying it was created to prosecute Africans

in Cambodia' (2005) 4 *Northwestern Journal of Human Rights* 549.

⁷⁶³ Colum Lynch, 'UN Warns Cambodia on War Crimes Tribunal' (2001) *Washington Post* (Washington DC 3)

⁷⁶⁴ Scott Luftglass, 'Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from The Establishment of a Cambodian Tribunal to Prosecute The Khmer Rouge' (2004) *Virginia Law Review* 893, 964.

⁷⁶⁵ Niki Kuckes, 'Civil Due Process, Criminal Due Process' (2006) 25 (1) *Yale Law & Policy Review* 1, 61.

The phrase "due process of law" is fundamental to most judicial systems concepts of order and of liberty. It was first written into the Fifth Amendment of American Constitution by men who had had bitter experience with the arbitrary power of kings. It was made specifically applicable to the states at the end of the Civil War, the most bitter internal conflict in some states history. The Fourteenth Amendment language reads: "nor shall any state deprive any person of life, liberty, or property, without due process of law". The importance of this language to present legal problems is made more obvious by reference to Article VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and 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". Criminal procedure deals with the set of rules governing the series of proceedings through which the government enforces substantive criminal law. Municipalities, states, and the federal government each have their own criminal codes, defining types of conduct that constitute crimes. George Edwards, 'Due Process of Law in Criminal Cases' (1966) 57 *Journal of Criminal Law, Criminology and Police Science* 130.

⁷⁶⁶ Harold A Ashford and Michael D Risinger, 'Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview' (1969) 79 (2) *Yale Law Journal* 165, 208.

⁷⁶⁷ Kurt Mills, 'Bashir is Dividing Us": Africa and the International Criminal Court' (2012) 34 (2) *Human Rights Quarterly* 404, 447.

and others from poor countries. Critics note that the OTP has yet to open an investigation into crimes allegedly committed in a territory or by nationals of States that are wealthy and powerful and argue that the failure to do so has weakened support for the ICC in African countries and given the impression that the ICC is partisan. In addition, some argue that the ICC's work has interfered with efforts to achieve peace in Africa or that under-developed, unstable, or stateless territories need foreign aid more than international criminal investigation and prosecution. Even where a situation in Africa has been referred to the Prosecutor by a State Party or the Security Council, the Prosecutor is not obliged to open an investigation into the situation, including for the reason that s/he believes that there are substantial reasons that an investigation would not serve the interests of justice.

Nonetheless, both the international tribunal and Cambodian human rights activists are of the view that the Khmer Rouge Tribunal was properly established. If this can be considered fact, then it can be said that it marked the “beginning of the end of a culture of impunity”⁷⁶⁸ through securing accountability for human rights abuses under international criminal law. The important theoretical issue regarding criminal accountability of human rights abuses and crimes against humanity is the legitimacy⁷⁶⁹ of liability involved and how this liability is manifested in the concept of accountability. The reason behind this is that legitimacy can be classified as an element of accountability, thus strengthening the position of the court and the proceeding. Therefore, in the law, power and court authority are related to legality and legitimacy, respectively. In this sense, legitimacy presupposes legality, the existence of a legal system and of a power issuing orders according to its rules. Nonetheless legitimacy also provides the justification of legality, by surrounding power with an aura of authority. It is a kind of a special qualification, a surplus to the (pure) force which the court exercises in the name of the law. A legitimate system of law is distinct from a system of mere commands coercively enforced, which the ICC lacks. Also, the second attempt at establishing accountability was the special court for Sierra Leone initiated by the government of the country on 10 August 2000.⁷⁷⁰

⁷⁶⁸ Amy Kazmin and Carola Hoyos, ‘Cambodia Moves Towards Tribunal of Khmer Rouge’ (Financial Times 2001).

⁷⁶⁹ The distinction between normative legitimacy and sociological legitimacy. On the one hand, legitimacy as a normative concept. When “legitimacy” in the normative sense, it is making assertions about some aspect of the rightness or wrongness of some action or institution. On the other hand, legitimacy is also a sociological concept. Though these two senses of legitimacy are related to one another, they are not the same. That’s because an institution could be perceived as legitimate on the basis of false empirical beliefs or incorrect value premises. The legitimacy concern in this thesis is legal validity, fairness, rule of law and acceptance of Law,

⁷⁷⁰ William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006).

Following the request by the government of Sierra Leone, the UN responded by authorising the UN Secretary-General Kofi Annan to negotiate an agreement with the Sierra Leone on the creation of the independent special court and asking him to describe how he met the government's request.⁷⁷¹ As a result of the UNSG's report, the court was created on a "treaty-based *sui generis* court of mixed jurisdiction and composition".⁷⁷² The treaty gave the court power to prosecute the person most responsible for a serious crime against humanity, international law, and Sierra Leonean law committed in the jurisdiction of the country since November 1999.

The Sierra Leonean court judges appointed were from Sierra Leone and abroad, while the prosecutor was appointed by the UNSG after consultation with the government of Sierra Leone and the deputy prosecutor from Sierra Leone. What made the accountability and procedure of the enforcement of accountability in the Sierra Leone court extraordinary was that the court adopted a broad approach to accountability and liability by seeking to include the international and national court in the process, as well as balancing the interests of the international community's enforcement of accountability.⁷⁷³ Perhaps the concept of accountability is a notion that must include the national state and national court playing a significant role in the process and enforcement of human rights obligations. This was evident when the special court was given a concurrent jurisdiction with domestic courts, similar to the *ad hoc* tribunal model. Following this methodology, the court was able to extend its jurisdiction on issues that created further exchanges between the UNSC and the UNSG, including the court's jurisdiction over children⁷⁷⁴ and how widely the net should be cast in terms of another aspect of the court's personal jurisdiction, as well as the future court's funding.

After a careful analysis of the establishment of the Sierra Leonean court and other tribunals, what is clear is that the UN has a great deal of influence over the development and

⁷⁷¹ UN Doc. S/2000/915, ((2000), para 1 and 6, 14 August 2000.

⁷⁷² Report of the Secretary-General on the Establishment of a Special Court of Sierra Leone, UN Doc. S/2000/915, 9. The Report in its Annex, includes a draft Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and, in Enclosure, a draft Statute of the Special Court for Sierra Leone.

⁷⁷³ *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72 (E), Judgement of 31 May 2004. "Justice Robertson traced the preparatory work leading to the adoption of the Special Court Statute and argued that the state of international law in 1996 in respect of child enlistment was unclear to the UN Secretary-General himself. He pointed out that the question of whether an act was criminalised should be carefully separated from whether it should be criminalised and considered in depth the principle of "no punishment without law".

⁷⁷⁴ The President of The United Nations Security Council Addressed to the Secretary-General, UN Doc. S/2000/1234, 22 December 2000, as see; Secretary-General addressed to the President of the United Nations Security Council, UN Doc. S/2001/40, 13 January 2001.

enforcement of accountability in these courts. While the study believes that the state should play a central role in enforcing accountability, it also argues that the initiation and enforcement of human rights accountability should primarily rest in the domestic tribunal/court and the international community, where the state has failed, is unwilling, and where there is weak governance and a weak judicial system of accountability.

In August 1999, following a referendum in Indonesian-controlled East Timor, in which 80 percent of the population voted for independence, a pro-Indonesia militia with the support of the Indonesian military instigated a brutal period of repression. A group of experts recommended an *ad hoc* tribunal to try those responsible for the human rights abuses.⁷⁷⁵ This recommendation, however, was rejected. Instead, the UN Transitional Administration in East Timor created the Special Panels for Serious Crimes within East Timor's court system. Each panel comprised one trial panel with an international and Timorese judge, a court of appeal with the same composition and a prosecutorial unit made up of mostly an international legal expert. The Panels had jurisdiction over war crimes, crimes against humanity, genocide committed between January and October 1999, as well as torture as a freestanding international crime and domestic crime.⁷⁷⁶

The Special Panels were plagued from the start by a shortage of funding and competent support staff, as well as lukewarm support by both the UN and the Timorese government.⁷⁷⁷ Trial judgment was often poorly reasoned and evinced a lack of comprehension of basic criminal law principles.⁷⁷⁸ The Panel went without a court of appeal in October 2001 to June 2003 due to the disagreement between the UN and the government over appointment; when the court of appeal began functioning again, many of its decisions contained patent legal errors, some of which resulted in the conviction of defendants for non-existent or unindicted crimes.⁷⁷⁹ In the end, 87 low-level defendants were tried and 84 convicted, usually for domestic crimes and sometimes for crimes against humanity as well. Also, 300 inductees remained safely at large in Indonesia throughout the duration of the Panels' existence, including all of the mid and

⁷⁷⁵ Report of the International Commission of Inquiry on East Timor to the Secretary-General, 30 January 2000, UN Doc. A/54/726-S/2000/59, para.153.

⁷⁷⁶ John RWD Jones and Steven Powles, *International Criminal Practice: The International Criminal Tribunal for The Former Yugoslavia, The International Criminal Tribunal for Rwanda, The International Criminal Court, The Special Court for Sierra Leone, The East Timor Special Panel for Serious Crimes, War Crimes Prosecutions in Kosovo* (Brill-Nijhoff 2003).

⁷⁷⁷ Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' *Criminal Law Forum* (Vol. 12. No. 2. Kluwer Academic Publishers 2001).

⁷⁷⁸ Ida Maria Gran Solaas, *Transitional Justice in East Timor: A Case Study of Justice versus Reconciliation and Its Consequences* (MS thesis 2009).

⁷⁷⁹ SPSC Regulation SS 3-9, 22.

high ranking inductees.⁷⁸⁰ The UNSC abruptly withdrew funding from the Special Panels in May 2005, and they closed soon after.⁷⁸¹

In an examination of the establishment of all the courts and the tribunals for international crime against humanity, it has emerged that the process and procedure for accountability in the court jurisdictions are complex.⁷⁸² The effectiveness of the accountability depends ultimately on the cooperation of the state, good legal experts, knowledge of the judicial process, and procedures of accountability, as well as the collaboration between the state and the UN in the indictment and enforcement of accountability in the state jurisdiction. Therefore, regardless of the initiative of the international community and the UN in enforcing accountability, as long as the central role of the procedure rests on the state, there will be a fundamental gap in accountability.⁷⁸³ However, the intention is not to bypass the state but rather to develop a mechanism that will be able to take care of the flaws and the unwillingness of the

⁷⁸⁰ Caitlin Reiger and Marieke Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect* (New York: International Center for Transitional Justice 2006).

⁷⁸¹ William A Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*. (Cambridge University Press 2006).

⁷⁸² Special Tribunal for Lebanon Trial Chamber held and the STL Appeals Panel confirmed, there is no international consensus yet on the elements of corporate liability under international law. Nadian Bernaz, "Corporate Criminal Liability under International Law: the new TV SAL and Akhbar Beirut SAL Cases at the Special Tribunal for Lebanon" (2015) 13 (2) *Journal of international Criminal Justice* 313, 330. To identify common standards of attribution and determine whether they have emerged into international custom or general principles of law would require an in-depth empirical comparative analysis of a cross-section of legal systems around the world.

⁷⁸³ I/A Court H.R., *Velásquez Rodríguez v Honduras Case*. Judgment of July 29, 1988, Series C No. 4, paragraph 166; *Perozo et al. v Venezuela Case*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, paragraph 149; *Case of Anzualdo-Castro. Peru*. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, paragraph 63; *Case of González et al. ("Cotton Field") v Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, paragraph 252. I/A Court H.R., *González et al. ("cotton field") v Mexico Case*. Series C No. 205, Judgment November 16, 2009, paragraph 280; *Massacre of Pueblo Bello v Colombia Case*. Judgment of January 31, 2006. Series C No. 140, paragraph 123; *Indigenous Community Sawhoyamaya v Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, paragraph 155; and *Valle-Jaramillo and et al. v Colombia Case. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 192, paragraph 78. See also ECHR, Case of *Kiliç v Turkey*, Judgment of 28 March 2000, paragraphs 62 and 63 y ECHR, Case of *Osman v. the United Kingdom*, Judgment of 28 October 1998, paragraphs 115 and 116. I/A Court H.R., *Baldeón García v Peru Case*. Judgment of April 6, 2006. Series C No. 147, paragraph 81; *Indigenous Community Sawhoyamaya v. Paraguay Case*. Judgment of March 29, 2006. Series C No. 146, paragraph 154; and *Massacre of Pueblo Bello v Colombia Case*. Judgment of January 31, 2006. Series C No. 140, paragraph 111.

Therefore, the citizen security policies must be evaluated from a perspective of respect and guarantee of human rights. On the one hand, negative obligations involving abstention and respect; on the other hand, positive obligations linked to the adoption of prevention measures. The effective enforcement of rights involves positive and negative obligations at four levels: the obligation to respect, the obligation to protect, the obligation to ensure and the obligation to promote the right in question. The obligation to respect is defined as the state's duty not to interfere with, hinder or bar access to, the enjoyment of the resources that are the object of the right. The obligation to protect is the duty to prevent third parties from interfering with, hindering or barring access to the resources that are the object of that right.

state to either cooperate or enforce accountability. This is because it is critical to observe and respect the sovereign rights⁷⁸⁴ of a state and that accountability is needed for each corporate entity. In this view, accountability could have multiple dimensions, such as state, judiciary, society, the UN, and international forums, such as tribunals or courts. However, if there is a lack of cooperation and regulation in the process, then society can resort to the UN through the international tribunal or court for accountability after exhausting all the avenues at the national level.

3.6. The International Criminal Court

The first major effort to create an international criminal court was the 1937 Convention for the creation of an International Criminal Court, an initiative of the League of Nations.⁷⁸⁵ The UN then made efforts to create an international court accompanied by the preparation of the Genocide Convention (which contemplates such a court), with the Secretariat preparing two draft statutes in 1947.⁷⁸⁶ The General Assembly also adopted a resolution asking the International Law Commission to examine the creation of an international criminal court with jurisdiction over genocide and other crimes.⁷⁸⁷ In early 1950, the organisation pursued further efforts to create an international criminal court, including the preparation of a draft statute, despite these initiatives becoming tied up in Cold War politics (is the open yet restricted rivalry that developed after World War II between the United States and the Soviet Union and their respective allies. The Cold War was waged on political, economic, and propaganda fronts and had only limited recourse to weapons),⁷⁸⁸ domestic politics and never proving successful.⁷⁸⁹ Hence, even though both the Genocide and Apartheid Conventions envisioned

⁷⁸⁴ Stephen Tierney, 'Reframing Sovereignty? Sub-state National Societies and Contemporary Challenges to The Nation-State' (2005) 54 (1) *International & Comparative Law Quarterly* 161,183, Jens Bartelson, 'The Concept of Sovereignty Revisited' (2006) 17 (2) *European Journal of International Law* 463, 474, Jean Bodin, *Bodin: On Sovereignty* (Cambridge University Press 1992). "The concept, the sovereignty acts as a supreme, absolute and independent of the state's laws power over his subjects, which is, however, limited by divine and natural law. Sovereignty, as something peculiar to the bearer of the supreme state power, that is to say, the absolute monarchy, endowed them the features of absoluteness, universality, limitlessness and eternity".

⁷⁸⁵ Cherif M Bassiouni, 'Historical Survey 1919-1998' (1998) *Statute of the International Criminal Court: A Documentary History* 31, 32.

⁷⁸⁶ Draft Convention on the Crime of Genocide, June 26, 1947, UN Doc. E/447, at 66. The reference to international criminal tribunal in the Genocide Convention was a source of extensive debate during its drafting. Ultimately, the drafters adopted a provision for giving future international panel tribunal jurisdiction over genocide with respect those parties who accepted its jurisdiction.

⁷⁸⁷ General Assembly Resolution, 260B (II), UN Doc.A/760, at 12-13 (1948).

⁷⁸⁸ Uta G Jazz Poiger, *Rock, and Rebels: Cold War Politics and American Culture in a Divided Germany* (Vol. 35. Univ of California Press 2000).

⁷⁸⁹ Cherif M Bassiouni, *Introduction to International Criminal Law* (Brill 2012).

an international criminal tribunal,⁷⁹⁰ no permanent tribunal with jurisdiction over those or any offences was created until decades later.

In 1989, the UN took issue again when Trinidad and Tobago raised concerns before the Sixth Committee, primarily to combat narcotics trafficking and terrorism.⁷⁹¹ The anxieties of some Member States emphasised caution on the General Assembly, which first requested the ILC's opinion and only asked the ILC to commence work on the draft statute⁷⁹² as the conflict in the former Yugoslavia reach ever more horrendous proportions and states began calling for an international tribunal. Thus, UN members, particularly the US, allowed the initiative and gave greater attention to the development of an international court that focused more on the offences being perpetrated in Yugoslavia.⁷⁹³

The ILC first produced a set of principles for the court and subsequently adopted a draft statute in 1994.⁷⁹⁴ The court was heavily influenced by the ICTY model; the ILC's Draft Statute was primarily directed at the suppression of war crimes, genocide and other crimes against humanity, though it did not jettison the notion of jurisdiction over narcotics trafficking and terrorism, which was the initial idea. However, the Draft Statute extended the Court's subject matter jurisdiction to include: genocide, aggression, a serious violation of international law and customs applicable in armed conflict, crimes against humanity, and crimes under certain treaties set out in an annex. At the same time, it showed greater deference to states and the UNSC than its predecessors. Notably, the court would only be a complement to a national criminal justice system where it was not effective or available.⁷⁹⁵

Likewise, the Court's jurisdiction over a case could be triggered only by the bringing of a complaint by the state party to the statute or by referral of a matter by the UNSC; the Prosecutor would not have had any powers to bring cases on his or her own. The Draft Statute also required the consent of the custodial state, the territorial state and any state that requested the offender's extradition for any prosecution other than for genocide. The UNSC would have

⁷⁹⁰ Genocide Convention, Art. VI; Apartheid Convention, Art. V.

⁷⁹¹ Yves Beigbeder and Theo Van Boven, *Judging War Criminals: The Politics of International Justice* (Macmillan Basingstoke and New Publishing 1999).

⁷⁹² General Assembly Resolution, 44/39, para. (1990), General Assembly Resolution, 44/41, para. (1991), also see; Robert Rosenstock, 'The Forty-fourth Session of The International Law Commission' (1993) 87 (1) *American Journal of International Law* 138, 144.

⁷⁹³ Paul C Szasz, 'Proposed War Crimes Tribunal for Ex-Yugoslavia' (1992) 25 *New York University Journal of International Law and Politics* 405.

⁷⁹⁴ Report of The International Law Commission on The Work of Its Forty-Fourth Session, UN Doc. A/47/10(1992)

⁷⁹⁵ *Ibid.*

enjoyed extensive prerogatives under the Draft Statute, which permitted it to refer matters to the Court without any state's consent. It further determined that aggression had occurred before any prosecution for that crime, and precluded prosecution arising from a matter that was under Chapter VII.⁷⁹⁶ The General Assembly, furthermore, established a special committee to negotiate a draft statute that would command political acceptance.⁷⁹⁷

From March 1996 to April 1998, a preparatory committee met to consider the ILC's Draft Statute and a revision proposed by the UN's members. In April 1998, the committee completed a new text and transmitted it to a diplomatic conference that met in the Summer of 1998 in Rome. As a result of the difference of opinions among states that characterised the deliberations preceding the Rome conference, the draft text transmitted to the conference was more of a working document than a uniform text, setting forth various proposed alternatives and leaving it for the Rome delegates to resolve these issues.⁷⁹⁸ After a month of intensive negotiations, the UN diplomatic conference adopted the ICC Statute by a vote of 120 in favour, 7 against, and 21 abstaining.⁷⁹⁹ After a highly effective ratification campaign by governmental and NGOs friends of the ICC, the Court came into existence less than four years later, on 2 July 2002, after the sixth state had ratified the statute. According to the statute's term, the Court would be able to prosecute an individual only for crimes committed after this date. It is an independent body with jurisdiction over the most serious international crimes. Unlike the ICTY and ICTR, which have primacy over national tribunals, a central attribute of the ICC is that, like its statute, it is devised by the ILC, and it is complementary to national criminal jurisdiction.⁸⁰⁰

⁷⁹⁶ *Ibid.*

⁷⁹⁷ UN General Assembly Resolution, 49/53 (1995); UN General Assembly Resolution, 50/46 (1996).

⁷⁹⁸ UN General Assembly, 51/207 (1996); UN General Assembly Resolution, 52/160 (1997); Report of the Preparatory Committee on The Establishment of an International Criminal Court, Apr. 14, 1998, UN Doc. A/CONF.183/2/Add.1.

⁷⁹⁹ Roy SK Lee, ed. *The International Criminal Court: The Making of The Rome Statute: Issues, Negotiations and Results* (Martinus Nijhoff Publishers 1999).

⁸⁰⁰ ICC Statute, Preamble, Arts. 1, 11(1), 126(1). The Court has been brought into relationship with the United Nations through a separate agreement, thus avoiding the need to amend the UN Charter and limiting political encroachments on the ICC's independence by the UN Court, Oct. 4, 2004, UN Doc. A/58/874, *aslo see*; Luigi, Condorell and Santiago Villalpando 'Relationship of The Court with The United Nations' (2002) *The Rome Statute of International Criminal Court: A commentary* 221.

3.7. The Three Flaws in ICC/Tribunals Credibility and Legitimacy

After a careful consideration of the process and the establishment of the ICC, it is important to note that the ICC was dogged by accusations of political influence and rejection by the UN Member States.⁸⁰¹ Therefore, it can be argued that the concept of the ICC and its effectiveness in offering accountability for international crimes in the broad spectrum has been watered down throughout the negotiations of the statute.⁸⁰² Therefore, this can lead one to question the credibility of the ICC and its ability to offer a legitimate accountability mechanism for people who violate international law. These flaws can be grouped into three categories in this thesis: these are the issue of credibility, legitimacy, and the realistic expectation of the court.

The credibility issues are evident in the trial of Thomas Lubanga in 2012, after decades of the Court spending over a billion euros on only one verdict,⁸⁰³ this is due to the difficulties surrounding the arrest, indictment, criminal procedures, and the obstacles facing the court in exercising its jurisdiction in the defendant state and across international communities. However, not only this, in the three years following the verdict in *Lubanga*,⁸⁰⁴ there were other ICC cases (*Mathieu Ngudjolo Chui*,⁸⁰⁵ *Germain Katanga*,⁸⁰⁶ *Prosecutor v Jean-Pierre Bemba*)⁸⁰⁷ which are all thought to lack credibility due to the process and the manner in which the cases were conducted.⁸⁰⁸ This is further supported by the statement from ICC's President Silvia Fernandez de Gurmendi, in which she acknowledged that the court proceeding was slow, which

⁸⁰¹ David A Nill, 'National Sovereignty: Must It be Sacrificed to The International Criminal Court' (1999) 14 *Brigham Young University Journal of Public Law* 119.

⁸⁰² Bruce Broomhall, *International Justice and The International Criminal Court: Between Sovereignty and The Rule of Law* (Oxford University Press 2003)

⁸⁰³ Sara Anoushirvani, 'Future of the International Criminal Court: The Long Road to Legitimacy Begins with The Trial of Thomas Lubanga Dyilo' (2010) 22 *Pace International Law Review* 213.

⁸⁰⁴ *Ibid.*

⁸⁰⁵ *The Prosecutor v Mathieu Ngudjolo Chui*. ICC-01/04-02/12. <<https://www.icc-cpi.int/drc/ngudjolo?ln=en>> accessed 6 November 2016.

⁸⁰⁶ *The Prosecutor v Germain Katanga*. ICC-01/04-01/07. <<https://www.icc-cpi.int/iccdocs/PIDS/publications/KatangaEng.pdf>> accessed 6 November 2016.

⁸⁰⁷ *Bemba Case The Prosecutor v Jean-Pierre Bemba Gombo*. ICC-01/05-01/08. <<https://www.icc-cpi.int/car/bemba?ln=en>> accessed 6 November 2016.

⁸⁰⁸ There is lack of fair trial for the accused, judge can witnesses and ordered an internal investigation. Although the International Criminal Court is slowly but surely sending a warning against those who commit crimes on a massive scale, it still lacks the support of the world's major powers and several key suspects remain at large. Of the five permanent Security Council members, the United States, Russia and China are not members. India, Indonesia, Israel and many Islamic countries have snubbed it as well. Critics also point to its slow progress, starting its first trial in January 2009, stymied by evidence disclosure problems. The court is neither international nor independent.

had affected the institution, the ability to ensure justice for victims, and certain vital elements for a fair trial.⁸⁰⁹

This thesis however argues that states have a substantial input in the drafting and negotiation of the establishment of the court and that perhaps these should also have a vital role to play in restoring credibility to the ICC. This is because with the state playing a central role, the court has the ability to either try to ensure effective accountability for international crimes or fail without state cooperation. Therefore, it is suggested here that to ensure the ICC and future tribunals and courts gain full credibility, more states should be encouraged to become members.⁸¹⁰ More specifically, there should be an appropriate mechanism at the state level for witness relocations and sentence enforcement agreements. This will ensure that the court meets its obligations under accountability such as prosecution and the enforcement of a sanction, which will prevent fugitives escaping prosecution.⁸¹¹

The second obstacle facing the ICC observed in this study is the question of legitimacy. In the past, the ICC Prosecutor has come under heavy criticism over its selection of situations and cases, such as Georgia,⁸¹² the Central African Republic,⁸¹³ and the Republic of Mali.⁸¹⁴ Likewise, there have been complaints that the Court has only focused on the investigation and prosecution of African cases⁸¹⁵ when the reason for this is unclear. While the vast number of these situations have arisen from self-referrals, non-member states such as Cote d'Ivoire (at that time) and Ukraine have accepted the Court on an *ad hoc* basis, in addition to two situations which were referred to the Prosecutor by the UNSC. Some have claimed that this shows the ICC is biased in its approach to investigating cases and prosecuting offenders.⁸¹⁶ This has led to complaints and questions concerning the legitimacy of the Court.⁸¹⁷ Whether this could be

⁸⁰⁹ Silvia Fernández de Gurmendi President of the International Criminal Court, 'Remarks to the 25th Diplomatic Briefing Check against delivery The Hague, (2015). <<https://www.icc-cpi.int/iccdocs/db/25DB-Pres-Eng.pdf>> accessed 5 November 2016.

⁸¹⁰ *Ibid.*

⁸¹¹ Benedict Abrahamson Chigara and Chidebe Matthew Nwankwo, 'To Be or Not to Be?' The African Union and Its Member States Parties' Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court 1998' (2015) 33 (3) *Nordic Journal of Human Rights* 243, 268.

⁸¹² Georgia Situation in Georgia, ICC-01/15. <<https://www.icc-cpi.int/georgia>> accessed 6 November 2016

⁸¹³ Central African Republic II Situation in Central African Republic II, ICC-01/14. <<https://www.icc-cpi.int/carII>> accessed 6 November 2016.

⁸¹⁴ Mali Situation in the Republic of Mali, ICC-01/12. <<https://www.icc-cpi.int/mali>> accessed 6 November 2016.

⁸¹⁵ Alexis Arieff, Rhoda Margesson and Marjorie Ann Browne 'International Criminal Court Cases in Africa: Status and Policy Issues' (Diane Publishing 2010).

⁸¹⁶ Ovo Imoedemhe, 'Unpacking the Tension between the African Union and the International Criminal Court: the Way Forward' (2015) 23 (1) *African Journal of International and Comparative Law* 74, 105.

⁸¹⁷ Associated Press in Addis Ababa, 'African Leaders Plan Mass Withdrawal from International Criminal Court' (2017). <<https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>> accessed 8 July 2017, Kurt. Mills, 'Bashir is Dividing US: Africa and The

something that can be resolved at the state level is another argument. However, this defect has contributed to the distortion of the legitimacy of the Court's global standing, which is undoubtedly undermined by the fact that only two of the permanent members of the UNSC are members of the Court, yet the UNSC can refer situations to the Prosecutor, with no effective follow-up. It is argued that this is a double standard by the UNSC and it undermines the legitimacy of the Court and the rule of law. Syria is a typical example of where the UNSC failed to protect human rights and hold the responsible actors accountable for human rights violations.⁸¹⁸ Of the UNSC's unwillingness to hold individuals accountable for human rights violations has also played its part in reducing the strength of the Court.⁸¹⁹

Lastly, the third obstacle facing the ICC concerns the realistic expectations of the court. As Carsten Stahn put it, the ICC is a "persistent object of faith".⁸²⁰ Hence, the expectation of the ICC is unrealistically high, and this has inevitably led to many disappointments and created a significant flaw in the objective of the Court because it lacks a systematic approach to accountability.⁸²¹ However, this contention is inconclusive as it is not clear whether this is because the UNSC does not enforce the objectives and obligations or follow up on its referrals with funding or coercion, or whether because state parties refuse to enforce sanctions or pay their contributions to the Court's budget. With respect to evaluation, determining such a variable is difficult, or complex. This is very difficult to answer. Nonetheless, the ICC is a judicial institution, which inhabits the world of *realpolitik*,⁸²² and where great powers act when

International Criminal Court' (2012) 34 (2) *Human Rights Quarterly* 404, 447. African leaders have adopted a strategy calling for a collective withdrawal from the international criminal court. The non-binding decision came behind closed doors near the end of an African Union summit. It was the latest expression of impatience by African leaders with the court, which some say has focused too narrowly on Africa while pursuing cases of genocide, war crimes and crimes against humanity. South Africa, Burundi and the Gambia all announced plans to leave the court, leading to concerns that other states would follow. Some African countries have been especially critical of the ICC for pursuing heads of state. Sudanese president Omar al-Bashir has been wanted by the court since 2009 for allegedly orchestrating atrocities in Darfur. The ICC also caused an uproar among some African nations by indicting Kenyan president Uhuru Kenyatta on charges of crimes against humanity for 2007 post-election violence in which more than 1,000 died. The case collapsed because of what the ICC prosecutor called lack of cooperation by Kenya's government.

⁸¹⁸ UN Security Council, 'Begins Negotiations On New Syria Resolution' (2016). <<http://www.cbsnews.com/news/united-nations-security-council-begins-negotiations-on-new-syria-resolution/>> accessed 21 November 2016.

⁸¹⁹ Michael J Glennon, 'Why the Security Council Failed' (2003) 82 *Foreign Affairs* 16.

⁸²⁰ Carsten Stahn, *The Law and Practice of The International Criminal Court* (Oxford University Press USA 2014).

⁸²¹ Nadia Banteka, 'Mind the Gap: A Systematic Approach to The International Criminal Court's Arrest Warrants Enforcement Problem' (2016) 49 *Cornell International Law Journal* 521 and Shirin Jaafari, 'Lack of Political will Stands in The Way of Bringing Assad to Court' (2017). <<https://www.pri.org/stories/2017-04-06/lack-political-will-stands-way-bringing-assad-court>> accessed 8 July 2017.

⁸²² August Ludwig von Rochau, *Grundsätze Der Realpolitik: Ausgewendet Auf Die Staatlichen Zustände*

they want and when they can to protect their own interests. A possible implication of this is that states will only act to protect their national, economic, and security interests.⁸²³

On May 6, 2002, the Bush Administration announced that the United States does not intend to become a party to the Rome Statute of the International Criminal Court. Bolton, the Under Secretary of State for Arms Control and International Security, sent a letter to Kofi Annan, the Secretary-General of the United Nations, stating that "the United States does not intend to become a party to the treaty," and that, "[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000."⁸²⁴ Nor is it clear how long the object and purpose obligation lasts after a nation has signed a treaty. It could be argued that a long delay in ratifying a treaty would signal a clear intent not to become a party to the treaty. On the other hand, it is worth noting that the United States has sometimes ratified treaties long after signing them. A notable example is the Convention on the Prevention and Punishment of the Crime of Genocide, which the United States signed in 1948 but did not ratify until 1988.

Deutschlands (K. Göpel 1859) and Frank Lorenz Müller, 'The Spectre of a People in Arms: The Prussian Government and The Militarisation of German Nationalism, 1859–1864' (2007) 122 (495) *The English Historical Review* 82, 104. Realpolitik, politics based on practical objectives rather than on ideals. In this respect, it shares aspects of its philosophical approach with those of realism and pragmatism. It is often simply referred to as pragmatism in politics, e.g. "pursuing pragmatic policies". The term Realpolitik is sometimes used pejoratively to imply politics that are perceived as coercive, amoral, or Machiavellian. The term Realpolitik was coined by Ludwig von Rochau, a German writer and politician in the 19th century. His 1853 book *Grundsätze der Realpolitik angewendet auf die staatlichen Zustände Deutschlands* describes the meaning of the term ["The study of the forces that shape, maintain and alter the state is the basis of all political insight and leads to the understanding that the law of power governs the world of states just as the law of gravity governs the physical world. The older political science was fully aware of this truth but drew a wrong and detrimental conclusion the right of the more powerful. The modern era has corrected this unethical fallacy, but while breaking with the alleged right of the more powerful one, the modern era was too much inclined to overlook the real might of the more powerful and the inevitability of its political influence.

⁸²³ Scott Burchill, *Realism and Neo-realism* (Palgrave 2001) and David Boucher, *Political Theories of International Relations* (Vol. 11. Oxford University Press 1998). In accordance with state national interest, or the interests of that particular state. State interests often include self-preservation, military security, economic prosperity, and influence over other states. Sometimes two or more states have the same national interest. For example, two states might both want to foster peace and economic trade. And states with diametrically opposing national interests might try to resolve their differences through negotiation or even war. According to realism, states work only to increase their own power relative to that of other states. Realism also claims the following:

- The world is a harsh and dangerous place. The only certainty in the world is power. A powerful state will always be able to outdo and outlast weaker competitors.

The most important and reliable form of power is military power.

- A state's primary interest is self-preservation. Therefore, the state must seek power and must always protect itself
- There is no overarching power that can enforce global rules or punish bad behaviour.
- Moral behaviour is very risky because it can undermine a state's ability to protect itself.
- The international system itself drives states to use military force and to war. Leaders may be moral, but they must not let moral concerns guide foreign policy.
- International organisations and law have no power or force; they exist only as long as states accept them.

⁸²⁴ Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan, <<http://www.state.gov/r/pa/prs/ps/2002/9968.htm>>. accessed 5 June 2018

This study has raised critical questions regarding the nature and extent of a state's desire to act legitimately to enforce international criminal law in the international arena. As such, the underlying factors include the sanctioning and enforcement, rather than the legal concept, of human rights obligations.

It is morally and legally unforgivable for the UNSC and its member states to allow the Court to be in such disarray. This indicates some of the fundamental flaws in the establishment of the Court and the difficulties of enforcing human rights accountability at the international level through international criminal law. Thus far, accountability is extremely difficult to obtain and that measures and mechanisms to enforce it are convoluted and often difficult to reach, but it also shows that the ICC is an imperfect system and needs to be shaken up if it is to be seen as an international mechanism for human rights accountability.

3.8. Examining the Principle of Accountability under the Nuremberg Tribunal and ICC

Despite the exploratory nature of the ICC, this section will offer insight into the principle of liability for categorising crimes under international law, such as slavery, genocide, war crimes, torture, and other crimes against humanity.⁸²⁵ In addition to the expectations of corporate accountability under international law, corporate actors were held accountable for certain war crimes by the US Military Tribunal at Nuremberg in the *IG Farben* case, where the German corporation IG Farben was treated as a legal person who had the capacity to violate the international law of war by its act.⁸²⁶

Furthermore, after extensive discussion on individual accountability, the Rome Statute of the ICC created a draft provision that would have subjected juridical persons to the jurisdiction of the Court.⁸²⁷ Nonetheless, there is still evidence that certain international treaties do provide for the criminal liability of a legal person. A typical example is Article 9 of the European Convention on the Protection of the Environment through Criminal Law⁸²⁸ of 1998, which provides for corporate criminal liability under the domestic law of the contracting state,

⁸²⁵ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006) 244.

⁸²⁶ Andrew Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from The Rome Conference on an International Criminal Court* (2000) p. 167.

⁸²⁷ *Ibid.*

⁸²⁸ Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2012).

as well as Article 12 of the UN Convention Against Corruption 2003.⁸²⁹ Other examples include the 1999 UN Convention on the Suppression of the Financing of Terrorism⁸³⁰ and the 2000 UN Convention Against Transnational Organised Crime.⁸³¹ A possible implication of this is that criminal liability of corporations is perhaps not appropriate in corporate accountability but rather tort and civil sanction could be considered necessary to ensure an effective system of liability and enforcement.⁸³² However, this study favours the use of tort and civil law because it has already been used in the law of negligence. Tort law and civil law obligations have regulated interactions of different actors, including corporations, and society, long before international human rights standards were developed.⁸³³

Therefore, one can only accept the ICJ's analysis as the basic principles of criminal and civil legal accountability,⁸³⁴ which enhance the understanding of the liability of some international crimes. Accordingly, one cannot undermine the flexibility and enforcement

⁸²⁹ UN General Assembly, *United Nations Convention Against Corruption*, 31 October 2003, A/58/422 <<http://www.refworld.org/docid/4374b9524.html>>accessed 23 September 2016].

⁸³⁰ UN General Assembly, *International Convention for The Suppression of The Financing of Terrorism*, 9 December 1999, No. 38349. <<http://www.refworld.org/docid/3dda0b867.html> >accessed 23 September 2016.

⁸³¹ UN General Assembly, *United Nations Convention against Transnational Organized Crime: Resolution / Adopted By The General Assembly*, 8 January 2001, A/RES/55/25. <<http://www.refworld.org/docid/3b00f55b0.html> >accessed 23 September 2016.

⁸³² Because a corporation lacks a mind of its own, establishment of corporate guilt is a major challenge. There is much controversy about the legal standards for determining knowledge and intent with regard to criminal liability of a legal entity, such as a corporation. Celia Wells, *Corporations and Criminal Responsibility*. (Oxford University Press on Demand 2001). Some countries, such as France, employ a vicarious liability model to establish criminal liability of the corporation; in such cases, “corporate blameworthiness” is irrelevant. Rather, *mens rea* needs to be found in the individual. Then, the proof of causality in terms of “cause and effect” leads to the attribution of criminal liability to the corporation. This approach reflects the notion in France that corporations lack minds and thus a corporation can only be found guilty through its individual employees.

The practical implication is that a court must find all elements of the offense in one individual, which imposes a stringent standard to establish criminal liability of the corporate entity. A major downside of this approach is that corporations could avoid liability by dividing up duties and compartmentalising information within the corporate structure in bad faith. Thomas A Hagemann and Joseph Grinstein, ‘Mythology of Aggregate Corporate Knowledge: A Deconstruction’ (1996) 65 *George Washington Law Review* 210. For that reason, courts have often established corporate guilt on the basis of the “collective knowledge” doctrine that imputes to the corporation the totality of the knowledge of all employees, as acquired within the scope of their employment. *Bank of New England*, 821 F.2d at 856. The United States follows this model, for example. This approach recognises corporations as aggregate bodies that have a personality of their own and thus establishes criminal culpability of the corporation as an independent entity. George R Skupski, ‘The Senior Management *Mens rea*: Another Stab at a Workable Integration of Organisational Culpability into Corporate Criminal Liability’ (2011) 62 *Case Western Reserve Law Review* 263. Especially when dealing with large-scale atrocity crimes, this collective approach seems to be a more accurate reflection of corporate wrongdoing, because involvement in such crimes is often a function of a systemic issue that proliferates throughout the corporate culture of the organisation.

⁸³³ Rudu Mares, ‘Gap in the Corporate Responsibility to Respect Human Rights’ (2010) 36 *Monash University Law Review* 33.

⁸³⁴ Richard M Locke, Fei Qin, and Alberto Brause, ‘Does Monitoring Improve Labor Standards? Lessons from Nike’ (2007) 61(1) *Industrial & Labor Relations Review* 3, 31

within the tort of negligence principle. Therefore, it is perfectly adequate for the adaptation of tort and civil law (tort of negligence) to corporate accountability. However, this requires a profound discussion around tort and civil law notions of accountability in order to arrive at a narrower or broader interpretation of corporate liability.

Additionally, tort and civil law will justify why a parent corporate should be accountable for the conduct when its supply chain or subsidiaries violate human rights, in the absence of any conduct on the part of the parent corporate itself.⁸³⁵ This means that liability arises once accountability is established. However, this requires two sub-accountabilities: the first, to gather information and the second, to act on it to prevent human rights abuses and remedy violations. Therefore, it is argued that outsourcing operations to subsidiaries and contractors also means outsourcing accountability; hence, some residual accountability remains with the parent's company. The tort and civil law accountability concept simply means that the parent company cannot remain a passive bystander after outsourcing business operations to subsidiaries.⁸³⁶ The accountability of the parent company means that it should change its own decisions so as to not violate human rights directly or indirectly. However, the difficulty comes when the parent company does not make any harmful decision and so it is unclear how a supply chain or subsidiary's voluntary decision can be separated from the parent company.⁸³⁷

⁸³⁵ Corporate criminality is of a hybrid civil-criminal nature such that the crimes are committed by a legal fiction under private law. Unlike individuals, typically corporations are mainly regulated, constrained, and incentivised in their behaviour by private law and civil remedies. This is one main reason why the ATCA which is unprecedented globally in that it provides civil damages in tort cases for violations of international law that are often criminal in nature has long been considered uniquely suited to remedy the violations at hand. Yet, it is exactly this compensatory civil liability for corporate involvement in international crimes that has often been subject to criticism.

Beth Stephens, 'Corporate Liability: Enforcing Human Rights Through Domestic Litigation' (2000) 24 *Hastings International and Comparative Law Review* 401. While monetary compensation alone is probably insufficient to right wrongs of the magnitude and scale of international crimes, many civil law systems have paired civil tort claims for monetary damages with criminal prosecution in those cases. The so-called "partie civile" procedure, also referred to as "action civile," provides a mechanism by which the victim of a crime can attach to the criminal case his or her civil claim for damages suffered and therefore become a (civil) party to the criminal proceedings. Eric Engle, 'Alien Torts in Europe? Human Rights and Tort in European law' (2005).

⁸³⁶ See chapter 8 for further discussion. The principle of 'do no harm' on which the responsibility to respect is based adequately covers situations where the core company's own decisions create negative ripple impacts throughout affiliate operations. Radu Mares, 'A Gap in the Corporate Responsibility to Respect Human Rights' (2010) 36 (3) *Monash University Law Review*. However, the same cannot be said about instances in which affiliates infringe rights in the absence of a core company's own harmful decision. Then the core company is merely associated with abusive affiliates.

⁸³⁷ A different approach would be to stay within the scope of the ICC's purely criminal structure and amend the current penalty section in Part VII of the Rome Statute to include corporate actors. Part VI of the Rome Statute deals with "penalties". However, extending the ICC's jurisdiction to non-natural persons poses challenges with regard to the existing penalty structure under Article 77 of the Rome Statute, which

3.9. Case Study – Khmer Rouge 1975-1979

3.9.1. Improvements and Limitations in Ascribing International Criminal Accountability

It can be argued that the development of the various acts which incur individual responsibility under international law portray a legal landscape that is marked by clarity as well as certainty under international criminal law. To explain most of the improvements and limitations in ascribing criminal accountability for human rights violation, this section will apply the norms of international law to the Cambodia case. This study chooses the Cambodia case because it highlights the difficulties and flaws associated with accountability under international criminal law. Here, the complex definitional issue inherent in international criminal law becomes very clear.⁸³⁸ This is due to the fact that accountability also arises under the domestic judicial system, and is subsequently vital to assessing the circumstances of the Khmer Rouge period under Cambodian criminal law.

It is obvious that international criminal law accountability analysed here is related to a small country like Cambodia. An assessment of the coverage of Cambodian law highlights the procedures that need to be taken for the application of the law in other cases. This is because of the similarity of the basic elements regarding the law to those of another state (such as the code borrowed from the French Criminal Code). The second is because it illustrates the constraints on invoking the law when a state's tumultuous history leaves the choice of applicable law, as well as its interpretation, subject to a substantial uncertainty.⁸³⁹

The point mentioned above illustrates that first, with respect to both international law and national law, the principle of *nullum crimen sine lege* “(is the legal principle in criminal law and international criminal law that a person cannot⁸⁴⁰ or should not face criminal

provides imprisonment as the primary penalty available. “According to Article 77(1) of the Rome Statute”, “the Court may impose one of the following penalties [:] (a) [an i] mprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) [a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”. Also, see art. 77(1).

However, according to Article 77(2), the ICC can impose fines in addition to the primary penalty of imprisonment, but these fines do not constitute a legitimate stand-alone penalty in the face of the egregious crimes under the jurisdiction of the Rome Statute. Because corporations are fictional entities under the law, a court cannot sentence a corporate entity to imprisonment per se. Thus, the states parties of the ICC will have to expand the catalogue of available penalties under Article 77(1) of the Rome Statute to include other available penalties that are suitable to be imposed on convicted legal persons.

⁸³⁸ Neil J Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’ (1996) 59 (4) *Law and Contemporary Problems* 127, 152.

⁸³⁹ Steven R Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Arocities in International Law: Beyond The Nuremberg Legacy* (Oxford University Press 2009).

⁸⁴⁰ Julia Crisan, ‘The Principles of Legality “Nullum Crimen, Nulla Poena Sine Lege” and Their Role’ (2010) 5 *Effectius Newsletter* 1, 3. Nulla poena sine lege certa. “There is to be no penalty without definite law.

punishment except for an act that was criminalised by principle)⁸⁴¹ dictate the application of the international law and domestic law in force since 1975, at the start of the idea of crime against humanity, rather than that in effect today.⁸⁴² Hence, for example, the view of recent national and international tribunals (in particular the ICTY and ICTR) regarding the state of international criminal law will need to be examined closely to determine whether their opinions apply to the law in effect ever since 1975. Second, any application of the law such as this can reach only a *prima facie* conclusion based on historical record. Likewise, the definitive findings concerning the guilt of an individual require an examination of detailed evidence deemed admissible by a specific court regarding precise events. In addition, definitive findings further require the role of individual actors in them (for example, a national court or international court). The section will move on to examine the various law in the Cambodia case.

3.9.2. Genocide⁸⁴³

Cambodia has been party to the Genocide Convention, without reservations, since the Convention's entry into force in 1951.⁸⁴⁴ It appears that Khmer Rouge never denounced the Convention when they were in power. It is clear that the Khmer Rouge subjected the people of Cambodia to almost all the acts in Article II (a-e) of the Genocide Convention during their

This provides that a penal statute must define the punishable conduct and the penalty with sufficient definiteness to allow citizens to foresee when a specific action would be punishable, and to conduct themselves accordingly. The rule expresses the general principle of legal certainty in matters of criminal law. It is recognised or codified in many national jurisdictions, as well as e.g. by the European Court of Justice as a "General Principle of Union law". "*Nulla poena sine lege* (Latin for no penalty without a law) is a legal principle, requiring that one cannot be punished for doing something that is not prohibited by law. This principle is accepted and codified in modern democratic states as a basic requirement of the rule of law. It has been described as "one of the most 'widely held value-judgement[s] in the entire history of human thought'".

⁸⁴¹ Venus Ghareh Baghi and TR Mruthi, 'Nullum Crimen sine Lege in the International Criminal Court' (2010) 6 (3) *Acta Universitatis Danubius. Juridica* 65, 73.

⁸⁴² Beth Van Schaack, 'The Principle of Legality in International Criminal Law' (2010) 10(8) *Santa Clara Univ Legal Studies Research Paper*.

⁸⁴³ The crime of genocide is defined in Article II, the provision that sits at the heart of the Convention. Genocide is a crime of intentional destruction of a national, ethnic, racial and religious group, in whole or in part. Article II lists five punishable acts of genocide. This definitional provision has stood the test of time, resisting calls for its expansion, and it is reproduced without change in such instruments as the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court. The obstinate refusal to modify the definition is not explained by some innate conservatism in the international lawmaking process. Rather, the gaps left by the somewhat narrow definition of genocide in the 1948 Convention have been filled more or less satisfactorily by the dramatic enlargement of the ambit of crimes against humanity during the 1990s. The coverage of crimes against humanity expanded to include acts perpetrated in time of peace, and to a broad range of groups, not to mention an ever-growing list of punishable acts inspired by developments in international human rights law. For much the same reason, judicial interpretation of Article II has remained relatively faithful to the intent of the drafters of the provision.

⁸⁴⁴ John Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate Publishing Ltd 2013).

rule.⁸⁴⁵ The more difficult task is to determine whether the Khmer Rouge carried out these acts with the requisite intent and against groups protected by the Convention. Current literature⁸⁴⁶ has made a significant *prima facie* case that the Khmer Rouge committed an act of genocide against the Cham minority group, the ethnic Vietnamese, Chinese, and the Thai minority groups, as well as the Buddhist monkhood.⁸⁴⁷ What is clear from the literature is that the Khmer Rouge subjected these groups to particularly harsh and extensive forms of the acts enumerated in the Genocide Convention. Likewise, the requisite intent appears to be demonstrated by both direct and indirect evidence, including Khmer Rouge records and statements, eyewitness accounts, and the nature and number of victims in each group, both in absolute terms and in proportion to each group's total populations.⁸⁴⁸ Thus, it remains confined to the intentional physical destruction of the group, rather than attacks on its existence involving persecution of its culture or the phenomenon of "ethnic cleansing". Article III lists four additional categories of the crime of genocide in addition to perpetration as such. One of these, complicity, is virtually implied in the concept of perpetration and derives from general principles of criminal law. The other three are incomplete or inchoate offences, in effect preliminary acts committed even where genocide itself does not take place. They enhance the preventive dimension of the Convention. The most controversial, "direct and public incitement", is restricted by two adjectives so as to limit conflicts with the protection of freedom of expression.

In some instances, such as the case of the Buddhist monkhood, their intent seems to be established by the Khmer Rouge's intensely hostile stance against religion and the monkhood specifically; their policies to eradicate the physical and ritualistic aspect of the Buddhist religion; the disrobing of monks and abolition of the monkhood; the number of victims; and the execution of Buddhist leaders, and recalcitrant monks. In addition to the number of victims, the intent to destroy the Cham and other ethnic minorities appears to be evidenced by such Khmer Rouge actions as their announced policy of homogenisation, the total prohibition of these groups' different cultural traits, their dispersal among the general population, and the execution of their leadership.⁸⁴⁹ These groups are clearly protected under the Genocide

⁸⁴⁵ UN General Assembly, *Prevention and Punishment of the Crime of Genocide*, 9 December 1948, A/RES/260. <<http://www.refworld.org/docid/3b00f0873.html>> accessed 7 November 2016.

⁸⁴⁶ Evan Gottesman, *Cambodia after The Khmer Rouge: Inside The Politics of Nation Building* (Yale University Press 2004)

⁸⁴⁷ Jason Abrams, 'The Atrocities in Cambodia and Kosovo: Observations on The Codification of Genocide' (2000) 35 *New England Law Review* 303

⁸⁴⁸ Kathryn Railsback, 'Genocide Convention Action against the Khmer Rouge: Preventing a Resurgence of the Killing Fields' (1989) 5 *Connecticut Journal of International Law* 457.

⁸⁴⁹ Hurst Hannum and David Hawk, 'The Case Against the Standing Committee of the Communist Party of Kampuchea' (1986) *New York Cambodia Documentation Commission*.

Convention:⁸⁵⁰ the Cham as an ethnic and religious group; the Vietnamese, Chinese, and Thai communities as ethnic and perhaps racial groups; and the Buddhist Monkhood as a religious group. That the Khmer Rouge targeted Chinese people as an ethnic group, rather than merely as part of an economic class, is supported by reports that their mistreatment continued well after the Khmer Rouge had confiscated their property and had forced them to live as Khmer peasants.⁸⁵¹

A more complex issue, however, is the characterisation of atrocities committed against the general Cambodian population. Many observers have asserted that the Khmer Rouge committed genocide against the Khmer national group, though they acknowledge that the Khmer Rouge obviously did not intend to destroy the Khmer nation as a whole.⁸⁵² These debates take various forms, for instance, one line argues⁸⁵³ that the Khmer Rouge committed genocide against that portion of the Khmer national group that did not conform to their concepts and ideological purity. This portion transcended characterisation as a political or economic group, neither of which is protected by the Convention since it represents a far broader segment of society. In sum, that segment did not fit into the vision of the Khmer nation that Khmer Rouge sought to impose.⁸⁵⁴ Several theorists argue that the Khmer Rouge committed genocide against the urban Khmer population and the Khmer in the Eastern Zone (who were subjected to brutal treatment in connection with the hostilities with Vietnam and the rebellion in the zone).⁸⁵⁵

The Khmer people of Cambodia clearly constitute a national group within the meaning of the Convention.⁸⁵⁶ However, the question whether the Khmer Rouge committed genocide with respect to part of the Khmer national group turns on certain difficult interpretive issues, especially concerning the Khmer Rouge's intent with respect to its non-minority group victims. Therefore, while the drafters of the Convention eliminated a particular motivation, the drafters' intention is directed at a protected group does and suggest that victims must have been targeted by virtue of their membership in their protected group.⁸⁵⁷ Accordingly, if the Khmer Rouge

⁸⁵⁰ Kathryn Railsback (n 581).

⁸⁵¹ Kamal Hossain, ed. *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Martinus Nijhoff Publishers 2000).

⁸⁵² David Hawk, 'The Cambodian Genocide' (1988) 1 *Genocide: A Critical Bibliographic Review* 137.

⁸⁵³ Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide: Elusive Justice and the Khmer Rouge Tribunal* (UNSW Press 2005).

⁸⁵⁴ Hurst Hannum (n 844).

⁸⁵⁵ *Ibid.*

⁸⁵⁶ Kamal Hossain (n 846).

⁸⁵⁷ United Nations Genocide Convention, Art. II.

targeted these victims solely as members of political, professional, or economic groups, or random violence or harsh conditions imposed on society at large, it would be difficult to conclude that acts committed against them constituted genocide under the Convention.⁸⁵⁸ On the other hand, if the Khmer Rouge targeted these non-minority elements as members of the Khmer nation, then an argument that the Khmer Rouge committed genocide towards Khmer nationals becomes more plausible.

“The Convention’s failure to address the type of situation that prevailed in Cambodia stems largely from the mind-set that dominated its elaborations”;⁸⁵⁹ the drafters did not appear to contemplate the mass killing of one segment of a group by another segment of that same group. Therefore, the theoretical question is, should the Convention protect everyone, including the other segment of the Khmer? The framework that guides the drafting, primarily the Nazi genocide against the Jews, involved attempts to destroy a group that was different to the perpetrators, but this was in opposition to the bulk of the atrocities committed by the Khmer Rouge. Hence, even though arguments can be advanced that the Convention ought to be interpreted in light of its spirit and purpose to cover the mass killing of Cambodians by the Khmer Rouge, it is uncertain how a court would decide the issue. This question turns in part on whether the Convention is to be accorded relatively broad or more limited interpretation.⁸⁶⁰

The argument that the Khmer Rouge committed genocide against the Khmer national group appears to be relatively weak in light of these facts. Most of the literature suggests that the Khmer Rouge did not target non-minority victims as members of the Khmer nation.⁸⁶¹ Rather, it illustrates that the regime targeted them as economic, social or political elements whom the Khmer Rouge sought to eradicate and whom the Convention does not protect, such as certain group of people who does not fall in the category specified by the Convention, or that they were victims of arbitrary violence and harsh conditions that the government imposed virtually on the whole country.⁸⁶² The adoption of an alternative legal interpretation, though

⁸⁵⁸ Stephen P Marks, ‘Forgetting the Policies and Practices of the Past: Impunity in Cambodia’ (1994) 18 *Fletcher Forum of World Affairs* 17.

⁸⁵⁹ Steven R Ratner, Jason S. Abrams, and James L. Bischoff. *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press 2009) pp 321, 325.

⁸⁶⁰ Kamal Hossain (n 846).

⁸⁶¹ William A Schabas, ‘Problems of International Codification Were The Atrocities in Cambodia and Kosovo Genocide’ (2000) 35 *New England Law Review* 287, Jason Abrams, ‘The Atrocities in Cambodia and Kosovo: Observations on The Codification of Genocide’ (2000) 35 *New England Law Review* 303 and William A Schabas, ‘National Courts Finally Begin to Prosecute Genocide, The ‘Crime of Crimes’’ (2003) 1 (1) *Journal of International Criminal Justice* 39, 63.

⁸⁶² Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and The Khmer Rouge Tribunal* (UNSW Press 2005).

morally appealing, would as a practical matter, enlarge the deliberately limited range of the Convention's list of protected groups insofar as almost any political, social, or economic element of a population can be viewed as part of a larger national group. The definition of genocide under customary international law is likely to coincide with that under the Convention.⁸⁶³ An argument based on custom furthermore would also appear to be problematic.

It must be mentioned that the use of the term "genocide" in the context of Cambodia may cause Cambodians to view the above conclusion regarding atrocities committed against the general population with concern. Indeed, for many years the Cambodian government has used the term loosely and as a blanket label for the full gamut of the Khmer Rouge's atrocities.⁸⁶⁴ Therefore, the arguments such as this should, however, in no way detract from the gravity of the Khmer Rouge abuses or diminish efforts to address them. However, it has proved to be the case that even though there is a clear established convention and mechanism for accountability, liability and enforcement, it was ineffective in the Khmer Rouge case. It also indicates the flaws in the system of international criminal law accountability.⁸⁶⁵

3.9.3. Crimes Against Humanity⁸⁶⁶

As developed from the outset of the Nuremberg Tribunal, crimes against humanity remain of central importance to those asking to bring the Khmer Rouge to justice. However, as for the state of the law since 1975, the most complex issue is to define how the relationship

⁸⁶³ Israel W Charny, *Toward a Generic Definition of Genocide* (University of Pennsylvania Press 1994).

⁸⁶⁴ John Quigley J Howard and Kenneth J Robinson, eds. *Genocide in Cambodia: Documents from The Trial of Pol Pot and Leng Sary* (University of Pennsylvania Press 2012).

⁸⁶⁵ Antonio Caesius, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 (1) *European Journal of International Law* 144, 171.

⁸⁶⁶ Crimes against humanity are certain acts that are deliberately committed as part of a widespread or systematic attack or individual attack directed against any civilian or an identifiable part of a civilian population. United Nations, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity Adopted and opened for signature, ratification and accession by General Assembly resolution 2391 (XXIII) of 26 November 1968 Entry into force: 11 November 1970, in accordance with article VIII. Article I. No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

- (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;
- (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid.

between armed conflicts and the victims require accountability to be imposed with respect to the human rights violations at that time and the present development of the law regarding armed conflicts. The problematic aspect of accountability in Khmer Rouge case is the exclusion of the majority of the Khmer Rouge's atrocities because the Khmer Rouge did not commit most of their offenses in relations with the war crime vis-à-vis Vietnam or the rebels in the Eastern zone.⁸⁶⁷

It is argued moreover that it makes practical sense for prosecutors and judges in the Khmer Rouge tribunal to adopt the same legal principles like the Nuremberg Tribunal.⁸⁶⁸ Where it is assumed that all crimes against humanity are in relation to war crimes and supply due to having taken place in conjunction with the conflict.⁸⁶⁹ In a theoretical analysis, however, the evidence does not easily support such a legal concept. As historians have observed, the majority of the atrocities of the Khmer Rouge leadership are connected to the armed conflict in which it was engaged.⁸⁷⁰ It has been pointed out that the Khmer Rouge leadership's ideas of self-reliance include an overall hatred of foreign and Vietnamese elements that they are manifested in significant crimes against humanity.⁸⁷¹

However, the fundamental fact is that this hatred does not explain the preponderance of the Khmer Rouge crimes from the beginning of the armed conflicts, the distinctive place in which it took place in Cambodia, the type of armed conflict, or as a legal matter in relation to the atrocities that took place in Cambodia. The most interesting fact here is that the Khmer Rouge might as well have seen all their policies in relation to the fight with the Vietnamese or internal war against adversaries as a violation of international law and human rights law. However, states such as Cambodia, North Korea, US, Russia or UK, knew no one could prosecute them under the principle of international law, and the national law could not stop them from engaging in any indirect crimes against humanity. Likewise, the continued connection to armed conflict would have protected many Khmer Rouge atrocities from international accountability as they could be deemed to fall under armed conflict.

⁸⁶⁷ Steven R Ratner, Jason S Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond The Nuremberg Legacy* (Oxford University Press 2009).

⁸⁶⁸ John David Ciorciari and John David Ciorciari, eds. *The Khmer Rouge Tribunal. No. 10. Phnom Penh Cambodia: Documentation Center of Cambodia* (Documentation Center of Cambodia 2006).

⁸⁶⁹ Steven R Ratner, Jason S. Abrams and James L Bischoff (n 862).

⁸⁷⁰ Ben Kiernan (n 658)

⁸⁷¹ Karl D Jackson, 'The Ideology of Total Revolution (1975) *Cambodia* 37, 78, also see Karl D Jackson, ed. *Cambodia, 1975-1978 Rendezvous with Death* (Princeton University Press 2014).

In addition, the analysis of the progress since the Nuremberg Tribunal shows that while the problem is certainly open to debate, on the other hand, the connection between crimes against humanity⁸⁷² and war crimes or crime against peace⁸⁷³ seem to have served Khmer Rouge in 1975. Hence, with this contention in mind, the views of the state during the time of the drafting of the 1968 Statutory Limitation Convention and the International Law Commission position in its 1954 Draft Code appear to have ignored or failed to have predicted the challenges of interpreting crime against humanity and armed conflict. Therefore, the development that has now solidified is well in place at that time and makes it difficult to prosecute the Khmer Rouge leaders for such abuses. It is also argued here that prosecuting the Khmer Rouge under international law and human rights law will not breach a sensible reading of *nullum crimen*⁸⁷⁴ (no crime or punishment without a law)⁸⁷⁵ principle.

Therefore, the question that needs to be asked is, if there existed atrocities and crimes against humanity in Cambodia, will the prosecution be able to hold the Khmer Rouge accountable for its crimes? Those gathering evidence must focus on the other core elements that are historically part of crimes against humanity: the systematic or mass nature of the

⁸⁷² Definition of Crime Against Humanity (n 599)

⁸⁷³ Crime Against Peace. A crime against peace, in international law, is “planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”. Franz B Schick, ‘Crimes Against Peace’ (1947) 38 *Journal of Criminal Law and Criminology* 445. Nuremberg Trial Proceedings Charter of the International Military Tribunal, Article 6 of the Charter provides:

“(b) War Crimes: namely, violations of the laws or customs of war. “Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;” (c) Crimes against Humanity: “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”.

As heretofore stated, the Charter does not define as a separate crime any conspiracy except the one set out in Article 6 (a), dealing with crimes against peace. The Tribunal is of course bound by the Charter, in the definition which it gives both of war crimes and crimes against humanity. With respect to war crimes, however, as has already been pointed out, the crimes defined by Article 6, section (b), of the Charter were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

⁸⁷⁴ Only the law can define a crime and a penalty: *nullum crimen [nulla poena] sine lege*. To respect the principle of legality, the scope of the crime and the applicable punishment must be set out in clear terms before its commission. This is affirmed in article 11(2) of the Universal Declaration of Human Rights, as well as in virtually all human rights treaties and national constitutions: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed.”

⁸⁷⁵ Iulia Crisan, The Principles of Legality “Nullum Crimen, Nulla Poena Sine Lege” and Their Role’ (2010) 5 *Effectus Newsletter* 1, 3.

atrocities, the discriminatory intention for the prosecution offences, and the state action. Documentation by historians and the other scholars illustrate that the substantial even predominant part of Khmer Rouge atrocities exhibited these features as a general issue, with distinctive acts showing contradictory stages of conformity.⁸⁷⁶

Similarly, the majority of the atrocities are subject to individual accountability as a crime against humanity than as genocide, as defined by the Genocide Convention. Nonetheless, most vitally, the former includes atrocities against the hundreds of thousands of people, if not more, seen as political enemies by the regime. Moreover, for the act against the Cham, Buddhist, Chinese, and other minorities, they qualify as crimes against humanity even with proof that the Khmer Rouge intended to destroy them (the touchstone of genocide); and the sufficiency of political grounds as the justification for the discrimination, means that it is not necessary to prove that the Khmer Rouge acted against them based on their religion or ethnicity. Nonetheless, a substantial number of literature⁸⁷⁷ has clarified the ‘systematicity’ (it means the quality or condition of being systematic; systematicness)⁸⁷⁸ behind the terror, addressing claims that many atrocities, especially those outlying areas, lacked direction, and amounted effectively to random cruelty.⁸⁷⁹ Therefore, the government’s nonfeasance in the face of such atrocities was motivated by animosity towards victims.⁸⁸⁰ Whether an act is politically motivated or relates to the status of an individual, it is argued here that it would seem equivalent to systematicity. Hence, such an inquiry would also need to determine whether Khmer Rouge cadres who simply killed those whose work habits or demeanour they disliked, or on arbitrary grounds, as well as their superior who tolerated such acts, may be guilty only of crimes under Cambodian law or also crimes against humanity. As for the state action, assuming the governmental action is still required during the Khmer Rouge armed conflicts in 1975, evidence will appear to follow the crimes committed by the Khmer Rouge in Cambodia.⁸⁸¹ However, since only the government of the Democratic Kampuchea had control of the country, it needed to engage in these actions before liability could arise under international law. This is due to the fact that action by regional authorities would also qualify, as would the

⁸⁷⁶ Ben Kiernan (n 658).

⁸⁷⁷ Darryl Robinson, ‘Defining Crimes Against Humanity at The Rome Conference’ (1999) 93 (1) *American Journal of International Law* 43, 57.

⁸⁷⁸ William A Schabas, *An Introduction to The International Criminal Court* (Cambridge University Press 2011).

⁸⁷⁹ Ben Kiernan, ‘Bringing the Khmer Rouge to Justice’ (2000) 1 (3) *Human Rights Review* 92, 108.

⁸⁸⁰ Estelle Bockers, Nadine Stammel and Christine Knaevelsrud, ‘Reconciliation in Cambodia: Thirty Years after The Terror of the Khmer Rouge Regime’ (2011) 21 (1) *Torture Journal* 71, 83. “Animosities is: a strong feeling of dislike or hatred, ill will or resentment tending toward active hostility: an antagonistic attitude”.

⁸⁸¹ Alexander Laban Hinton, ‘A Head for an Eye: Revenge in the Cambodian genocide’ (1998) 25 (3) *American Ethnologist* 352, 377.

implementation of policies through third party channels, rather than formal government bodies since the party is controlled by the government.

For the individual crimes, the historical record indicates clear *prima facie* cases of murder (rising to the level of extermination of political opinion) forced labour, torture, imprisonment, and other inhumane acts.⁸⁸² In relation to forcible transfers of populations, the evidence shows a cruel and unlawful means of accomplishing the plan, as well as an unjustifiable purpose aimed against people who live in the city.⁸⁸³ Also, the records of Tuol Sleng and other torture and interrogation centres offers an immediate source of evidence for several of these crimes; eyewitness accounts would presumably fill in the details of the many acts of which written records prove lacking.⁸⁸⁴ Furthermore, in connection with the prosecution, there is ample evidence of Khmer Rouge actions of closing religious institutions and defrocking monks, removing children from school, and forcing some enemies to wear different garbs.⁸⁸⁵ These acts are similar to the crimes committed by Nazi regime. However, the exactitude of the term's protection, from 1975 onwards, indicates that any institution determining accountability must follow the strategy of the Nuremberg Tribunal. The ICTY and ICTR prosecutors focus on a specifically defined act, such as murder, forced labour, and so on, rather than introducing a broad definition for which individual accountability should account for. The Khmer Rouge also destroyed a great deal of public and private property, yet under the standard in *Eichmann*⁸⁸⁶ and elsewhere, this would have also created *prima facie* accountability for crimes against humanity.⁸⁸⁷

⁸⁸² Alexander Laban Hinton, *Man or Monster? : The Trial of a Khmer Rouge Torturer* (Duke University Press 2017).

⁸⁸³ Tom Fawthrop and Helen Jarvis, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (UNSW Press 2005).

⁸⁸⁴ Michelle Caswell, 'Khmer Rouge Archives: Accountability, Truth, and Memory in Cambodia' (2010) 10 (1) *Archival Science* 25, 44.

⁸⁸⁵ David Hawk, 'International Human Rights Law and Democratic Kampuchea' (1986) 16 (3) *International Journal of Politics* 3, 38.

⁸⁸⁶ The charges against Eichmann were numerous. After the Wannsee Conference (January 1942), Eichmann coordinated deportations of Jews from Germany and elsewhere in western, southern, and northern Europe to killing centers (through his representatives Alois Brunner, Theodor Dannecker, Rolf Guenther, and Dieter Wisliceny and others in the Gestapo). Eichmann made deportation plans down to the last detail. Working with other German agencies, he determined how the property of deported Jews would be seized and made certain that his office would benefit from the confiscated assets. He also arranged for the deportation of tens of thousands of Roma (Gypsies). Eichmann was also charged with membership in criminal organizations the Storm Troopers (SA), Security Service (SD), and Gestapo (all of which had been declared criminal organisations in 1946 in the verdict of the Nuremberg Trial). As head of the Gestapo's section for Jewish affairs, Eichmann coordinated with Gestapo chief Heinrich Mueller on a plan to expel Jews from Greater Germany to Poland, which set the pattern for future deportations.

⁸⁸⁷ Petros A Papadatos and Pierre Achille Papadatos, *The Eichmann Trial* (FA Praeger 1964).

What has been evident so far in the Khmer Rouge case as explained above, are two distinctive dimensions of the law, one is the definition of what constitutes crimes against humanity and the body that committed the act (either government or government body) and the second is international law itself, the concept of crimes against humanity, its interpretation and its accountability element in relation to the specific crime. Thus, the assumption is that the concept of crimes against humanity is vague and does not clearly explain the aspect of the act that could constitute a crime against humanity and its intentional elements.⁸⁸⁸ This has left a vacuum in accountability for human rights violations or a prohibited act such as crimes against humanity.⁸⁸⁹ This inconsistency may be due to the fact that international legal system and the national legal system have treated the different parts of human rights violations, such as crimes against humanity, genocide, mass murder, and other human rights abuses distinctively.⁸⁹⁰ However, the observation from this study suggested that, these crimes are not distinctive but rather an extension of human rights violations under international law. Therefore, it is uncertain that one could strongly support corporate accountability for human rights abuses under this regime of law. The lack of clarity and the narrow interpretation of crimes against humanity under international law has led this research to argue against the notion that international criminal law (crime against humanity) could perhaps be a better form of corporate accountability.⁸⁹¹

3.9.4. War Crimes

This area of law remains pertinent because certain Khmer Rouge atrocities took place in the course of warfare with other states, in particular Vietnam, as well as perhaps against domestic resistance forces, primarily during its last year in power. At the same time, this aspect of Khmer Rouge operations constituted at best a small portion of its human rights violations. This part of the research which examines accountability for human rights violations under international criminal law will not pay much attention to war crimes in relation to the case study because the definition of war crime does not follow the same principle and patterns of

⁸⁸⁸ Mark Lattimer and Philippe Sands, eds. *Justice for Crimes Against Humanity* (Bloomsbury Publishing 2003).

⁸⁸⁹ Sydney L Goldenberg, 'Crimes Against Humanity 1945-1970' (1971) 10 *Western Ontario Law Review* 1.

⁸⁹⁰ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013).

⁸⁹¹ Larissa Van den Herik and Jernej Letnar Černič, 'Regulating Corporations under International Law: from Human Rights to International Criminal Law and Back Again' (2010) 8 (3) *Journal of International Criminal Justice* 725, 743.

corporate human rights violations in this study.⁸⁹² Instead, this research will move on to focus its attention on the law of international armed conflict.

3.9.5. Law of International Armed Conflict

Cambodia, Laos, Thailand, and Vietnam were all parties to the Geneva Conventions during the period discussed in this study. However, none of these states became a party to the Protocol before 1980.⁸⁹³ Therefore, the severe violation of the provision does apply, though the criminality might have gone beyond these serious violations of international law and human rights law, the customary law of that time. The fact that Democratic Kampuchea's aggressions toward Vietnam range from different crimes and its intensity does makes these crimes a subject of international law, in particularly when attention is devoted to the threshold of the armed conflict.

The Khmer Rouge conduct from the beginning of the aggression in Cambodian, and Vietnam forces in the border conflicts in the early May 1975, arguably breach international law and human rights law. When the Khmer Rouge tried to seize the Vietnamese island of Phu Quoc and Tho Chu as well as the borders provinces.⁸⁹⁴ Also, Nayan Chanda, the Khmer Rouge evacuated 500 Vietnamese civilians who were never seen again.⁸⁹⁵ Notwithstanding the few outward illustrations of friendship, efforts to solve the crisis and demarcate the border proved inadequate, and the aggression continued along Cambodia's north-eastern border.⁸⁹⁶ Hence,

⁸⁹² The Statute of the International Criminal Court defines war crimes as, *inter alia*, "serious violations of the laws and customs applicable in international armed conflict" and "serious violations of the laws and customs applicable in an armed conflict not of an international character". The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor also provide jurisdiction over "serious" violations of international humanitarian law. In the *Delalić case* in 2001, in interpreting Article 3 of the Statute of the International Criminal Tribunal for the former Yugoslavia listing the violations of the laws or customs of war over which the Tribunal has jurisdiction, the Appeals Chamber stated that the expression "laws and customs of war" included all laws and customs of war in addition to those listed in the Article. The adjective "serious" in conjunction with "violations" is to be found in the military manuals and legislation of several State.

⁸⁹³ Michael Bothe, Karl Josef Partsch, and Waldemar A. Solf, eds. *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff Publishers 1982). also see: [http://icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) accessed 12 November 2016, The Provision Revolution Government of the Republic of Vietnam (the Vietcong) became party in 1974; the Socialist Republic Vietnam confirmed the continued adherence of Vietnam to the Convention on July, 4 1976.

⁸⁹⁴ Ramses Amer, 'Border Conflicts between Cambodia and Vietnam' (1997) 5 (2) *BRU Boundary and Security Bulletin* 80, 97.

⁸⁹⁵ Nayan Chanda, *Brother Enemy: The War after the War* (Harcourt 1986).

⁸⁹⁶ Shelton L Woods, *Vietnam: A Global Studies Handbook* (ABC-CLIO 2002).

after the continuous aggression and tension in 1976, the Khmer Rouge began attacking villages in its three neighbours' border areas in spring 1977, and in September attacked villages in Vietnam's Tay Nin Province, killing hundreds of civilians. This action by the Khmer Rouge also marked the start of systematic deportation and execution of Vietnamese people in Cambodia, which became worse in 1978 as the government tried to eliminate what it called the Vietnamese-inspired threat from Khmer Rouge loyalists in the Eastern Zone. Vietnam answered with an attack of 20,000 forces on Cambodia in October 1977. In late December, Vietnam sent 58,000 reinforcements to Cambodia's Eastern Zone, penetrating up to 25 miles and prompting Cambodia to sever diplomatic relations. Vietnam's troops started withdrawing in January 1978. However, in March, Cambodia launched another attack on Vietnam, killing hundreds of civilians in the village of Ha Tien. After spending much of 1978 planning, Cambodian resistance force in Vietnam launched its large invasion of Cambodia on 25 December 1978.⁸⁹⁷

Observing these developments in relation to accountability under international criminal law, the factual patterns indicate that, for the purpose of the Geneva Convention, armed conflict between Vietnam and Cambodia clearly started by September 1977, though most likely earlier. The border conflicts in May 1975 and the continuation of incidents make a strong case for the applicability of the Convention in connection with Cambodia and Vietnam during the whole of Democratic Kampuchea's rule. Likewise, Cambodia's attack on Vietnam, Thailand, and Laos in 1977 would activate the obligations under the Genocide Conventions with respect to the non-Cambodians killed or injured and the targets attacked. In regards to the crime committed, the serious violations provisions of the Geneva Conventions apply only in the cases of acts taken against protected persons or property. Hence, in the Geneva Convention I and II, these are broadly defined as wounded and sick members of the armed forces.⁸⁹⁸ Therefore, the nature and extent of Khmer Rouge acts against members of the armed forces are not well documented and require further examinations.⁸⁹⁹

The Geneva Convention VI protects civilians who find themselves in the hands of a party to the conflict or occupying power of which they are not nationals.⁹⁰⁰ The rights are given by the Geneva Convention, this clearly includes Vietnamese in Vietnam as well as in Cambodia during the armed conflict. As most ethnic Vietnamese in Cambodia were seen as residents

⁸⁹⁷ Nayan Chanda (n 890).

⁸⁹⁸ Geneva Convention I and Article 13.

⁸⁹⁹ Geneva Convention III and Article 85.

⁹⁰⁰ Geneva Convention IV and Article 4.

rather than Cambodian citizens, the Convention would be able to protect them.⁹⁰¹ Therefore, the act against Vietnamese in Vietnam and Cambodia seems to meet the standard for a *prima facie* serious violation of Article 147 of the Geneva Convention IV. Specifically, the Cambodian army committed the wilful killing, torture, and inhuman treatment of Vietnamese victims, and extensively destroyed Vietnamese property. In addition, beyond the Geneva Convention, the records also indicate the commission of other crimes that breached international law, human rights law, and customs of war as set out in the Hague Commission: malicious destruction of towns or villages; attack on undefended towns or villages; and plunder of public or private property, which can be observed in modern corporate human rights violation being argue in this thesis.

3.9.6. Summary of the Limitation of International Criminal Law Accountability

Examining the Khmer Rouge and Democratic Kampuchea case reveals that even though authoritative determinations demand any analysis of the whole *corpus* of national criminal law and the deliberation of other prudential and precedential factors, certain *prima facie* summarisation seems possible. The basic offense, the Khmer Rouge's atrocities meet the general definition of the vast majority of crimes in the Cambodian Panel Code of 1956. Hence, this consists of murder, torture, rape, unlawful detention, other physical assaults, attack on religion, and other violations of government authority.⁹⁰² This is due to the fact that these are crimes under the Cambodia law and that the prosecution would not need to prove addition element for international crimes.

In a similar way, the defences acknowledge in national law, however, raise a number of vital considerations that would be needed in a situation beyond Cambodia. The first one is, youthful offenders may well be exempt from any accountability, particular given the totality control and atmosphere of terror and siege that gripped the nation during that time. The second is the exact status of the *force majeure defence*⁹⁰³ that will need expansion, even though the

⁹⁰¹ Geneva Convention IV and Article 4.

⁹⁰² Sarah Williams, 'Genocide: The Cambodian Experience' (2005) 5 (3) *International Criminal Law Review* 447, 461.

⁹⁰³ Alphonse M Squillante and Felice M Congalton, 'Force Majeure' (1975) 80 *Commerical Law Journal* 4.

The concept of force majeure, which originated in French law and is translated to English as "superior force", is a French term used to describe events that are "acts of God", acts of government, and any other unexpected event beyond the control of the parties within a contract. Under French law, force majeure is an event that is unforeseeable, unavoidable and external that makes execution of a contract impossible. Specifically, for a French defendant to invoke force majeure, the event must pass three tests:

code appears to suggest that an offender would have to prove that he faced a virtual kill or risk being killed. In addition, a self-defence claim would seem inapplicable in the vast circumstances given the helplessness of most victims. The third is the range of the following orders defence under Cambodia law requires definition. However, the question is, was the Khmer Rouge's order lawful for purpose of this defence? If so, then what is the extent of the subordinate's accountability for carrying out the illegal orders? Thus, the patterns developing out of the World War II and other circumstance may help answer these empirical questions. Those in a position of domestic leadership or others with a greater discretion to issue orders clearly cannot invoke, such defence.

Lastly, for the limitation of the international crime, one interpretation would simply take the law's provisions at face value and bar any prosecutions for atrocities committed during 1975-79 after 1985, ten years from the Khmer Rouge's loss of governmental power. Indeed, crimes committed before 1979 would have had to be investigated or prosecuted prior to 1989. Nevertheless, other avenues could be available to the National Assembly and the national court, namely the elimination of the statute of limitation legislatively and the judicial or legislative suspension of the activities of the statute due to the lack of a functioning criminal justice system. Hence, this choice appears specifically justified in light of the destruction of the judiciary by the Khmer Rouge itself and the resultant disorganised state of the system.

Therefore, the application of the international criminal law and national criminal law to the human rights violations of the Khmer Rouge thus exposes the majority of the offenses for which *prima facie* case of guilt for many cadres can be made. It also reveals the many international law offenses which qualify as a crime of humanity rather than genocide. However, the regime also undertook the latter against a particular targeted group. The Khmer Rouge soldiers committed war crimes during the conflict with Vietnam. Forced labour as made criminal in the 1930 Convention appears to have been widespread. This has been true for torture as well. The scope of the offenses under Cambodian law is much wider, covering many areas of its criminal code.

Externality

The defendant must have nothing to do with the event's happening.

Unpredictability

If the event could be foreseen, the defendant is obligated to have prepared for it (thus, being unprepared for a foreseeable event leaves the defendant culpable).

Irresistibility

The consequences of the event must have been unpreventable.

The emerging indication from the whole case of Khmer Rouge and Democratic Kampuchea is the lack of effective international criminal accountability and effective accountability at domestic judicial level. This is due to lack of effective national judicial system and the lack of a cohesive implementation of international criminal law into domestic legal system.⁹⁰⁴ It also does demonstrates the significant divergence in international criminal accountability. Thus, it could be argued that international criminal law does not offers a proper channel of accountability. What this section has shown is that this notion of international criminal accountability is limited. It rests substantially on the domestic law which effects and recognises international law. A possible explanation for this might be that international treaty law comprises obligations states expressly and voluntarily accepted between treaties.⁹⁰⁵ Therefore, international law can only be effective in domestic court if it is implemented in national judicial systems.⁹⁰⁶ It also demonstrates that the application of international criminal accountability is marked with difficulties and complexities of judicial interpretations and enforcement of international human rights law. The international criminal law does not have a universal application because the majority of the states have not acknowledged or implemented several international crimes in their domestic judicial system, as some scholars have advocated for. Whether or not the international criminal law imposes accountability on the abuser, the question of liability rests on the concept of legal interpretation and the practice of the national state. What this means is that states and its judicial system are free to choose the appropriate methods to implement international law or enforce the law in their domestic courts. Thus, there are two implications, the positive aspect is that states can implement international law under domestic law, which match the states needs and culture, whereby the negative aspect is that it leaves a gap in the interpretation and enforcement of international law at domestic level. As a result, international law may lack universal application and enforcement at domestic courts. Hence, this is why the Khmer Rouge and Democratic Kampuchea were able to escape liability

⁹⁰⁴ Katheryn M Klein, 'Bringing The Khmer Rouge to Justice: The Challenges and Risks Facing The Joint Tribunal in Cambodia' (2005) 4 *Northwestern Journal of Human Rights* 549.

⁹⁰⁵ Public international law establishes the framework and the criteria for identifying states as the principal actors in the international legal system. As the existence of a state presupposes control and jurisdiction over territory, international law deals with the acquisition of territory, state immunity and the legal responsibility of states in their conduct with each other. International law is similarly concerned with the treatment of individuals within state boundaries. There is thus a comprehensive regime dealing with group rights, the treatment of aliens, the rights of refugees, international crimes, nationality problems, and human rights generally. It further includes the important functions of the maintenance of international peace and security, arms control, the pacific settlement of disputes and the regulation of the use of force in international relations.

⁹⁰⁶ Daniel Thürer, 'The "Failed State" and International Law' (1999) 81 (836) *International Review of the Red Cross* 731, 761 and Fateh Azzam, 'The Duty of Third States to Implement and Enforce International Humanitarian Law' (1997) 66 (1) *Nordic Journal of International Law* 55, 75.

for many crimes under international law. Following this, it will be hard to see international criminal law utilise the appropriate tool for corporate human rights accountability.

3.10. The Enforcement Limitation of International Criminal Law Accountability

“Sometimes the state goes on record through its statute, in a way that might well please a conscientious citizen in whose name it speaks, but then owing to official evasion and unreliable enforcement give rise to doubts that the law really means what it says”.⁹⁰⁷ Much has been discussed here and in the literature concerning the Nuremberg, International Criminal Tribunal for the former Yugoslavia (ICTR), and International Criminal Tribunal for Rwanda (ICTR). Likewise, much is to be expected. The presumption in this part of this study is that none of these international judicial bodies provided the remedy envisaged by the UNSC or the member states that are signatory to the court. Therefore, it is not dishonest to contest that these judicial bodies have fallen short, at least at this time, in regards to their expectations. In addition, there is the unremitting commission of war crimes, and crimes against humanity throughout the globe,⁹⁰⁸ as well as international crimes involving many nations who are a member of the UN. Likewise, peace nor security has been restored in these countries, and communities have been destroyed by acts concerning international crime. Furthermore, effective accountability and remedy have not been delivered to either the Former Yugoslavia or Rwanda. Thus, what does accountability look like? This is a question of enforceability that weakens international criminal law.⁹⁰⁹

Following the establishment of the Military Tribunal, which started in Nuremberg, in that time the aggression had stopped and the capture of the defendants has an insignificant effect on their arrest and prosecution.⁹¹⁰ Also, the recent Tribunals, must accept the fact that their access to the defendant took place at the will of each distinctive state providing refuge to the accused.⁹¹¹ Therefore, the majority of these perpetrators of these war crimes have fled to

⁹⁰⁷ Michael H Tonry, *Why Punish? How Much? : A Reader on Punishment* (Oxford University Press on Demand 2011).

⁹⁰⁸ Kelly Dawn Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (Vol. 1. Martinus Nijhoff Publishers 1997).

⁹⁰⁹ Farhad Malekian, *The Monopolization of International Criminal Law in The United Nations: a Jurisprudential Approach* (Coronet Books Inc 1995).

⁹¹⁰ Ernst C Stiefel Symposium, ‘1945-1995: Critical Perspective on the Nuremberg Trial and State Accountability’ (1995) 12 *New York Law School Journal of Human Rights* 631, 637.

⁹¹¹ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press on Demand 2005).

neighbouring nations where they believe it is safe for them to seek protection.⁹¹² Thus, there is no overwhelming evidence from a number of victims to connect the defendant crimes too.⁹¹³ This inadequacy has made the arrest of the majority of the ICTY and ICTR accused difficult. In this development, among the sixty-six separate indictment defendants⁹¹⁴ registered only thirty-three defendant are in custody at the ICTY holding facility and awaiting trial.⁹¹⁵ Also, the ICTR has handed out twenty-eight public indictments, implication forty-eight separate defendant,⁹¹⁶ only 38 of these alleged individuals are in the ICTR custody. This problem is a result of a direct lack of coercive enforcement provision of the ICTY and the ICTR Statutes.

In addition to these flaws, neither the Tribunal prosecution team or prison unit has a police force to support them in the physical aspect of the tribunal prosecution proceedings.⁹¹⁷ Instead, the Tribunals rely on the assistance and cooperation of states or NATO forces,⁹¹⁸ to support them in carrying out their obligations.⁹¹⁹ The limitation of the Tribunal has proven much more serious than most people may have predicted during the drafting of the respective Tribunal Statutes. A typical example is the US' refusal to hand over Elizaphan Ntakirutimana, a name ICTR defendant, regardless of the repeated appeal from the Tribunal and the UN⁹²⁰ Additionally, no mechanism currently exists to force the US under the Tribunal Statute's to respect the request of the Tribunal.⁹²¹ These flaws show that international criminal law is

⁹¹² ICTY, ICTY Latest List of Detainees (2011). <<http://www.icty.org/en/about/office-of-the-prosecutor/the-fugitives>> accessed 13 November 2016. The first defendant that the International Tribunal arrested and subsequently turned over to The Hague authorities by Germany was Dusko Tadic. Also Zambian official arrested Jean-Paul Akayesu outside of Rwanda and turned him over to the ICTR. Kenyan officials also arrested Jean Kambana outside of Rwanda and turned him over to the ICTR.

⁹¹³ Kenneth J Harris and Robert Kushen, 'Surrender of Fugitives to The War Crimes Tribunals for Yugoslavia and Rwanda: Squaring International Legal Obligations with The US Constitution' (Kluwer Academic Publishers 1996)

⁹¹⁴ ICTY, ICTY Latest List of Detainees (2011) (n 644).

⁹¹⁵ LC Green, 'Case Analysis: Drazen Erdemovic: The International Criminal Tribunal for The Former Yugoslavia in Action' (1997) 10 (2) *Leiden Journal of International Law* 363, 381.

⁹¹⁶ International Criminal Tribunal for Rwanda, Press and Public Affairs Unit, Fact Sheet No.1; the Tribunals at a Glance (1999). <<http://www.ictr.org/ENGLISH/factsheet.htm>> accessed 13 November 2016.

⁹¹⁷ Anne L Quintal, 'Rule 61: The Voice of the Victims Screams Out for Justice' (1998) 36 *Columbia Journal of Transnational Law* 723.

⁹¹⁸ Diane F Orentlicher, 'Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes' (1996) 3 *ILSA Journal of International and Comparative Law* 713.

⁹¹⁹ Jelena Pejic, 'Tribunal and the ICC: Do Precedents Matter' (1996) 60 *Albany Law Review* 841.

⁹²⁰ Bartram S Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Journal of International Law* 383.

⁹²¹ Theodor Meron, 'War crimes in Yugoslavia and The Development of International Law' (1994) 88 (1) *American Journal of International Law* 78, 87.

limited by state cooperation and the political will of states that undermine the Tribunal ability to enforce accountability.⁹²²

In an examination of the limitations of the Tribunals, it is clear that the continuous hindrance and contradiction shown towards the enforcement of accountability by the international community is perfectly incomprehensible. Even though there is a political will in the creation of the tribunal for the purposes of holding individual accountable for war crimes and crimes against humanity, it is unclear why the political will does not exist when it comes to arresting and detaining an alleged individual who has committed an international crime. This is a major concern to the effectiveness of the Tribunals and does raises many questions concerning the state and capacity of the Tribunal to hold individual accountable for international crimes.

Likewise, it is alarming to imagine that an International Criminal Tribunals and Court stood sluggishly because of both individually and collectively, refuses to risk the consequences of enforcement.⁹²³ On the other hand, one could have thought that each UN member states will acknowledge the difficulties in enforcing criminal law in the ICTY and the ICTR Statute before it was adopted. Also, each presumably could have understood that the rest of alleged defendant is an inherently risky endeavour.⁹²⁴ Contrary, to stop the crime against humanity, international crimes requires a strong character and steadfast solution. Therefore, one could expect those offenders who violate the rights of others and act against the international law and norm of a civilised society should be a matter of rule of law or cooperation with policing authorities and states.

In addition, the evidence of the inadequacy of the current international criminal law system is indicated, in the fact that many of the inductees in the ICTY custody surrendered prior to arrest.⁹²⁵ The Implementation Force (IFOR) and Stabilisation Force (SFOR) forces

⁹²² Diane Marie Amann and Mortimer NS Sellers, 'The United States of America and the International Criminal Court' (2002) 50 *American Journal of Comparative Law* 381, 404.

⁹²³ Bartram S Brown (n 915).

⁹²⁴ Sarah B Sewall, Carl Kaysen, Gary J Bass, Bartram S Brown, Abram Chayes, Robinson O Everett, Richard J Goldstone, Madeline Morris, William L Nash, Samantha Power, Leila Nadya Sadat, Michael P Scharf, David J Scheffer, Anne-Marie Slaughter, Ruth Wedgwood, and Lawrence Weschler, *The United States and The International Criminal Court: National Security and International Law* (Rowman & Littlefield Publishers 2000).

⁹²⁵ <<http://www.icty.org/>> accessed 13 November 2016, 13 individuals voluntarily surrenders to the ICTY. In contrast international forces arrested only defendants (in the 11 defendants arrested, SFOR was responsible for ten while UNTAES was responsible for only 1). The ICTR, however struggles with similar enforcement difficulties. Recently, Ignace Bagilishema, the former Bourgemestre of Mabanza commune, surrendered to the ICTR after successfully taking refuge for a period of time in South Africa.

commended to oversee that the arrest does not generate international shame or pressure. Therefore, the force remains resentfully convinced that the perilous arrests do not constitute any part of their mission.⁹²⁶ “IFOR maintains that with respect to the arrest of the indicted persons which is IFOR’s potentially most important contribution to the Tribunal’s work it will detain and transfer to the Tribunal person indicted for war crimes when it comes into contact with such person carrying out its duties”.⁹²⁷ Explicitly, this statement demonstrates admission and acknowledgment that the IFOR will not seek out indicted war criminals in a hostile manner. If the international community is unable to depend on an international force capable of providing police services to support the arrest of defendants, as well as fulfilling the mandate to bring international criminal before the tribunal, then what is the role of the international legal system in accountability for violations of international law and human rights law? This question is difficult to answer and requires a careful understanding of accountability and the role of both state and the international community. The question of enforcement must both be addressed and remedied at international and domestic level.

In order to ensure effective accountability and remedy, the task for any Tribunals and International Criminal Court is to solidify their lack of enforcement. This is because as long as permanent members of the UNSC control the enforceability of the international criminal law, elements of international accountability for human rights abuses and crime against humanity will always be subjected to controversy and contradiction. On the other hand, the international legal system cannot be effective if it is submissive to the indecisive interests of national states, which in practice it is very difficult to avoid. However, considering the emerging dimension of international law obligations and globalisation,⁹²⁸ it can be assumed that under a well cohesive legal principle, this can be avoided. Hence, such submissiveness delimits the true and illusory adjudication powers of the Tribunals or the Courts.⁹²⁹ As argued here, the lack of coercive power to bring allege defendant before the Tribunal or Court weakens the legal nature of the

⁹²⁶ Paola Gaeta, ‘Is NATO Authorized or Obligated to Arrest Persons Indicted by The International Criminal Tribunal for The Former Yugoslavia?’ (1998) 9(1) *European Journal of International Law* 174, 181.

⁹²⁷ Michael O’Flaherty and Gregory Gisvold, eds. *Post-War Protection of Human Rights in Bosnia and Herzegovina* (Vol. 53. Martinus Nijhoff Publishers 1998).

⁹²⁸ Gerhard Von Glahn and James Larry Taulbee *Law Among Nations: an Introduction to Public International Law* (Routledge 2015), Cherif M Bassiouni, ‘Legal Control of International Terrorism: A Policy-Oriented Assessment’ (2002) 43 *Harvard International Law Journal* 83 and Daniel Bodansky, ‘the Legitimacy of International Governance: a Coming Challenge for International Environmental Law?’ (1999) 93 (3) *American Journal of International Law* 596, 624.

⁹²⁹ Richard A Falk, *The Vietnam War and International Law, Volume 3: The Widening Context* (Vol. 3. Princeton University Press 2015).

international criminal law. As a consequence, it has a significant effect on its ability to hold the individual accountable for their crimes.

Therefore, merely branding an individual as an international fugitive does not add any weight to the success of either the Tribunal or Court.⁹³⁰ Finally, as situations regarding the International Criminal Tribunals and the Court's ability to hold the individual, international criminal law lacks enforcement and a remedy for accountability. It cannot depend on the acquiescence of powerful nations for the enforcement of the international criminal law. Thus, if this problem is not ratified, international criminal law, Tribunals, and Courts will return to the beginning of the victors' justice, and this raises the question of whether the international criminal law is capable of reasonable distribution of human rights liability. Without prejudice and significant enforcement, international criminal provides only an alluring mirage of justice.

3.11. The Overview of International Criminal Law Accountability

The emerging illustrates from this section is one that can be subjected to an intense debate about the concept of international criminal law accountability and what it actually means in practice. Therefore, the difficulties are the rocky connection between the appropriate procedural rights and the desire to provide an effective remedy for victims of international human rights violations. In this rationale, international crime law has failed to offer an appropriate system of accountability on both dimensions, such as accountability for the crime and remedy for the victims. However, on the other hand, one could have thought there would be no reason to balance these two dimensions, as they currently coexist.⁹³¹ However, in the practical world, it can be argued that there is a trade-off between what constitutes accountability for international crime and remedy for victims of human rights violations.⁹³² An explanation

⁹³⁰ Peter Rosenblum, 'Save the Tribunals; Salvage the Movement, a Response to Makau Mutua' (1997) 11 *Temple International & Comparative Law Journal* 189.

⁹³¹ Fines imposed as criminal penalties are not dissimilar from civil monetary damages. Criminal fines can be used as an effective and appropriate penalty for international crimes under the following conditions: (1) if fines under Article 77(2) of the Rome Statute are very high (relative to the global annual revenue of the company concerned) so as to prevent a commoditising of human rights, because the costs outweigh the benefits for the corporation under a classical cost-benefit analysis as the major premise of modern-day business decision making. Iris Bohnet, Bruno S Frey and Steffen Huck, 'More Order With Less Law: On Contract Enforcement, Trust, and Crowding' (2001) 95 (1) *American Political Science Review* 131, 144. And (2) if criminal fines are joined with other non-monetary sanctions as primary penalties under Article 77(1) of the Rome Statute. Bruno Frey, 'Motivation Crowding Theory-a New Approach to Behaviour' (2008) *Behavioural Economics and Public Policy: Roundtable Proceedings. Australian Government Productivity Commission*.

⁹³² France law became one of the first civil law jurisdictions in Europe to adopt a comprehensive corporate criminal liability scheme, which led to a detailed catalogue of penalties aimed at legal persons as criminal

of this might be that international criminal law accountability and remedies for human right violations fall under the same umbrella of international law and reparations. International criminal law and human rights law impose obligations on actors to not violate or cause harm to individuals or groups of people. Viewing the international criminal law with respect to these two dimensions of accountability for crime and remedy for human rights violations, helps to understand the process and the mechanism that needs to be implemented to ensure effective accountability, example the integration of both criminal and tort element to ensure effective accountability.

This is because an attempt to restore the dignity of a victim of human rights violations and to provide them or their relatives with the appropriate forum such as Tribunal or Court to express their pain is, of course, an ennobling humanity desire. It is also significantly useful in reducing human rights violation and preventing future violations. It also provides victims with the rights to tell their stories in front of a judge, which further helps judges in their chambers gain a better understanding of the events. There is no doubt that the international criminal legal system has fulfilled some of these elements. However, one needs to bear in mind that the problem of enforcing human rights has always been a challenge for the international legal and national legal system due to the enforcement gap that exists at domestic level.⁹³³ Also, the lack of governance at domestic level and the lack of state willing to cooperate and implement international law into domestic law have affected human rights accountability for international crimes. However, the international criminal law does provides some form of access to justice and enhances the effectiveness of bringing a legal proceeding against individual who have violated human rights.⁹³⁴

perpetrators. Under French law, there are nine deprivations of corporate rights as enforceable penalties. Andrew Kirsch, 'Criminal Liability for Corporate Bodies in French Law' (1998) 9 *European Business Law Review* 38. These penalties include dissolution of the corporation, judicial surveillance, public display and distribution of the sentence, confiscation of assets, permanent or temporary exclusion from invitations for tenders offered by public authorities, and permanent or temporary closure of the corporation's establishments engaged in the commission of the crimes. In light of the gravity of international crimes under the Rome Statute, the closure of implicated corporate units, general confiscation of all of the company's assets (rather than only those assets associated with the criminal offense), and even the extreme measure of dissolving the corporation "the corporate death penalty" "may be suitable penalties in the context of the Rome Statute." France, for example, prescribes general confiscation of assets for crimes against humanity that were committed by a legal person. Also see, Code Penal '[C. PEN'] [Penal Code, art. 213.3 (Fr.).

⁹³³ Peter Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2003) 42 *Columbia Journal of Transnational Law* 521, Andrew T Guzman, *How International Law Works: a Rational Choice Theory* (Oxford University Press 2008) and Sean D Murphy, *Principles of International Law* (Thomson West 2006).

⁹³⁴ From a comparative legal perspective, it seems that countries providing for corporate criminal liability share a similar standard for when dissolution of the company is an eligible penalty for corporate criminal

Nonetheless, it should not be underestimated that international criminal law lacks on many grounds, such as implementation, enforcement, compliance, cooperation, effective prosecution procedures, and the lack of financial capacity to investigate and prosecute individual that is found to violate international law and international human rights law. It will be a flaw to argue here that international criminal law offers appropriate accountability system for human right violations and that this should be extended to corporate human rights accountability. Thus, what shall be contested here is that the system is an indication of criminal justice, that can be improved, but its practical aspect is almost impossible to implement due to the failures highlighted above. Therefore, to address this gap in accountability, it is imperative to understand what constitutes accountability, the duty of care, and how to relate the practical meaning of accountability for human rights obligations. The next section of this thesis shall address the tort element of criminal accountability by examining the tort of negligence in criminal law cases,⁹³⁵ but first, this study shall explain how tort coexist in criminal law before moving to tort in civil law.

3.12. Tort of Negligence in Criminal law

Mueller explains that the difference between tort and crime law liability “was certainly unknown in the primitive administration of justice”.⁹³⁶ Closely connected to this explanation is a second thought: there is a complete unconcern with a notion of guilt, and consequently, with any degree of guilt, reflecting the inner motivations and psychological attitudes. The author argued that he who thirsts for vengeance is not interested in motives; he is concerned only with the objective happening of the event by which his desire for vengeance has been aroused. Therefore, the anger expresses itself equally against lifeless objects, by which he has

conduct. The French and Belgian legal systems permit the winding-up of the legal person provided the legal person was criminal in character, that is, was established to commit the crimes, or was intentionally misused for criminal purposes contrary to the original purpose of the corporation. Code Penal /Strafwetboek [C.PEN/SW.] art. 35 (Belg.). In addition to measures of closure of business premises, confiscation of assets, fines, or (in the most severe cases) dissolution of the company, judicial surveillance and transparency initiatives could further enforce effective retribution and future deterrence. On all these aspects, close cooperation with signatory states is necessary, because there would need to be a companion domestic law created to render enforceable any such penalty imposed by the court. This is particularly true at the enforcement level when seizing a company’s assets. There are many legal, political, and practical issues that will have to be addressed at the enforcement level as modern-day MNCs consist of a complex structure of parent company, subsidiaries, branches, and joint ventures across multiple jurisdictions world-wide.

⁹³⁵ Kenneth W Simons, ‘The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives’ (2007) 17 *Widener Law Journal* 719.

⁹³⁶ Gerhard OW Mueller, ‘Tort, Crime and The Primitive’ (1955) 46 *Journal of Criminal Law, Criminology, and Police Science* 303.

been unexpectedly hurt, or against animals by which he has been unexpectedly injured, and against human beings who have harmed him unknowingly, negligently or intentionally. It was further contested that every wrong is, a “tort” that “requires expiation, and no tort is more than a wrong that requires expiation”.⁹³⁷ Mueller’s explanation implies that in primitive society the only response to “wrong,” which by definition is a violation of some standard or norm set by community agreement, tacit or express, is the revenge or compensation of the group or individual injured.

Conceivably, one can interpret Mueller’s definition as not very narrow, but should add that not all reactions to “wrongs” were punishment, but that some reactions were of religious significance.⁹³⁸ Mueller's view about the ancient law of wrongs: primitive society recognised three reactions against a person or object which “committed” a violation of a law recognised by this society as binding, namely, satisfaction of a desire for vengeance against this person or object, compensation for the harm done, and expiation of the likewise harmed deity by dedication of the wrongdoer or wrongdoing object in the form of a sacrifice. Perhaps through mortification and destruction respectively, without concern for the guilt or motives of the wrongdoer or wrongdoing object.⁹³⁹

Expanding on these definitions of old and modern law of wrongs (tort), especially criminal justice, one can acknowledge that both coexist in the real world. Apart from fundamental procedural differences today which the author terms “protection of a regular procedure,” Mueller seems to indicate that today's public concern for morality and expedience, which supposedly expresses itself both in the nature of those actions deemed wrongs and in the concern with the wrongdoers' frame of mind, is the main, perhaps only distinguishing criterion. Accepting, for the present, the author opinion that the oldest law of wrongs did not distinguish between tort and crime,⁹⁴⁰ and this have existed throughout the 19th and 21st centuries.

⁹³⁷ Kenneth Mann, ‘Punitive Civil Sanctions: The Middle Ground between Criminal and Civil Law’ (1992) *Yale Law Journal* 1795, 1873 and Bronislaw Malinowski, *Crime and Custom in Savage Society* (Transaction Publishers 2013).

⁹³⁸ *Ibid.*

⁹³⁹ Gerhard OW Mueller (n 931).

⁹⁴⁰ Bonnge, Justice in *Reed v Littleton*, 289 N. Y. Supp. 798, 159 Misc. 853 (1932)

“[Furthermore] has not my good brother overlooked the fact that a certain amount of naivete is an essential adjunct to the judicial office? Does not the Supreme Court grind out thousands of divorces annually upon the stereotyped sin of the same big blonde attired in the same black pajamas? Is not access to the chamber of love quite uniformly obtained by announcing that it is a maid bringing towels or a messenger boy with an urgent telegram? Do we not daily pretend to hush up the fact that an offending defendant is insured when every jury with an ounce of wit recognises the defendant's lawyer and his entourage as old friends? More than half a century ago P. T. Barnum recorded the fact that the American people delight in being humbugged, and such is the national mood still. Nowhere is this trait more clearly

Criminal liability in tort is equivalent to absolute liability in modern tort law,⁹⁴¹ but one comparison should be made: Mueller, no doubt, was familiar with some reports about absolute liability in primitive law for persons who had left their arms at a place where a third person had access, which third person accidentally lost his life by unauthorisedly handling such arms.⁹⁴² Mueller made it explicitly clear the man in primitive society that “his anger expresses itself equally against inanimate objects,” and we have at least some evidence that penalty was inflicted upon such inanimate objects as for instance a falling tree which had killed the woodcutter, by burning this “delinquent” tree.⁹⁴³ Therefore, the question is does such a behaviour differ to any considerable extent from an instruction for the destruction of fishnets used in violation of someone's fishing rights, or perhaps general fishing regulations? Yet, this is the reaction today's criminal legal theory.⁹⁴⁴ The same holds true with respect to “revenge against animals”.⁹⁴⁵ Was this then and is it today an action of revenge, as the author seems to imply, or has it always been a rather practical and utilitarian provision? Some of the issues emerging from this finding relate specifically to the application of tort in criminal law. What has become apparent in this analysis is that the purpose of both legal system is clear on it objective, which is punishment. Likewise, the principle of the fault finding element in both criminal law and tort law are not distinct, however they do varies depending on the crime and the degree of the offense.⁹⁴⁶

shown than in the field of gambling. A church fair or bazaar would scarcely be complete without a bevy of winsome damsels selling chances on bed quilts, radios, electric irons, and a host of other things. If the proceeds are to be devoted to the ladies' sewing circle or the dominie's vacation, no sin is perceived and the local prosecutor, whoever or wherever he may be, stays his hand. But if a couple of dusky youths are apprehended rolling bones to a state of warmth, blind justice perceives the infamy of the performance and the law takes its course”.

⁹⁴¹ Jeremiah Smith, ‘Tort and Absolute Liability: Suggested Changes in Classification’ (1917) 30 (3) *Harvard Law Review* 241, 262.

⁹⁴² Gerhard OW Mueller (n 931).

⁹⁴³ *Ibid.*

⁹⁴⁴ *Lawton v Steele*, 152 US 133, 14 S.Ct. 499 (1894). Upon trial before a jury, a verdict was rendered, subject to the opinion of the court, in favour of the plaintiffs against defendant Steele for the sum of \$216, and in favour of defendants Sargent and Sherman. A motion for a new trial was denied, and judgment entered upon the verdict for \$216 damages and \$166.09 costs. On appeal to the general term, this judgment was reversed and a new trial ordered, and a further appeal allowed to the Court of Appeals. On appeal to the Court of Appeals, the order of the general term granting a new trial was affirmed, and judgment absolute ordered for the defendant. 119 N.Y. 226. Plaintiffs there upon sued out a writ of error from this Court. In *Rep.* 317 (1904), the defendant left a loaded gun leaning on a fence on his property, next to a public highway. The defendant's sixteen year old son found the gun. He took it with him to the highway and, not knowing that it was loaded, pointed it, in play, at the plaintiff. The gun went off, and the plaintiff was injured.

Held: A person who leaves a dangerous weapon at a place to which other persons have access, is liable for injuries caused by the handling of the weapon.

⁹⁴⁵ Christoff Zietsman, ‘Vicious Dogs a Case Study from 2000 BC to AD 2000’ (2000) 45 (1) *Akroterion* 75, 87.

⁹⁴⁶ Richard A Epstein, ‘The Tort/Crime Distinction: A Generation Later’ (1996) 76 *BUL Rev* 1

Mueller's definition of primitive wrongs and criminal liability is seen in a tort in criminal law. Thus, the criminal liability in tort is when a person conducts in relations to a risk, of which he/she reasonably foresee or which a reasonable person⁹⁴⁷ would have been aware, fall below the standard which will be expected of a reasonable person in the light of the danger.⁹⁴⁸ The concept of reasonable man standard in tort and civil law falls under the principle of negligence.⁹⁴⁹ It may be the case therefore that negligence suffices for criminal liability in more offences than is commonly acknowledged. For instance, a survey in 1996 showed that 540 offences triable in the Crown Court, 23 of them have negligence as their principal *mens rea*⁹⁵⁰ or one of their *mens rea* element.⁹⁵¹ This number has now increased significantly by the Sexual Offences Act 2003.⁹⁵² A *mens rea* refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime. *Staples v United States*, 511 US 600 (1994). Establishing the *mens rea* of an offender is usually necessary to prove guilt in a criminal trial. The prosecution typically must prove beyond reasonable doubt that the defendant committed the offense with a culpable state of mind. Justice Holmes famously illustrated the concept of intent when he said "even a dog knows the difference between being stumbled over and being kicked". The *mens rea* requirement is premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct; however, a defendant need not know that their conduct is illegal to be guilty of a crime. Rather, the defendant must be conscious of the "facts that make his conduct fit the definition of the offense". The number of

⁹⁴⁷ Amelia Skelding, 'The Elusive Standard of Reasonableness' (2015) 3 *Legal Issues Journal* 72

In establishing whether the standard of care in negligence has been met, the courts compare what the defendant has done to the imagined actions of the so-called "reasonable man". One of the earliest reported uses of the reasonable man standard occurred in a 19th century British case of *Vaughan v Menlove* (1837) 3 Bing NC 468, 132 ER 490 (CP).

In *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205 Lord Bowen uses the imagery of "the man on the street", "the man on the Clapham omnibus" and "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves". The representation of a man in a busy public realm by day and a leisurely domestic evening life may be the objectives of a suburban middle-class male.

⁹⁴⁸ Card Richard and Philip Asterley Jones, *Criminal Law* (Oxford University Press 2008).

⁹⁴⁹ Richard A Posner, 'A Theory of Negligence' (1972) 1 (1) *Journal of Legal Studies* 29, 96.

In the modern law of tort, the word "negligence" has two meanings. First, it indicates the state of mind of a party in doing an act and secondly, it means a conduct which the law deems wrongfully. In law of torts, these two meanings are considered as separate theories, namely subjective theory and objective theory.

⁹⁵⁰ Francis Bowes Sayre, 'Mens Rea' (1932) 45 (6) *Harvard Law Review* 974, 1026.

Mens Rea refers to criminal intent. The literal translation from Latin is "guilty mind". The plural of *mens rea* is *mentes reae*

⁹⁵¹ Andrew Ashworth and Meredith Blake, 'The Presumption of Innocence in English Criminal Law' (1996) *Criminal Law Review* 306, 317.

⁹⁵² Sexual Offences Act 2003.

The Sexual Offences Act 2003 (SOA 2003) came into force on 1 May 2004 and repealed most sections of the Sexual Offences Act 1956. It represented 'a large-scale revision of the law of sexual offences. The Act applies to England and Wales only. Scotland is covered by the Sexual Offences (Scotland) Act 2009.

criminal offences with negligence as a principal *mens rea* is undoubtedly even high in offence triable⁹⁵³ only in a magistrates' courts.⁹⁵⁴ The present study raises the possibility that in criminal negligence, the danger in question as to which the defendant is required to be negligent could concern a consequence of his conduct or a circumstance in regards to the crime. Therefore, a defendant negligent as to a consequence of an act or omission on his behalf if:

- the risk of it occurring would have been foreseen by a reasonable person; and
- the defendant either fails to foresee the risk and to take steps to avoid it or, having foreseen it, fails to take steps to avoid it or takes steps which fall below the standard and of conduct which would be expected of a reasonable person in the lights of that risk.⁹⁵⁵

According to these explanations, negligence in criminal liability is a consequence that is required for the defendant's action to suffice for criminal accountability. For instance, the offence of putting people in fear of violence, contrary to the Protection from Harassment Act 1997, s4(1).⁹⁵⁶ Section 4(1) provides that a person whose course of conduct causes another

⁹⁵³ David Riley and Julie Vennard, *Triable Either-Way Cases: Crown Court or Magistrates' Court?* (No. 98. Bernal Press 1988).

A crime that may be tried either as an indictable offence or a summary offence. Such crimes include offences of deception or fraud, theft, bigamy, and sexual activity with a child under the age of 16. When an offence is triable either way, the magistrates' court must decide, on hearing the initial facts of the case, if it should be tried on indictment rather than summarily (for example, because it appears to be a serious case). Even if they decide that they can deal with the matter adequately themselves, they must give the defendant the choice of opting for trial upon indictment before a jury. There are three exceptional cases, however:(1) If the prosecution is being conducted by or on behalf of the Attorney General, Solicitor General, or Director of Public Prosecutions, and they apply for trial on indictment, the case must be tried on indictment.(2) If the case concerns criminal damage or any offences connected with criminal damage (except arson), and the damage appears to be less than £5,000, the case must be tried summarily.(3) If the defendant is under 18, he must be tried summarily unless he is charged with (a) homicide; (b) an offence for which he is charged jointly with someone over 17, and it is thought necessary that they should be tried together; (c) a violent or sexual offence for which an adult could be sentenced to 10 years' imprisonment or more; (d) a firearms offence carrying a mandatory minimum sentence; or (e) certain other specified offences that can be punished by long periods of detention.

⁹⁵⁴ Sally Cunningham, 'Taking Causing Serious Injury by Dangerous Driving seriously' (2012) and Richard Card and Jill Molloy, *Cross and Jones Criminal Law* (Oxford University Press 2016).

⁹⁵⁵ Card Richard (n 943).

⁹⁵⁶ Protection from Harassment Act 1997.

S4 (1).

Putting people in fear of violence

(1)A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2)For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

(3)It is a defence for a person charged with an offence under this section to show that

(a)his course of conduct was pursued for the purpose of preventing or detecting crime,

person to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.⁹⁵⁷ It may be the case therefore that the only common law offences where negligence as a consequence suffices seem to be involuntary manslaughter (provided the negligence is gross)⁹⁵⁸ and public nuisance.⁹⁵⁹ A note of caution is due here since, in some statutory offences liability is based on the fact that there is a reasonably foreseeable risk that some consequence may result from the defendants' conduct, although that consequence need not be proved actually to have resulted. For instance, a number of offences where the word likely is used in regard to such as risk, the Public Order Act 1986, s 5 is a typical example.⁹⁶⁰

(b)his course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c)the pursuit of his course of conduct was reasonable for the protection of himself or another or for the protection of his or another's property.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ Frank A Karaba, 'Negligent Homicide or Manslaughter: A Dilemma' (1931-1951) (1950) 41(2) *Journal of Criminal Law and Criminology* 183, 189.

R v Fenton (1830) 1 Lew CC 179, *R v Franklin* (1883) 15 Cox CC 163, *R v Lamb* [1967] 2 QB 981, *R v Mitchell* [1983] QB 741 and *R v Goodfellow* (1986) 83 Cr App R 23 and *R v Lowe* [1973] QB 702

Constructive manslaughter is also referred to as unlawful act manslaughter. Constructive manslaughter is a form of involuntary manslaughter in that an unlawful killing has taken place where the defendant lacks the mens rea of murder. There are two types of involuntary manslaughter: constructive manslaughter exists where the defendant commits an unlawful dangerous act which results in death; where the defendant commits a lawful act which results in death this may amount to gross negligence manslaughter.

Elements of the offence:

The offence of constructive manslaughter can be broken down into three elements:

1. There must be an unlawful act
2. The unlawful act must be dangerous
3. The unlawful dangerous act must cause death

⁹⁵⁹ James Dunbar-Brunton, *The Tort of Nuisance: The Law and The Individual* (Macmillan Education UK

1979). There are two types of nuisance in English law: Public nuisance and Private nuisance. In some instances, the same set of facts can produce liability in both kinds of nuisance, although the two types of nuisance are very much distinct. Private nuisance is concerned with protecting the rights of an occupier in respect of unreasonable interference with the enjoyment or use of his land. The parties to an action in private nuisance are generally neighbours in the popular sense of the word and the courts undertake a balancing exercise between the competing rights of land owner to use his land as he chooses and the right of the neighbour not to have his use or enjoyment of land interfered with. Public nuisance is a crime but becomes actionable in tort law if the claimant suffers "particular damage" over and above the damage suffered by the public generally.

In *Malone v Laskey* [1907] 2 KB 141. The claimant was injured when vibrations from an engine on an adjoining property caused a bracket to come loose and the cistern to fall on her in the lavatory. She was unsuccessful in her claim as she did not have a proprietary interest in the house. Her husband was a mere licensee through his employment as a manager.

In *Sedleigh-Denfield v O' Callaghan* [1940] AC 880. Held: The defendant was liable. An occupier may be liable for the acts of a trespasser if they adopt or continue the nuisance.

Lord Maugham: "My Lords, in the present case I am of opinion that the Respondents both continued and adopted the nuisance. After the lapse of nearly three years they must be taken to have suffered the nuisance to continue; for they neglected to take the very simple step of placing a grid in the proper place which would have removed the danger to their neighbour's land. They adopted the nuisance for they continued during all that time to use the artificial contrivance of the conduit for the purpose of getting rid of water from their property without taking the proper means for rendering it safe".

⁹⁶⁰ Public Order Act 1986.

S 5 Harassment, alarm or distress

Other examples are offences where the defendant's conduct is required to be calculated to cause a particular consequence.⁹⁶¹ The explanation here seems to suggest that a calculated risk means likely or the probability for something bad to happen.⁹⁶² 'Likely' bears an objective meaning, although whether the reasonably foreseeable risk must be a probable risk or a lower degree of risk, such as a real risk that should not be ignored, varies depending on the specific context of the statutory words.⁹⁶³ In criminal law, a defendant is liable in negligence as to a circumstance relevant to this conduct if he/she ought to have been aware of its existence because a reasonable person would have thought about the risk that it might exist and would have found out that it

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- (1) A person is guilty of an offence if he(a) uses threatening [or abusive] words or behaviour, or disorderly behaviour, or
 (b) displays any writing, sign or other visible representation which is threatening or abusive], within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
 (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the other person is also inside that or another dwelling.
 (3) It is a defence for the accused to prove—
 (a) that he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment, alarm or distress, or
 (b) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling, or
 (c) that his conduct was reasonable.

⁹⁶¹ Nicholls Colin Timothy Daniel, Alan Bacarese and John Hatch, *Corruption and Misuse of Public Office* (Oxford University Press 2011).

The culpability 'must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment' (*R v Dytham* 1979 QB 722). The fact that a public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence.

Examples of behaviour that have in the past fallen within the offence include:

- wilful excesses of official authority;
- 'malicious' exercises of official authority;
- wilful neglect of a public duty;
- intentional infliction of bodily harm, imprisonment, or other injury upon a person; frauds and deceptions.
- Breaches of duty
- Some of the most difficult cases involve breaches of public duty that do not involve dishonesty or corruption.

In all cases, however, the following matters should be addressed:

- Was there a breach of a duty owed to the public (not merely an employment duty or a general duty of care)?
- Was the breach more than merely negligent or attributable to incompetence or a mistake (even a serious one)?
- Did the defendant have a subjective awareness of a duty to act or subjective recklessness as to the existence of a duty?
- Did the defendant have a subjective awareness that the action or omission might be unlawful?
- Did the defendant have a subjective awareness of the likely consequences of the action or omission.
- Did the officer realise (subjective test) that there was a risk not only that his or her conduct was unlawful but also a risk that the consequences of that behaviour would occur?
- Were those consequences 'likely' as viewed subjectively by the defendant? Did the officer realise that those consequences were 'likely' and yet went on to take the risk?
- Regard must be had to motive.

⁹⁶² *Turner v Shearer* [1973] 1 All ER 397.

⁹⁶³ *Whitehouse* (1999) Times, 10 December, CA.

did.⁹⁶⁴ However, negligence as to a circumstance is otherwise known, is misleadingly (because it does not constitute knowledge in criminal law),⁹⁶⁵ as constructive knowledge,⁹⁶⁶ though, negligence as to circumstance is a conception which, generally speaking, has no place in the criminal law.⁹⁶⁷ Nonetheless, negligence as to circumstance will suffice for liability in statutory offences in two cases:

- where the statute expressly uses the words connoting negligence; and
- where appellate judges have implied into a statutory offence words connoting negligence.⁹⁶⁸

Also, negligence as to circumstance suffices in statutory offence by whose definition the defendant can be convicted on the ground that he had reasonable cause to believe; reasonable to believe or reason to suspect; or that he could reasonably be expected to know or ought to know that a circumstance existed or did not reasonably believe that it did not.⁹⁶⁹ An example is the Sexual Offences Act 2003, as explained above, where negligence as to a circumstance suffices for a criminal liability. Other examples are to be found in different statutes, for instance the Official Secrets Act 1989, s5.⁹⁷⁰ In addition, under the Firearms Act 1968, s 25, it is an

⁹⁶⁴ Larry Alexander, 'Reconsidering the Relationship among Voluntary Acts, Strict Liability, and Negligence in Criminal Law' (1990) 7 (2) *Social Philosophy and Policy* 84,104.

⁹⁶⁵ *Roper v Taylor's Central Garages (Exeter) Ltd.* [1951] 2 T.L.R. 284.

- court cannot rely on evidence given against different defendant in related case.
- shutting the eyes is actual knowledge but neglecting to make inquiries is not

⁹⁶⁶ *Ibid.* *Norton v Corus UK Ltd* [2006] EWCA Civ 1630. In *Norton v Corus (UK) Limited* the Court of Appeal held that the claimant had had constructive knowledge of his injuries within the meaning of Section 14 of the Limitation Act 1980 so the claim was time-barred. The decision confirms that, on a preliminary issue, the burden of proving the ingredients of constructive knowledge lies with the defendant, but that, even where causation is in issue, a judge is entitled to make assumptions as to constructive knowledge where those assumptions are based on common knowledge and common sense. The case provides general guidance on constructive knowledge and how preliminary issues can be decided.

⁹⁶⁷ *Roper v. Taylor's Central. Garages (Exeter) Ltd.* [1951] 2 T.L.R. 284 at 288-288, per Devlin J.

⁹⁶⁸ Card Richard (n 943).

⁹⁶⁹ *Ibid.*

⁹⁷⁰ Office of Secretes Act 1989. S 5 Information resulting from unauthorised disclosures or entrusted in:

- confidence.
- (1) Subsection (2) below applies where
- (a) any information, document or other article protected against disclosure by the foregoing provisions of this Act has come into a person's possession as a result of having been—
- (i) disclosed (whether to him or another) by a Crown servant or government contractor without lawful authority; or
- (ii) entrusted to him by a Crown servant or government contractor on terms requiring it to be held in confidence or in circumstances in which the Crown servant or government contractor could reasonably expect that it would be so held; or
- (iii) disclosed (whether to him or another) without lawful authority by a person to whom it was entrusted as mentioned in sub-paragraph (ii) above; and
- (b) the disclosure without lawful authority of the information, document or article by the person into whose possession it has come is not an offence under any of those provisions. (2). Subject to subsections (3) and (4) below, the person into whose possession the information, document or article has come is

offence for a person to sell any firearm or ammunition to another person whom he knows or has reasonable cause of believing to be drunk or of unsound mind.⁹⁷¹ In *R v Saik*,⁹⁷² the House of Lords held that reasonable grounds to suspect that any property is or represent person's proceeds of criminal conduct in the Criminal Justice Act 1988, s 93 C (2) repealed by the Proceeds of Crime Act 2002) included a requirement that the defendant had actual suspicion as well as requirement that there were reasonable grounds for the suspicion, so that the test was not purely object one.⁹⁷³

It would be unwise to assume that the decision on the above point is of general application. Only two members of the House of Lords dealt with the issue in details. Lord Hope referring to the case⁹⁷⁴ relating to a statutory power of arrest on reasonable grounds for suspecting that a

guilty of an offence if he discloses it without lawful authority knowing, or having reasonable cause to believe, that it is protected against disclosure by the foregoing provisions of this Act and that it has come into his possession as mentioned in subsection (1) above. (3).

In the case of information or a document or article protected against disclosure by sections 1 to 3 above, a person does not commit an offence under subsection (2) above unless— (a)the disclosure by him is damaging; and

(b)he makes it knowing, or having reasonable cause to believe, that it would be damaging; and the question whether a disclosure is damaging shall be determined for the purposes of this subsection as it would be in relation to a disclosure of that information, document or article by a Crown servant in contravention of section 1(3), 2(1) or 3(1) above.

(4) A person does not commit an offence under subsection (2) above in respect of information or a document or other article which has come into his possession as a result of having been disclosed— (a)as mentioned in subsection (1)(a)(i) above by a government contractor; or (b)as mentioned in subsection (1)(a)(iii) above, unless that disclosure was by a British citizen or took place in the United Kingdom, in any of the Channel Islands or in the Isle of Man or a colony.

(5)For the purposes of this section information or a document or article is protected against disclosure by the foregoing provisions of this Act if (a)it relates to security or intelligence, defence or international relations within the meaning of section 1, 2 or 3 above or is such as is mentioned in section 3(1)(b) above; or (b)it is information or a document or article to which section 4 above applies; and information or a document or article is protected against disclosure by sections 1 to 3 above if it falls within paragraph (a) above.

(6)A person is guilty of an offence if without lawful authority he discloses any information, document or other article which he knows, or has reasonable cause to believe, to have come into his possession as a result of a contravention of section 1 of the MIOfficial Secrets Act 1911.

⁹⁷¹ Firearms Act 1968.

s 25 It is an offence for a person to sell or transfer any firearm or ammunition to, or to repair, prove or test any firearm or ammunition for, another person whom he knows or has reasonable cause for believing to be drunk or of unsound mind.

⁹⁷² *R v Saik* [2006] UKHL 18

The House of Lords considered the law of conspiracy with respect to the offence of money laundering, particularly where individuals suspected, rather than knew that the funds involved in a transaction were the proceeds of crime. The substantive offence with which Mr Saik was charged is contained in section 93C (2) of the Criminal Justice Act 1988 (amended). The offence of conspiracy is contained within section 1 of the Criminal Law Act 1977. Both of these are reproduced for reference at the end of this article. Their Lordships held that the criminal provenance of the property is a fact necessary for the commission of the offence and as such section 1(2) of the Criminal Law Act 1997 applies, (paras 23, 81 and 117 of the judgment).

⁹⁷³ *Ibid.*

⁹⁷⁴ *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286.

person was concerned in acts of terrorism, where he had held that the test was partly subjective and partly objective. Lord Brown based his conclusion on the view that the defendant could not have acted with the required purpose of assisting a person to avoid prosecution unless subjectively he either actually knew or suspected the property to be hot.⁹⁷⁵ Therefore, it was necessarily implicit in s 93C (2)⁹⁷⁶ that not only must the defendant have reasonable grounds to suspect that the property was hot but that he also did suspect it.⁹⁷⁷ Although Lord Hope's reasoning is of potentially general application to reason to suspect or reasonable ground to suspect or like terms when they are *mens rea* requirement. Lord Brown limited the particular wording of s 93C (2) (i.e. the illogicality which would arise if, in s 93C (2), reasonable ground suspects the hotness of the property was a purely objective requirement while at the same time s 93C (2) required a purpose to assist a person to avoid prosecution.

Overall, this study strengthens the idea that negligence as to a circumstance will suffice in corporate accountability in a criminal law when a phrase such as reasonable cause to believe; reasonable to believe or reason to suspect; or that he could reasonably be expected to know or ought to know that a circumstance existed or did not reasonably believe that it did not. However, the emphasis on a subjective approach to criminal liability by House of Lord in *B v DPP*⁹⁷⁸ and *G (2003)*⁹⁷⁹ makes it most unlikely that such an implication would now be made

The plaintiff had been arrested on the basis of the 1984 Act. The officer had no particular knowledge of the plaintiff's involvement, relying on a briefing which led to the arrest.

Held: A reasonable suspicion upon which an arrest was founded need not be based on the arresting officer's own observations. All that is required is a genuine and reasonably based suspicion in the mind of the officer.

⁹⁷⁵ *Ibid.*

⁹⁷⁶ Criminal Justice Act 1988, s 93 C(2)

⁹⁷⁷ *Ibid.*

⁹⁷⁸ *B V DPP* [2000] 2 AC 428.

A boy aged 14 was charged with an offence of inciting a child under 14 to commit an act of gross indecency, contrary to section 1(1) of the Indecency with Children Act 1960. He had sat next to a 13 year old girl on a bus and repeatedly asked her to perform oral sex with him. She refused. The boy believed the girl was over 14. The question for the court was whether the offence under s.1 (1) was of strict liability in relation to the age of the victim.

Held: The House of Lords held that *R v Prince* did not lay down a rule that all offences relating to age of the victim were outside consideration of the general presumption in favour of *mens rea*. Moreover, the law had moved on since this decision favouring an honest belief of the defendant which was not dependent upon the belief being reasonable. Where a charge was a true crime of gravity, the stronger the presumption of *mens rea*. The defendant's conviction was quashed.

⁹⁷⁹ *R v G & R* [2003] 3 WLR.

Held: The defendants' convictions were quashed. The House of Lords overruled *MPC v Caldwell* [1982] AC 341.

The appropriate test of recklessness for criminal damage is:

"A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to

(i) a circumstance when he is aware of a risk that it exists or will exist;

(ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

or would survive an appeal if it is applied in the context of corporate accountability under criminal law. Though, this thesis is of a different view, it is contest that negligence should suffice in criminal law where the requisite elements of negligent conduct is established.

A possible explanation for this might be that the unqualified, phrases such as reasonable cause to believe; reason to believe or reason to suspect; when used to describe the *mens rea* for an offence, undoubtedly postulate a wholly objective test.⁹⁸⁰ Contrary, in *Hudson*⁹⁸¹ the dictum explain that not only must there be an objective reason to suspect but also the defendant himself, taking into account his mental and other capacities, ought to have suspected. However, this dictum has not been follow in any other cases. On the other hand, the legislature can expressly or impliedly provide for a subjective element in an offense. Therefore, the absent of any of this element could be attributed to the fact that the legislature may have presumed that the court will exercise its discretion to find a criminal liability in negligent conduct. This have been done, for example, by the Sexual Offences Act 2003 in respect of negligence element in the non-consensual offences under ss 1-4 of the Act⁹⁸² where account must be taken of all the circumstance (including, it seems the defendant`s characteristics which affect his perception of the risk). A phrase such as ought to know or could reasonably be expected to know seems to carry the clear implication that the determination of whether they are satisfied must include reference to the defendant`s ability to perceive the relevant risk. In general, therefore, it seems that negligence exist in criminal law and is included in some statutory offences in the UK criminal system, which is relevant in Mueller's view of primitive wrongs and punishment. The contention in this study is that holding the corporation accountable under the neighbourhood principle of the duty of care is nonetheless, not a denial of corporation right for a fair trial or due process. What this means is that by applying the tort of negligence to corporation`s misconduct, the *mens rea* of the corporation is established through its knowledge and conduct.

3.13. The Potential Recommendation Principles of Corporate Human Rights Accountability under International Criminal Law

It is proposed in this chapter that there are potentially two principles to secure corporate criminal liability. The first, the outward conduct which must be proved against the corporations

⁹⁸⁰ *Young* [1984] 2 All ER 164.

⁹⁸¹ *Hudson* 1 QB 448 CCA.

⁹⁸² Sexual Offences Act 2003.

(which is known as the *actus reus*) and the second, the state of mind must be proved at the time of the relevant conduct (customarily known as the *mens rea*).⁹⁸³ This current study has found that it is adequate to argue that every criminal offensive must have *actus reus* and *mens rea* of the offence, thus the corporation may not have the requisite *mens rea* of a crime as the corporations do not have a brain to think and do not have a legal personality under international law. Therefore, a corporation cannot be prosecuted under international criminal law, even though other authors have argued that under the principle of the Nuremberg trial, this might be possible.⁹⁸⁴

A non-state actor or the corporation will not be liable for a criminal offence unless both elements are proven to be present. Although the vast majority of criminal offences may have both the *actus reus*⁹⁸⁵ and *mens rea*⁹⁸⁶ elements, some criminal offences such as strict liability do not require a *mens rea* element for every element of the *actus reus* of the offence.⁹⁸⁷ Whether this element is applicable to international criminal law and corporate accountability is a debate that depends on the extent of the corporate conduct in question. This is because the *actus reus* of every offence is different. The *actus reus* elements of international crime are every element within the definition of the crime that is not related to the state of the mind of the actor. Thus, the simplest way for a court to find the *actus reus* in corporate international crimes is to subtract the *mens rea* element, which is related to the state of mind of the actor from the definition of international criminal law and human rights law offence. A possible explanation for this might be that the *actus reus* of corporate international crimes may involve the following:

- An act or omission (conduct);⁹⁸⁸

⁹⁸³ Joshua Dressler, *Understanding Criminal Law* (Recording for the Blind & Dyslexic 2007).

⁹⁸⁴ Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon-An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91.

⁹⁸⁵ The *actus reus* in criminal law consists of all elements of a crime other than the state of mind of the defendant. In particular, *actus reus* may consist of: conduct, result, a state of affairs or an omission. Conduct the conduct itself might be criminal. *Duck v Peacock* [1949] 1 All ER and *R v Larsonneur* [1933] 24 Cr App R 74. Kenneth W Simons, 'Does Punishments *Mens Rea* and *Actus Reus*' (2002) 6(1) *Buffalo Criminal Law Review* 219, 315.

⁹⁸⁶ *Mens rea* in criminal law is concerned with the state of mind of the defendant. Most crimes will require proof of *mens rea*. Where *mens rea* is not required the offence is one of strict liability. There are three main levels of *mens rea*: intention, recklessness and negligence. *R v Inglis* [2011] 1 WLR 1110, *DPP v Smith* [1961] AC 290 and *R v Moloney* [1985] AC 905. Joshua Dressler, *Understanding Criminal Law* (Matthew Bender 1995).

⁹⁸⁷ Strict liability crimes are crimes which require no proof of *mens rea* in relation to one or more aspects of the *actus reus*. Strict liability offences are primarily regulatory offences aimed at businesses in relation to health and safety. Richard A Epstein, 'A Theory of Strict Liability' (1973) 2 (1) *Journal of Legal Studies* 151, 204.

⁹⁸⁸ A conduct elements involve an action or an omission to act.

- The occurrence of a result (consequences);⁹⁸⁹ and
- The existence of surrounding⁹⁹⁰ circumstances.⁹⁹¹

However, this study also acknowledges that some criminal offences may contain just one of these elements (conduct, consequences, or surrounding circumstances). While other criminal offences may have two of these elements, or even all the three. There are several possible explanations for this: the court must prove that the corporation had committed the *actus reus* with the relevant *mens rea* of the criminal offence under international law and human rights law. In order to establish liability under international criminal law, the court must prove each and every element of the *actus reus* of the offence. If one element of the *actus reus* is not established, then the *actus reus* cannot be proven in court and there is no criminal liability for the corporation. This is irrespective of whether or not the corporation or the corporate official had the required *mens rea* (if it can be proven) of the crime or the human rights violations. For example, take the offence of complicity in human rights violations. If the human rights violations or the resulting death of the victims cannot be proven in court, then the corporation is not liable for the offence, even if other elements of the crime have been satisfied.

Nonetheless, this research have already observed the complexities surrounding corporate accountability under international criminal law. Thus, this study continues advocating for a broad application of international criminal law if the corporations should be held liable for human rights violations, however, acknowledge that this can be difficult to implement in practice. This opinion may be explained by the fact that the conduct offences requires the corporation to perform a positive action⁹⁹² if the corporation is to be found liable for the criminal offence. Therefore, although the *actus reus* element of the conduct offence usually involves the performance of a positive act,⁹⁹³ a corporation should be criminally liable for an omission to act. A conduct offence requires a positive act, so corporations would be liable for human rights violations if it aids and abets national governments to commit human rights violations. However, the corporation will not be liable for any offence if the corporation leaves the national government to violate the human rights of its people. It can thus be suggested that

⁹⁸⁹ Consequences elements involve a result which must have been caused by conduct of the corporation.

⁹⁹⁰ Circumstances elements involve existence of a set of circumstances or state of affairs.

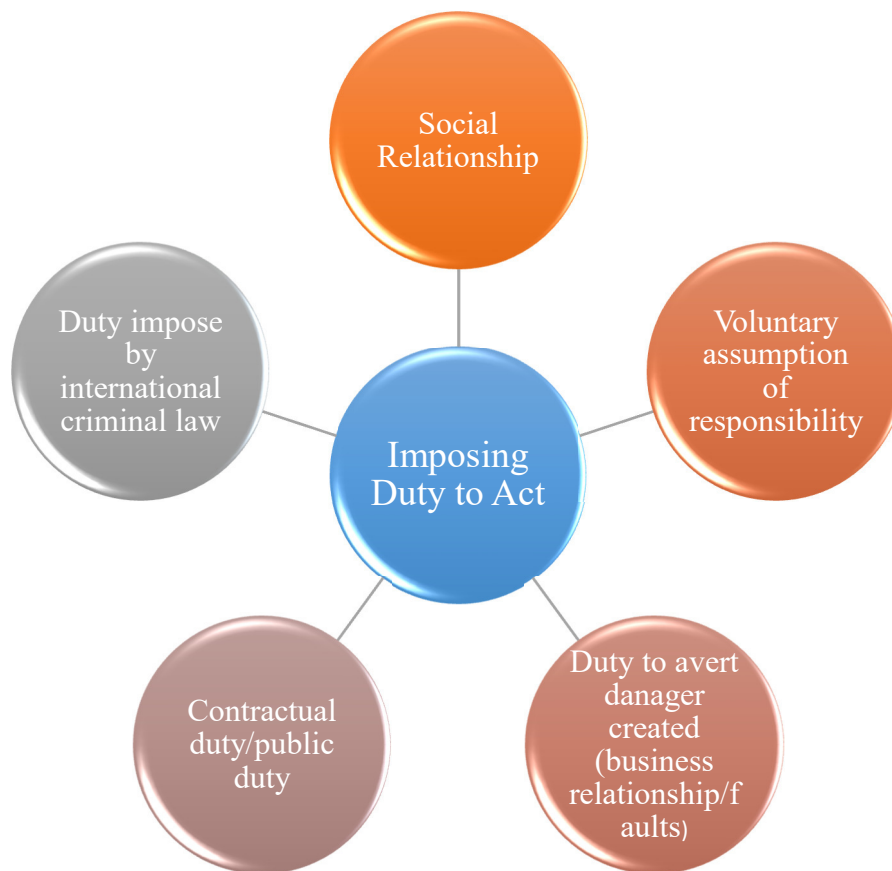
⁹⁹¹ Nicola Monaghan, *Criminal Law* (Oxford University Press 2016).

⁹⁹² Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013).

⁹⁹³ Can a person be held criminally responsible for a failure to act? The general rule is that there can be no liability for failing to act, unless at the time of the failure to act the defendant was under a legal duty to take positive action., Kevin W Saunders, 'Voluntary Acts and The Criminal Law: Justifying Culpability Based on the Existence of Volition' (1987) 49 *University of Pittsburgh Law Review* 443

there are five instances where international criminal law might be able to impose a duty on corporations and corporate official to act. If there is such a duty on the corporate to act and the corporations and its official fail to do so, then the actor should be liable for the criminal offences by omission. In this view, it can be inferred that the law imposes a duty on individuals and corporations to act where there is a social relationship between the parties.⁹⁹⁴

Diagram. 3



According to this diagram, this research can infer that the closer the social relationship, the more likely it is that the law imposes a duty on the corporation to act. In common law jurisdiction, the duty to act due to the existence of a special relationship was firmly established by the twentieth century.⁹⁹⁵ Likewise, a duty to act under international criminal law may be on the corporations where the corporate has voluntarily assumed responsibility for the whole operation of the subsidiary business operations. Hence, where the corporation undertakes the responsibility of the business operation and direction, any omission to do so resulting in human

⁹⁹⁴ See Chapter One for the definition of social relationship.

⁹⁹⁵ *Gibbons v Proctor* [1891] 64 LT 594.

rights violations should render the corporation liable for any criminal offence committed in relation to the business operation. Thus, such an undertaking of responsibility may arise as a result of express or implied⁹⁹⁶ acts by the corporation.

Furthermore, the law imposes a duty to act to avert a danger that an actor has created. Where the corporation innocently does an act, which creates a risk of human rights violations and environmental damages for the community. If the corporation becomes aware of the risk of human rights violations and environmental damages, the law imposes a duty on the corporation to act to avert or minimise the risk.⁹⁹⁷ In the case of *R v Miller*, the *actus reus* of the offence is committed by the original act, i.e. setting the mattress on fire. However, as this act was committed innocently, the *mens rea* of the offence was not present at this point in time. Hence, there was no coincidence that *actus reus* and *mens rea* were present,⁹⁹⁸ therefore, no *mens rea* and no offence. The defendant becomes liable when the defendant realises the danger that he has created (i.e. the defendant forms the *mens rea*) and then fails to act to avert the danger (this omission is sufficient *actus reus*). At this point in time, the *actus reus* and *mens rea* coincide, resulting in the criminal liability of the defendant. What is important to note is that the law does not require the corporation to stop the risk. However, the corporation is expected to reduce the risk created by its business operation. So, it can be argued here that where the corporations create a risk of human rights violations and environmental damages and thereby exposes another person to a reasonable foreseeable risk of human rights violations which materialises, there is an evidential basis for *actus reus* of the corporate conduct, thus criminal liability should be imposed by the court.

Similarly, a contract between the supply chain, subsidiary and parent corporations may give rise to a duty to act. This duty may be owed to people who are not a party to the contract, but who are likely to be affected by a failure of the supply chain or subsidiary adhering to

⁹⁹⁶ Express terms – those agreed between the parties themselves or Implied terms – terms which are put into the contract by the courts or by statute

⁹⁹⁷ *R v Miller* [1983] 2 AC 161. “The defendant had been out drinking for the evening. He went back to the house he had been staying in and fell asleep on a mattress with a lighted cigarette in his hand. He awoke and saw that the cigarette had started a small fire. Upon seeing the fire, he then got up and went to another room and went back to sleep. At his trial, the prosecution did not rely on the acts of the defendant in falling asleep with a lighted cigarette as being reckless, but relied solely on the grounds that upon becoming aware of the fire he failed to take steps to put the fire out or call the fire brigade. The defendant had created a dangerous situation and owed a duty to call the fire brigade upon becoming aware of the fire. He was therefore liable for his omission to do so”.

⁹⁹⁸ It is a principle of English law that the *actus reus* and *mens rea* must coincide. That is they must happen at the same time. This is sometimes referred to as the contemporaneity rule or the coincidence of *actus reus* and *mens rea*. *Edwards v Ddin* (1976) 63 Cr App R 218.

human rights obligations. In *R v Pittwood*⁹⁹⁹ the defendant was convicted of gross negligence manslaughter due to his omission to shut the gate. It was held that his duty arose under his contract of employment. The law may impose a legal duty on the corporation to act in a particular way so as not to engage in criminal business operations that may violate the human rights of the society it conducts its business operation. This could be under the international criminal law, human rights law, humanitarian law, or environmental.

It can, therefore, be assumed that where the corporation is liable for criminal conduct, the court must be satisfied that the corporation caused the result in order for the *actus reus* of the criminal conduct to be met. For example, in order to establish the *actus reus* of human rights violations and environmental damage, it must be proven that the corporation caused human rights abuses and environmental damage. There must be a chain of causation¹⁰⁰⁰ between the act or an omission of corporate conduct and its results. It is for the court to decide in a corporate criminal case whether the criminal act of the corporation is proved beyond all reasonable doubt that the corporation caused the necessary harm. There are, therefore, two main rules of causation, which must prove that the corporation was the factual cause¹⁰⁰¹ of the result and that the corporation was the legal cause of the result. The text for factual causation is the 'but for test',¹⁰⁰² thus it must be established that but for the corporation's action, the result would not have occurred. An implication of this is the possibility that it must be established in court that the corporation's conduct was the factual cause of the result. Therefore, corporate conduct must be (act or omission) a *sine qua non* (without which is not) of the result. This test is applied by asking the question: but for the corporation's conduct, would the consequence have occurred? If the answer is yes, irrespective of the corporation's conduct, the factual

⁹⁹⁹ *R v Pittwood* [1902] TLR 37.

¹⁰⁰⁰ Causation refers to the enquiry as to whether the defendant's conduct (or omission) caused the harm or damage. Causation must be established in all result crimes. Causation in criminal liability is divided into factual causation and legal causation. Factual causation is the starting point and consists of applying the 'but for' test. In most instances, where there exist no complicating factors, factual causation on its own will suffice to establish causation. However, in some circumstances it will also be necessary to consider legal causation. Under legal causation the result must be caused by a culpable act, there is no requirement that the act of the defendant was the only cause, there must be *no novus actus interveniens* and the defendant must take his victim as he finds him (thin skull rule). Paul H Robinson, 'Imputed Criminal Liability' (1984) 93 (4) *Yale Law Journal* 609, 676.

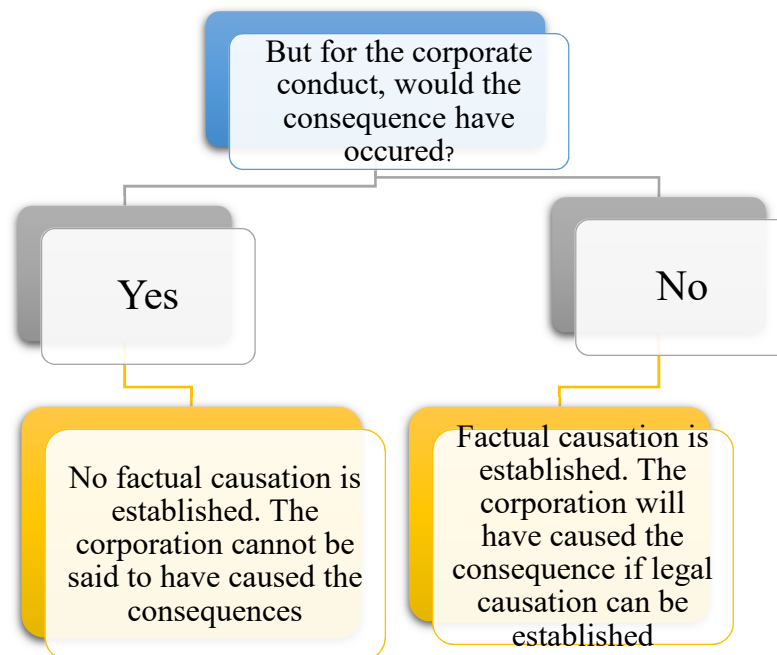
¹⁰⁰¹ Factual ("but for") Causation: Proximate Causation: A cause That is Legally Sufficient to Result in Liability, Paul K Ryu, 'Causation in Criminal Law' (1958) 106 (6) *University of Pennsylvania Law Review* 773, 805.

¹⁰⁰² Arno C Becht and Frank William Miller, *The Test of Factual Causation in Negligence and Strict Liability Cases* (Committee on Publications Washington University 1961). The 'but-for test' is a test commonly used in both tort law and criminal law to determine actual causation. The test asks, "but for the existence of X, would Y have occurred?" If the answer is yes, then factor X is an actual cause of result Y. *Barnett v Chelsea & Kensington Hospital* [1969] 1 QB 428.

causation is not established, and criminal liability cannot be imposed. This is because the corporation cannot be said to have caused the human rights violations and environmental damages and the corporation will not have the *actus reus* for any of the criminal conduct that require proof of causation of the crime.

If the result would not have occurred but for the corporation's conduct, then factual causation is established. However, this does not automatically lead to corporate criminal liability. In order to establish the *actus reus* of the offence, it must be proved that the corporation was the legal cause of the result and that there is no *novus actus interveniens*¹⁰⁰³ which break the chain of causation. It is possible, therefore, to recommend that corporate accountability in criminal law should perhaps follow the diagram below in order to address business human rights abuses and environmental liability under international criminal law.

Diagram. 4



Applying the but-for test, the question to be determined by the court is: but for the corporation's misconduct in failing to respect human rights and environmental law, would the human rights of the people have suffered? If it is established that the corporation was a factual

¹⁰⁰³ *Novus actus interveniens* is a Latin term which means a new intervening act. It is an act or event that breaks the causal connection between a wrong or crime committed by the defendant and subsequent happenings. The new event relieves the defendant from responsibility for the happenings. Glanville Williams, 'Finis for Novus actus?' (1989) 48 (3) *Cambridge Law Journal* 391, 416.

cause of the result in any given case, then the next question for the court is whether the corporation was the legal cause of the result. If both factual causation and legal causation are satisfied in corporate criminal case, then the corporation should be liable for its act or omission.

Moving on, the *actus reus* of some crimes may require proof of the existence of surrounding circumstances. This is normal and is referred to as the state of affairs of crime.¹⁰⁰⁴ This criminal offence requires no conduct or voluntary act to be proved, and as such, is no exception to the general rule that *actus reus* of an offence must be voluntary. Thus, the corporation in this situation may be criminally liable for an offence if it is proven that a specific set of circumstances exists. A possible explanation for this might be that these set of circumstances are criminal offences. Take for example the criminal offence of doing business with a supply chain or subsidiary in a conflict zone that uses forced labour in its business operations, or engaging in gross human rights violations and crimes against humanity or in a state that violates the human rights of its citizen for business purposes.

What this research is trying to illustrate here is that the crime might be committed when the state of affairs of the corporation is established by the court, this is by doing business with a subsidiary or the government that violate human rights of its people and damage the environment.¹⁰⁰⁵ The corporation does not need to do anything psychically to commit the crime. Another way of seeing this is supplying weapons illegally to rebel group or terrorist organisations, the crime is committed if the corporation simply supplies the weapon to the group to commit the crime, the corporation does not need to do anything psychically, such as using weapons,¹⁰⁰⁶ or the intent of using the weapon. The corporations in this situation should be found criminally liable because the *actus reus* of the crime is present. This criminal liability is unique and substantial for corporate accountability under international criminal law because such crime does not require the *mens rea* element to be present. In general, therefore, this study seems to suggest that if the international criminal law is broad in its context and scope, there is a possibility of finding a legal principle for holding a corporation criminally liable for human

¹⁰⁰⁴ One group of cases which cannot be discussed in terms of voluntary acts are often referred to as the “state of affairs” cases. These crimes are defined not in the sense of the defendant doing a positive act but consisting in the defendant “being found”, “being in possession” or “being in charge”. In some such cases all the prosecution needs to prove are the existence of the factual circumstances which constitute the crime the existence of the state of affairs. *R v Larsonneur* [1933] 24 Cr App R 74 and *Winzar v Chief Constable of Kent* [1983] The Times 28 March.

¹⁰⁰⁵ Leslie London, ‘Human Rights, Environmental Justice, and The Health of Farm Workers in South Africa’ (2003) 9 (1) *International Journal of Occupational and Environmental Health* 59, 68.

¹⁰⁰⁶ Odisu Terry Andrews, ‘The Nigerian State, Oil Multinationals and The Environment: A Case Study of Shell Petroleum Development Company (SPDC)’ (2015) 7 (2) *Journal of Public Administration and Policy Research* 24.

rights violations and environmental damages. Though, it is also acknowledged in this study that *mens rea* (the intent element) of corporate criminal accountability poses a difficult challenge in holding the corporation liable for a crime under international criminal law.

The intention is the most culpable form of *mens rea*, as it involves acting with the objective of bringing about a consequence with the desire to bring about that consequence and foresight that the action is virtually certain to do so.¹⁰⁰⁷ Whether the same standard of intention should be attributed to the corporation, is an objective debate, however, this study argued that corporate official should be subjected to the same degree of *mens rea*, while the corporation itself should be subjected to a lesser degree of *mens rea*. This is because a defendant who is charged with a serious criminal offence, such as murder, has his liberty at stake. If convicted, he will be sentenced to imprisonment for life with a tariff recommended by the trial judge. A tariff is a minimum period to be served in order to satisfy the sentencing objective of deterrence and retribution before the prisoner is eligible for parole, while a corporation will be liable for punishment in the form of a fine.

An implication of this is the possibility that criminal law recognises two types of intention, direct intent and oblique (or indirect) intent.¹⁰⁰⁸ The direct intent is one's aim or purpose. The direct intention may be explained in basic terms: when someone has an intention to do an act, such as going to the park, it means that it is the aim or purpose of the person to go to the park, or that the person desires to go to the park.¹⁰⁰⁹ These explanations suggest that in general where the intention of the corporation and the corporate officials in question, the court is concerned with the direct conduct of the corporation in relation to human rights violations and environmental damages. Consequently, the court does not need to resort to the legal personality doctrine to infer direct intention on the corporation, it is a matter of common sense rule of criminal liability.

Another way that the court can infer criminal intention of the corporation and its officials is through oblique intent.¹⁰¹⁰ Oblique intent is a less common intention. It does not involve a person's aim or purpose, nor does it involve the desire to do an act. It requires,

¹⁰⁰⁷ Robin Antony Duff, 'Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law' (1990).

¹⁰⁰⁸ Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law: An Inquiry into Degrees of Dlameworthiness* (Bodmin Cornwell Ashgate 2002).

¹⁰⁰⁹ Walter Wheeler Cook, 'Act, Intention, and Motive in the Criminal Law' (1917) 26 (8) *Yale Law Journal* 645, 663.

¹⁰¹⁰ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press 2014).

however, that the consequences of the defendant's actions be virtually certain and to have occurred, along with the defendant's appreciation that they are so.¹⁰¹¹ Therefore, if the corporation does foresee the consequences as virtually certain and to have occurred, it is to be taken to have those intended consequences. The court can hold foresight of the consequences as a rule of evidence¹⁰¹² in corporate criminal conduct. Therefore, the question for the court is as follows: did the corporation have the requisite intention to violate human rights and damage the environment? If this were the rule of evidence, a corporation's foresight of consequence as virtually certain to occur would only be a piece of evidence from which the court could infer that the corporation and its official intended those consequences.

The evidence from this study suggests that the principle of *mens rea* can be misleading on the following grounds: it is suggested that from all particular definitions of crime, such a thing exists as a *mens rea*, or guilty mind, which is always expressly or by implication involves every definition. This is obviously not the case, for the mental elements of different crimes differ widely.¹⁰¹³ The *maxim* can also be criticised in that *mens rea* is not always a requirement for criminal liability; in many offences an actor or non-state actor can be convicted despite the fact of blameless inadvertence as to a particular element of the *actus reus*, and in some despite the blameless inadvertence as to such elements.¹⁰¹⁴ Notwithstanding these criticisms, the significance of the maxim has been highlighted in a number of judgements, where it has been held by the House of Lords and other courts that, unless statute either by clear words or by necessary implication rules out *mens rea* as a constituent of or is part of a crime, a court should not find a person guilty of an offence against the criminal law unless he or she has a guilty mind.¹⁰¹⁵ The *maxim* is also important because save for exception offences where no *mens rea* is required, the commission of the *actus reus* is not in itself criminal but only becomes so if

¹⁰¹¹ Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009). The courts have stated that foresight of consequences can only be evidence of intention if the accused knew that those consequences would definitely happen. Thus, it is not sufficient that the defendant merely foresaw a possibility of a particular occurrence. *DPP v Smith* [1961] AC 290. The test is therefore subjective and a jury is to decide what the defendant's intention was from considering all the evidence. The relationship between foresight and intention was considered by the House of Lords in: *Hyam v DPP* [1975] AC 55, *R v Hancock and Shankland* [1986] 2 WLR 257. And by the Court of Appeal in: *R v Nedrick* [1986] 83 Cr App 267, *R v Walker and Hayles* [1990] 90 Cr App R 226. It is important to note that foresight of consequences is not the same as intention but only evidence of intention: *R v Scalley* [1995] Crim LR 504.

¹⁰¹² In legal terms, evidence covers the burden of proof, admissibility, relevance, weight and sufficiency of what should be admitted into the record of a legal proceeding. Sanford H Kadish, Stephen J Schulhofer and Rachel E Barkow, *Criminal Law and Its Processes: Cases and Materials* (Wolters Kluwer Law & Business 2016).

¹⁰¹³ *R v Tolson* [1889] 23 QBD 168.

¹⁰¹⁴ Rupert Cross, Philip Asterley Jones and Richard Card, *Introduction to Criminal Law* (MICHIE 1988).

¹⁰¹⁵ *Sweet v Parsley* [1970] AC 132.

committed with the requisite *mens rea*. Thus, as a general rule, the infliction of punishment is only justified when the defendant was at fault. Therefore, the requirement of *mens rea* is thus designed to give the effect of punishment.

Wootton, who argued in favour of the elimination of the requirement of *mens rea*, stated that if the primary function of the courts is conceived as a prevention of forbidden acts, there is a little cause to be disturbed by the multiplication of offences or strict liability. If the law says certain things are not to be done, it is illogical to confine this prohibition to occasions on which they are done from the malice aforethought. For at least the material consequence of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence, or sheer accident.¹⁰¹⁶

However, the author did not provide evidence to back his support for the abolition of *mens rea* in criminal law. Having said that, the fact that the requirement of *actus reus*, should always be proved is even more important than the requirement of *mens rea*. Criminal intention only becomes sufficiently dangerous to the community to merit punishment when the actor or non-state actor has gone a considerable distance towards carrying them out. It is, however, important that the *maxim* should not be allowed to become the master but rather the tool for accessing the liability for corporation's accountability under international criminal law. Therefore, this study argues that a perfect criminal liability for corporate human violations and environmental damages can be given without the element of *mens rea*. Hence, no useful purpose of corporate accountability under international criminal law is served by considering whether the requirement that the corporation must generally have the *mens rea* of the human rights violations and environmental damages, which are related to the *actus reus* of the criminal conduct. There can however, be the exceptional cases where the application of international criminal law depends on the classification of the elements of the offence. Overall, this study strengthens the idea that the requisite criminal intention of the corporation should not be required, before imposing criminal liability on the corporation under international criminal law, thus, the next section will examine corporate liability under tort law, by first assessing the ATCA.

¹⁰¹⁶ Barbara Wootton, *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist* (Stevens 1963).

Chapter IV

4. Aims and Objectives of Chapter IV

The aims and objective of this chapter are to examine the arguments on the limitations, benefits and the legal drawback on the applicability of the Alien Tort Claims Act 1789 (“ATCA”) on corporate human rights violations and environmental damages. The chapter also lays down a cohesive argument on the benefits of the ATCA, which allows for suit by an alien for a tort only, in violation of the law of nations or a treaty of the United States. The act was enacted in 1789.¹⁰¹⁷ Use of the ATCA remained dormant until 1980 when a federal court in *Filartiga v Peña-Irala*¹⁰¹⁸ allowed a Paraguayan woman to bring a suit against a Paraguayan government official that had tortured and killed her brother. This chapter further assesses the federal court jurisprudence on corporate accountability under the Act, which has developed over the years, and reflects on the impact that the current uncertain state of ATCA has on multinational corporate misconduct overseas. It concludes that *Kiobel*¹⁰¹⁹ does not mark the

¹⁰¹⁷ Jeffrey M Blum, and Ralph G Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v Peña-Irala*’ (1981) 22 *Harvard International Law Journal* 53. “The Alien Tort Statute (ATS)”; also known as the Alien Tort Claims Act) refers to 28 USC. § 1350, granting jurisdiction to federal district courts “of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States”. Broadly speaking, it serves as a statutory instrument for gaining universal jurisdiction over violations of international law. A lawsuit under the ATCA can proceed for any harm resulting from a violation of international law, no matter where the harm occurred, or who inflicted the harm, as long as the plaintiff serves process in US Territory. *Filartiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). ATCA claims can proceed against both natural persons and legal persons, but claims against state governments are precluded by sovereign immunity. *Sosa v Alvarez-Machain*, 542 US 692 (2004).

¹⁰¹⁸ *Filartiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). “A suit against Peña-Irala (D) on the premise that he had tortured to death the decedent of Filartiga (P), was filed by Filartiga (P). For purpose of the Alien Tort Statute, torture may be considered to violate law of nations. A suit claiming that Peña-Irala (D) had tortured Filartiga’s (P) decedent to death while he was a Police Inspector General, was brought by Filartiga (P). All parties were Paraguayan citizens. Jurisdiction was based on the Alien Tort Statute, 28 USC. S 1350, which provided jurisdiction for tort committed in violation of “the law of nations”. The case was dismissed by the district court for lack of jurisdiction to which *Filartiga* (P) appealed. On appeal, the circuit reversed, recognising that foreign nationals who are victims of international human rights violations may sue their misfeasors in federal court for civil redress, even for acts that occurred abroad, so long as the court has personal jurisdiction over the defendant. The court ruled that freedom from torture is guaranteed under customary international law. This decision provides a critical forum for human rights violations. For purpose of the Alien Tort Statute, may torture be considered as a violation of the law of nations?”

¹⁰¹⁹ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013). In the 1990s, the Movement for the Survival of the Ogoni People (MOSOP) began protesting the negative effects of oil drilling in Nigeria’s Ogoni region. In 1994, Ken Saro-Wiwa, Barinem Kiobel and other MOSOP members were arrested by Nigerian authorities, put on trial in a special military court and executed. In 2002, Barinem Kiobel’s wife, Esther, and eleven others from the Ogoni region filed a lawsuit in US court against Shell Oil, which operates in the area. The lawsuit alleged that the Nigerian military, aided and abetted by Shell, undertook a campaign of “torture, extrajudicial executions, prolonged arbitrary detention, and indiscriminate killings constituting crimes against humanity” against them and MOSOP. The case was brought under the United States’ Alien Tort Statute. On April 17, 2013, the Supreme Court issued its decision in the case, ruling that the Alien Tort Statute could not be applied to Shell’s actions in Nigeria. The Court’s decision

end of the ATCA. This is because the analysis of the ATCA in this research shows that it is not the end but rather the evolutionary process to develop a new concept of corporate tort liability.

4.1. Alien Tort Claims Act (“ATCA”)

Recent evidence suggests that the sacrosanctity of state sovereignty under international law and consequent restricts the extraterritorial liability, likewise, it has long been acknowledged that some international crimes can give rise to “universal jurisdiction,”¹⁰²⁰ which is, given to every domestic legal system to apply international law for specific violations of the “law of nations”. In a situation where the state in question has no link to the human rights violation when it took place, important for present purposes for corporate accountability in this thesis.¹⁰²¹ The imaginative and conventional universal jurisdiction offence is piracy, the prime example of a violation of the “law of nations”.¹⁰²² It is likely that all countries can enforce the prohibition against piracy as a matter of universal jurisdiction. It is observed in Blackstone opinion that, piracy is incontestably “an offence against the universal law of society”.¹⁰²³ It is therefore likely that such connections between piracy and universal jurisdiction might be the reason why some scholars have contested that the gap in the legal doctrine may be the reason why human rights advocates have sought to deploy creative arguments for extraterritorial accountability.¹⁰²⁴

In general, therefore, it seems that, universal jurisdiction function in the international community today as it did over a century ago as a legal authority to enforce existing international law against an act that is seen to be offensive to the law of nations. Such an offence is so profound that the perpetrator is rendered *hostis humani generis*.¹⁰²⁵ “an enemy of all

undercut 30 years of jurisprudence to limit US courts’ ability to hear cases on human rights violations committed outside the U.S, limiting the ATS to those cases that “touch and concern” the US with sufficient force.

¹⁰²⁰ Anna Grear and Burns H Weston, ‘The Betrayal of Human Rights and The Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ (2015) 15 (1) *Human Rights Law Review* 21, 44.

¹⁰²¹ George R Wright, ‘Negotiating the Terms of Corporate Human Rights Liability under Federal Law’ (2016).

¹⁰²² Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Springer 2010).

¹⁰²³ William Blackstone, *Commentaries on the Laws of England. A Facsimile of The First Edition of 1765-1769* (Vol. 1: Of the Rights of Persons 1765).

¹⁰²⁴ Kenneth C Randall, ‘Universal Jurisdiction under International Law’ (1987) 66 *Texas Law Review* 785

¹⁰²⁵ Jody Greene, ‘Hostis Humani Generis’ (2008) 34 (4) *Critical Inquiry* 683, 705.

For a pirate is not included in the list of lawful enemies, but is the common enemy of all; among pirates and other men there ought to be neither mutual faith nor binding oath. The vehemence that is evident in Cicero’s denunciation of pirates is fuelled not simply by the list of heinous acts committed by pirates. These are equally committed, mutatis mutandis, by brigands, thieves, and criminals on land. What especially appears to incite Cicero’s wrath that of his contemporaries, and most sane and

mankind”.¹⁰²⁶ The application of universal jurisdiction, can be understood in the same way as a state applying its own law to another state. However, the restriction hampering the extraterritorial application of human rights duties have led to creative approaches using national law, not international law and human rights law, to found accountability for corporate human rights violations extraterritorially.¹⁰²⁷ The theoretical implications of these findings are unclear, notable although indirect and unique exception: when domestic court allow resort to “the law of nations” as a source of law for decision, then human rights norms accepted as customary international law, part of the law of nations (as well as core components of international human rights law), may be invoked for the rule of decision.¹⁰²⁸

An example of this exception is of course the well-known statute unique to the US known as the Alien Tort Claims Act (ATCA),¹⁰²⁹ also called the Alien Tort Statute (ATS).¹⁰³⁰ Originally enacted during the first session of the First United States Congress as section 9 of the Judiciary Act of 1789 (establishing the Federal Judiciary) primarily to protect against piracy, it has for more than three decades been deployed by litigants to overcome the limitations burdening the extraterritorial application of universal human rights doctrines, principles and rules, beginning in 1980 when, in *Fila’rtiga v Pen~a-Irala*,¹⁰³¹ the US Second Circuit Court of

moral folks throughout the ages, is the fact that these acts are committed at sea on an element of nature that is not the natural locus for human beings. In Cicero’s day as today, sea-faring is often treacherous in and of itself. Human beings at sea owed and owe to this day a moral duty to assist each other when in distress at sea (e.g., the International Maritime Organization conventions: SOLAS 1974, augmented by SAR 1979 and even by SUR 1988), the customary law rules and the modern statutory rule being the same: save life above all and first, then property.

¹⁰²⁶ Christopher Harding, ‘*Hostis Humani Generis The Pirate as Outlaw in The Early Modern Law of the Sea’ Pirates? The Politics of Plunder, 1550–1650* (Palgrave Macmillan UK 2007)

¹⁰²⁷ Robert McCorquodale and Penelope Simons, ‘Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law’ (2007) 70 (4) *Modern Law Review* 598, 625.

¹⁰²⁸ Anna Grear and Burns H Weston (n 1015).

¹⁰²⁹ Section 1350 28 USC.

¹⁰³⁰ Alien Tort Statute (ATS).

The Alien Tort Statute (‘ATS’); also known as the Alien Tort Claims Act) refers to 28 USC. § 1350 granting jurisdiction to federal district courts ‘of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States.’ Broadly speaking, it serves as a statutory instrument for gaining universal jurisdiction over violations of international law. A lawsuit under the ATS can proceed for any harm resulting from a violation of international law, no matter where the harm occurred, or who inflicted the harm, as long as the plaintiff serves process in US Territory. *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). ATS claims can proceed against both natural persons and legal persons, but claims against state governments are precluded by sovereign immunity. *Sosa v Alvarez-Machain*, 542 US 692 (2004).

¹⁰³¹ *Fila’rtiga v Pen~a-Irala* 603 F 2d 876 (2d Cir 1980).

“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.” This court followed what it deemed the binding precedents of *III v Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) and *Dreyfus v Von Finck*, 534 F.2d 24 (2d Cir.), cert. denied, 429 US 835, 97 S. Ct. 102, 50 L. Ed. 2d 101 (1976), and dismissed for lack of jurisdiction on the ground that violations of the law of nations do not occur when the aggrieved parties are nationals of the acting state.

Appeals decided for the first time in modern times in favour of foreign human rights claimants based on the ATCA. Ever since *Fila'rtiga*, the US has proved to be compellingly a better forum for corporate human rights lawsuit, however, not least because of vital legal procedural benefit in using US court, the possibility of contingency fees is a typical example. As long as “[t]he US district courts will 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 US”.¹⁰³² The Alien Tort Claim Act, for many years after *Fila'rtiga*, has been judicially interpreted to allow foreign citizens to seek civil (tort) remedies in US courts for human rights violations committed outside the US, thus enabling non-US litigants to present “unique substantive causes of action against [MNCs] that violate their human rights”.¹⁰³³

The evidence from this case suggests that the language used in the Second Circuit judgment, resonate with the early development of the doctrine of universal jurisdiction in the context of piracy. Also, the court specified that “[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him host is *humani generis*, an enemy of all mankind”.¹⁰³⁴ *Fila'rtiga* concerned, as is well known, not a corporation but a former Paraguayan police inspector general who had tortured and killed a member of the *Fila'rtiga* family. However, the judicial authority from *Fila'rtiga* case was generally accepted among human rights advocates as the signalled of a “beacon of hope”¹⁰³⁵ by those who welcomed the ATCA’s “revival” as a powerful mechanism to challenging corporate human rights violations in the global economy. Certainly, the majority of MNC human rights lawsuits have arisen in US courts pursuant to this domestic legislation.¹⁰³⁶ Since 1990s, many corporate human rights abuse cases involving corporate human rights violations started coming before the US courts, progressively developing the application of the universal jurisdiction doctrine enabling US courts to hold corporate actors accountable in tort for human rights abuses committed far beyond US jurisdictional borders.¹⁰³⁷ The following conclusions can be drawn from the present study, possibly, a trajectory that, at the hands of more conventional ideology and politics (and therefore the appointment of more conventional jurists) was eventually to be substantial

¹⁰³² Craig Forcese, ‘ATCA's Achilles Heel: Corporate Complicity, International Law and The Alien Tort Claims Act’ (2001) 26 *Yale Journal of International Law* 487.

¹⁰³³ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Vol. 4. Hart Publishing 2004)

¹⁰³⁴ *Fila'rtiga v Pen'a-Irala* (n 763).

¹⁰³⁵ Janet Dine, ‘Jurisdictional Arbitrage by Multinational Companies: a National Law Solution?’ (2012) *Journal of Human Rights and the Environment*.

¹⁰³⁶ Richard L Herz, ‘Litigating Environmental Abuses under The Alien Tort Claims Act: a Practical Assessment’ (1999) 40 *Virginia Journal of International Law* 545.

¹⁰³⁷ Brad J Kieserman, ‘Profits and Principles: Promoting Multinational Corporate Responsibility by Amending The Alien Tort Claims Act’ (1998) *Catholic University Law Review* 881.

challenge as show in *Kiobel* 2010 by the US Second Circuit Court of Appeals (the same though differently composed court that decided *Fila'rtiga*)¹⁰³⁸ and later in *Kiobel* 2013¹⁰³⁹ by the US Supreme Court in what many commentators have regarded as a specific regressive ruling. It is to these two decisions in *Kiobel v Royal Dutch Petroleum Co* this thesis will examine the ATCA on.

4.2. The Contraction and Contradiction of the ATCA

The contraction and contradiction in *Kiobel* wholly underline the basic concerns of the uncertainty regarding the level of flaws in the legal cases under the ATCA since the early 1990s, against MNC human rights violations lawsuit.¹⁰⁴⁰ The case demonstrates the extensive primitive sense of injustice that cases of corporate human rights violation evoke the world over. The important case took place in Ogoniland, Nigeria, an oil-rich region of the Niger Delta intensively exploited for its oil reserves by Shell Oil (a subsidiary of Royal Dutch Shell) beginning in 1956.¹⁰⁴¹ A further analysis by this research shows that between 1990 to 1993, there was a substantial environmental damages in the Ogoniland district, including the negative health effects of gas flaring and damage wreaked by repeated oil spills (reportedly 2,976, or 2.1 million barrels from 1976 to 1991), Ogoniland residents rose up in non-violent protest.¹⁰⁴²

¹⁰³⁸ *Kiobel and Ors (on behalf of Kiobel and Tusima) v Royal Dutch Petroleum Co and Ors*, Appeal judgment, Docket No 06-4800-cv, Docket No 06-4876-cv, 623 F3d 111 (2d Cir2010), ILDC 1552 (US 2010), 17th September 2010, United States; Court of Appeals (2nd Circuit) [2d Cir].

In a September 2010 ruling in *Kiobel v Royal Dutch Petroleum Co.*, the Second Circuit became the first and only appellate court to reject the proposition that corporations may be held liable for torts in violation of international law under the ATCA. Subsequent decisions by the D.C. Circuit in *Doe v Exxon* and the Seventh Circuit in *Flomo v Firestone* explicitly rejected the Second Circuit's reasoning. In October 2010, counsel for the plaintiffs filed a petition for rehearing. The Clinic submitted an amicus curia brief in support of the petition on behalf of professors of legal history. The brief argues that the history and purpose of the ATCA support what the text explicitly provides: that jurisdiction extends to all causes in which an alien sues for a tort in violation of the law of nations, including cases against corporate defendants. The plaintiffs filed a second petition for rehearing in February 2011 after the first petition for rehearing was denied. Following the denial of the second petition for rehearing, the plaintiffs filed petition for certiorari to the US Supreme Court in June 2011. The Clinic filed an amicus brief on behalf of professors of legal history in support of that petition.

¹⁰³⁹ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹⁰⁴⁰ Courtney Shaw, 'Uncertain Justice: Liability of Multinationals under The Alien Tort Claims Act' (2002) *Stanford Law Review* 1359, 1386.

¹⁰⁴¹ Sheila Ruffin, 'Royal Dutch Shell Environmentally Degrades Nigeria's Niger Delta Region: A Land of Blacks' (2012) 5 (3) *Environmental Justice* 140,152.

¹⁰⁴² Jędrzej George Frynas, 'Political Instability and Business: Focus on Shell in Nigeria' (1998) 9 (3) *Third World Quarterly* 457, 478.

The Ogoni region is a highly oil-rich area in the Niger Delta area of Nigeria, populated by approximately 500,000 members of the Ogoni People. Since the Shell Petroleum Development Company discovered oil in Ogoniland in 1958, the region has been plagued with serious environmental degradation resulting from the over 100 oil wells in the area. Since 1990 the Ogoni have been engaged in a struggle with the government of Nigeria and the Shell Company to maintain their rights as the original inhabitants of the

The Nigerian government, nevertheless, responded brutally. Numerous Ogoni leaders were murdered, 9 in particular known as the “Ogoni 9” (including the now world-famous Ken SaroWiwa).¹⁰⁴³ All the activists were arrested on false criminal charges, brought to trial, sentenced to death, and, in 1995, executed.¹⁰⁴⁴ The trial, was thought to be a severe injustice, which not only exposed the repressive nature of the Nigerian regime at the time, but the extensive and human rights violation, complicity of the MNCs operating in Ogoniland particularly Shell.¹⁰⁴⁵ Ken Saro-Wiwa’s death, deemed by many to be a judicial murder, also attracted rapid and widespread international condemnation.¹⁰⁴⁶

Also, many litigations were started in the US against individuals and persons associated with the Royal Dutch Shell. *Kiobel*, was initiated under the ATCA.¹⁰⁴⁷ The claimant alleged that the Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in England), and Shell Petroleum Development Company of Nigeria (incorporated in Nigeria) aided and abetted extra-judicial killings, torture and the commission of crimes against humanity and other human rights violations by the Nigerian military.¹⁰⁴⁸

In 2010, a majority of the US Second Circuit Court of Appeals ruled that because the scope of liability in an ATCA suit is determined by customary international law and because “no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights,” corporate liability “is not obvious, much less

land. The nonviolent Movement for the Survival of the Ogoni People (MOSOP) has been met with violence on the part of the government as well as the assassination or imprisonment of many Ogoni leaders. Yet the Ogoni people have managed to force Shell Oil to withdraw from the area and have raised substantial international awareness of their situation.

¹⁰⁴³ Ken Saro-Wiwa, ‘*Genocide in Nigeria: the Ogoni Tragedy* (Vol. 18. Saros International Pub 1992).

¹⁰⁴⁴ Marion Campbell, ‘Witnessing Death: Ken Saro-Wiwa and the Ogoni Crisis’ (2002) 5 (1) *Postcolonial Studies: Culture, Politics, Economy* 39, 49.

¹⁰⁴⁵ Jeff Haynes, ‘Power, Politics and Environmental Movements in the Third World’ (1999) 8 (1) *Environmental Politics* 222, 242.

¹⁰⁴⁶ Boris Holzer, ‘Framing The Corporation: Royal Dutch/Shell and Human Rights Woes in Nigeria’ (2007) 30 (3) *Journal of Consumer Policy* 281, 301.

¹⁰⁴⁷ Cyril I Obi, *Globalization and Local Resistance: The Case of Shell versus The Ogoni Globalization and The Politics of Resistance* (Palgrave Macmillan UK 2000)

¹⁰⁴⁸ Kenneth. Anderson, ‘*Kiobel v Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional Universalism in Retreat*’ (2012) *Cato Supreme Court Review Archives* 149.

The corporate defendants, it was alleged, provided logistical support, transportation and weapons to Nigerian authorities to attack Ogoni villages and stifle opposition to Shell’s oil-extraction activities. Ogoni residents were beaten, raped, shot and / or killed during these raids. In 1995, Ken Saro-Wiwa and John Kpuinen were notoriously hanged after being convicted of murder by a special tribunal in the course of which Royal Dutch Shell allegedly bribed witnesses, conspired with Nigerian authorities to orchestrate the trial, and offered to free Ken Saro-Wiwa in return for an end to [his organization’s] international protests against Shell. During the trial, members of Ken Saro-Wiwa’s family, including his elderly mother, were beaten.

universally recognised norm of customary international law that may apply pursuant to [ATCA]”.¹⁰⁴⁹ The claim was dismissed for lack of subject matter jurisdiction.¹⁰⁵⁰ The grounds for positivity under the ATCA revival vis-à-vis as MNC accountability was noted to have reached its limit, therefore, it seemed that it has reached its dead end.¹⁰⁵¹

Dine on the other hand contested that much of the questions surrounding the ATCA “revival” was misplaced in the first place, despite its value in revealing “how complex extraterritorial claims are, how difficult it is to sue MNCs and the fact that no matter how “common sense” the solution appears to outraged human rights and environmental activists, legal solutions remain elusive”.¹⁰⁵² The author noted that some of the advanced argument by non-governmental organisations (NGOs) concerning the ATCA at its high point were of doubtful reliability and unduly optimistic.¹⁰⁵³ Therefore, the vast majority of cases were, in any event, settled out of court and the settlements thus obtained under the ATCA. For Dine, it is simply a way for MNCs to escape any formal admission of liability and accountability in court, as well as stopping the victims to hear their cases in front of a judge and jury. Janet Dine stated that “I would argue that it is wrong to call such settlements victories because the law has not been thereby developed to cover the instances of abuse forming the substance of the claim: there is no precedent for the future”.¹⁰⁵⁴

Additionally, being critical of the ATCA as a cause *ce'le'bre*¹⁰⁵⁵ for human rights progress, Dine is critical of the legislation itself. For the author, the ATCA invited an excessively restrictive standard for the substantive ground of a complaint raised under it. For example in *Kiobel*, the US Second Circuit Court found that only very restrictive grounds could be allowed relying on the US Supreme Court ruling in *Sosa v Alvarez-Machain*,¹⁰⁵⁶ a precedent

¹⁰⁴⁹ *Ibid.*

¹⁰⁵⁰ Charles E Powers, ‘Jurisdiction: The Word of Too Many Meanings’ (2012) 60 *Virginia lawyer, Family Law Section*. < <http://www.vsb.org/docs/valawyeromagazine/vl0212-jurisdiction.pdf> > accessed 18 January 2018. “Subject matter jurisdiction is often referred to as “potential” jurisdiction: a court is given the authority by the constitution or by statute to hear a certain type of case (e.g., a circuit court has the “potential” to grant an equitable distribution of a divorcing couple’s property based on the authority granted to it by Virginia Code § 20-107.3). However, unlike the other elements of jurisdiction, a lack of subject matter jurisdiction cannot be waived and cannot be conferred on the court by the agreement of the parties”. Virginia-Pilot Media *Companies v Dow Jones*, 280 Va. 464, 478, 698 S.E.2d 900, 902 (2010). 8 Any judgment made, even those made on the merits, without subject matter jurisdiction is null and void as is any subsequent proceeding based upon that defective judgment.

¹⁰⁵¹ Marco Fasciglione, ‘Corporate Liability, Extraterritorial Jurisdiction and The Future of The Alien Tort Claims Act: Some Remarks after *Kiobel*’ (2013) 2 *Diritti Umani e Diritto Internazionale* 401, 436.

¹⁰⁵² Janet Dine (n 1030).

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ A legal case that excites widespread interest.

¹⁰⁵⁶ *Sosa v Alvarez-Machain*, 542 US 692 (2004).

in which the Supreme Court held that claims must be founded on “a norm of international character accepted by the civilised world and defined with a specificity comparable to the features of the 18th Century paradigm.”¹⁰⁵⁷ There are, however, other possible explanations for this, although the ATCA revitalisation did accomplish some of the amplification of MNC reputational risk (as well as some compensation for victims of corporate abuse), *Kiobel* 2010, without overruling *Fila’rtiga*. However, by observing the restrictive reading of the basis for universal jurisdiction, did appear in this research that to some at least to the few potential causes of action to eighteenth-century standards, the ATCA did produce something of a full stop for twenty-first century human rights activists long before the Supreme Court ruling of 2013, thus, ATCA was dead before 2013.¹⁰⁵⁸

According to Dine a considerable meaning of legal reasoning surrounding the ATCA facts are as clearly maleficent as they were in *Kiobe* 2013, thus, nothing new exist. Obviously, *Kiobel* 2010 concerned public and private rights dividing the traditions that has protected corporate violations of human rights; a corporation can be held accountable under the ATCA.¹⁰⁵⁹ Nonetheless, it appears that if its corporation’s activity amounts to “state action” in breach of international law, Dine contested, *Kiobel* 2010 exposes “the extent to which the ATCA was a thin thread on which to hang legal accountability for [MNC] violations”.¹⁰⁶⁰ Notwithstanding the advantages of the ATCA cases bringing gross corporate human violations to public attention, the author perceives, ultimately the lawsuit strategy centring upon the ATCA move the attention from the kind of fundamental reforms necessary to change legal regimes expansively to hold business accountable for human rights abuses and environmental damages. Distracting attention from such reforms has, moreover, proved advantageous to the violating MNCs, as human rights advocates have spent energy fighting on a difficult and somewhat weak platform for corporate legal accountability.¹⁰⁶¹ Rather than focusing on changing the rules of international law and human rights law to establish that corporations can be hold accountable for human rights violation and to provide mechanisms for remedy for victim of human rights abuses. Nonetheless, in spite of the apparent disappointment presented

¹⁰⁵⁷ Eugene Kontorovich, ‘Implementing *Sosa v Alvarez-Machain*: What Piracy Reveals About The Limits of The Alien Tort Statute’ (2004) 80 *Notre Dame Law Review* 111.

¹⁰⁵⁸ Roxanna Altholz, ‘Chronicle of a Death Foretold: The Future of US Human Rights Litigation Post-Kiobel’ (2014) 102 *California Law Review* 1495.

¹⁰⁵⁹ Mohamed Chehab, ‘Finding Uniformity Amidst Chaos: A Common Approach to *Kiobel*’s Touch and Concern Standard’ (2016) 93 *University of Detroit Mercy Law Review* 119.

¹⁰⁶⁰ Janet Dine (n 997).

¹⁰⁶¹ *Ibid.*

by *Kiobel* 2010, the possibility of extraterritorial liability under the ATCA has continued to encourage corporate accountability debate by NGOs, activists and commentary.¹⁰⁶²

4.3. The Disappointment of ATCA in *Kiobel* 2013¹⁰⁶³

In 2013, in *Kiobel v Royal Dutch Petroleum Co*, the US Supreme Court, made a fragmented decision and invoking a canon of statutory interpretation known as the “presumption against extraterritorial application”¹⁰⁶⁴ (when legislation gives no clear contrary mandate), held that “the presumption against extraterritoriality applies to claims under the [ATCA], and that nothing in the statute rebuts that presumption”¹⁰⁶⁵ the Supreme Court reach a conclusion that without paying attention to the ATCA’s express directive to apply “the law of nations” (including, international law, human rights law and norms are accepted as

¹⁰⁶² David P Stewart and Ingrid Wuerth, ‘*Kiobel v Royal Dutch Petroleum Co.*: The Supreme Court and The Alien Tort Statute’ (2013) 107 (3) *American Journal of International Law* 601, 621.

As Wuerth recently noted, [a]fter more than thirty years of extensive high-profile litigation along with sustained academic commentary, a large and seemingly ever-growing number of basic questions about [the ATCA] remained unanswered. As lower courts and litigants hacked their way through a thickening jungle of unresolved [ATCA] issues, clarification from Congress or the Supreme Court felt long overdue.

That clarification was attempted in 2013 when the US Supreme Court delivered the final *Kiobel* judgment

¹⁰⁶³ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹⁰⁶⁴ William S Dodge, ‘Understanding The Presumption Against Extraterritoriality’ (1998) 16 *Berkeley Journal of International Law* 85.

- A. What is the presumption? Although the US Congress has the authority to regulate the conduct of US citizens and nationals outside the territorial boundaries of the United States, there is a general presumption against extraterritorial application of US law. Unless a contrary intent appears, it is presumed that US legislation applies only within the territorial jurisdiction of the United States. *E.E.O.C. v Arabian American Oil Co.*, 499 US 244 (1991). This canon of construction guards against inadvertent clashes between US laws and those of other nations and recognises that the US Congress generally legislates with domestic concerns in mind. *Foley Bros., Inc. v Filardo*, 336 US 281, 285 (1949).
- B. Whose burden it is to overcome the presumption? The burden of overcoming the above presumption lies with the party asserting application of US law to events that occurred abroad. *Labor Union of Pico Korea, Ltd. v Pico Prods., Inc.*, 968 F.2d 191, 194 (2d Cir.), *cert. denied*, 506 US 985 (1992).
- C. Overcoming the Presumption Against Extraterritoriality: The presumption against extraterritoriality can be overcome only by a *clear* expression of Congress’s intention to extend the reach of federal law beyond those places where the United States has sovereignty or has some measure of legislative control. *US v Gatlin*, 216 F.3d 207, 211-12 (2d Cir. 2000). In determining whether “clear evidence” exists, the Courts are permitted to consider “all available evidence” about “Congress” intent, including:
 1. The text of the relevant statute;
 2. The structure of the statute; and
 3. The legislative history of the statute.
- D. Exception for Criminal Statutes: There is no presumption against extraterritoriality when dealing with statutes prohibiting crimes against the US government. *US v Bowman*, 260 US 94 (1922); *but see Kollias v D & G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir. 1994), *cert. denied*, 513 US 1146 (1995) (holding that *Bowman* should be read narrowly, such that “only criminal statutes, and perhaps only those relating to the government’s power to prosecute wrongs committed against it, are exempt from the presumption [against extraterritoriality]”). Criminal statutes are deemed not to be dependent upon the locality of their government’s jurisdiction, but on the right of the government to defend itself against obstruction and fraud committed by its own “citizens, officers or agents” *Bowman*, 260 US at 98.

¹⁰⁶⁵ *Kiobel v Royal Dutch Petroleum Co.* at 1669.

customary international law). Similarly, the Supreme Court submitted that claims arising from a violation outside the US could be actionable under the ATCA. Specifically, where the claims touch and concern the territory of the United States, with sufficient force to displace the presumption against extraterritorial application.¹⁰⁶⁶

Agreeing with Weston, the author stated that informed observers responding to *Kiobel* [2013] appear generally to have agreed upon at least four implications of the Court's reasoning: "(1) that foreign corporations would be largely, if not completely, insulated from [US] "prosecution" under the [ATCA] for human rights violations committed against foreign nationals in foreign countries, (2) that [US] corporations would not be so insulated, (3) that the development of litigation in Europe and elsewhere outside the United States would be affected by [*Kiobel*]¹⁰⁶⁷ only slightly, if at all; and (4) that the applicability of [*Kiobel*] to foreign natural persons, never addressed by the court, was uncertain".¹⁰⁶⁸

It is possible, therefore, that the Supreme Court's judgement was, at least, conclusive in one crucial aspect: the presumption against extraterritoriality applies to the ATCA. Also, on the facts presented to it, the Supreme Court held that the presumption was not overcome because the violation at question happen within a foreign sovereign country and therefore, due to this fact the claims did not sufficiently "touch and concern" US territory. This suggests that the foreign defendants (Dutch Shell Petroleum) had no more than a "corporate presence" in the US.¹⁰⁶⁹ Thus, for legal scholars such as Curran and Sloss, the decision is "apparently [sounded] the death knell for "foreign-cubed" human rights claims under the [ATCA] that is, cases in which foreign defendants committed human rights abuses against foreign plaintiffs in foreign countries [and that] [t]he Court's decision overrules, sub silentio, a line of cases that originated with *Fila'rtiga v Pen~a-Irala*."¹⁰⁷⁰

Similarly, Ku observed that "[a]ll nine justices rejected decades of lower-court precedent and widespread scholarly opinion when they held that [the ATCA] excluded cases involving purely extraterritorial conduct, even if the alleged conduct constituted acts that are

¹⁰⁶⁶ *Ibid.*

¹⁰⁶⁷ Burns H Weston, 'Human Rights' ('International Human Rights in Domestic Courts') in *Encyclopaedia Britannica Online* (last updated 19 March 2014). <britannica.com/EBchecked/topic/275840/humanrights> accessed 22 August 2017.

¹⁰⁶⁸ *Ibid.*

¹⁰⁶⁹ Benjamin Thompson, 'Was *Kiobel* Detrimental to Corporate Social Responsibility: Applying Lessons Learnt from American Exceptionalism' (2014) 30 *Utrecht Journal of International and European Law* 82.

¹⁰⁷⁰ Vivian Grosswald Curran and David Sloss, 'Reviving Human Rights Litigation after *Kiobel*' (2013) 107 (4) *American Journal of International Law* 858, 863.

universally prohibited under international law”.¹⁰⁷¹ According to Ku, the judgement of the Supreme Court amount to nothing short of the common rejection in *Kiobel* of universal jurisdiction, a decision which, if exaggerated, it will drive the significance of the judgement for the hopes (misplaced hopes) of human rights activists and claimant seeking to use the ATCA as a tactical route for extraterritorial corporate human rights accountability and its universal jurisdiction over gross human rights violations committed by corporations in foreign country.

Contrary, given the heinousness human right abuses at stake, the issue of corporate accountability attracted a variety of legal suggestions from multiple amici in relations to *Kiobel* case.¹⁰⁷² The US Supreme Court received statements from governments from (Argentina, Germany, the Netherlands, the UK and the USA), the European Commission, NGOs, scholars and corporations.¹⁰⁷³ This is because the Supreme Court’s central holding was that alleged corporate malfeasance must “touch and concern the territory of the United States with sufficient force” to displace the presumption against extraterritoriality, logically the Court had to address that issue directly if it was to do justice to the question of corporate liability at all”.¹⁰⁷⁴ Therefore, the protective of corporate operation among other interests, one may have thought that, the Supreme Court reasoned that since corporations are often “present” in many countries, “corporate presence” alone is insufficient to displace the presumption,¹⁰⁷⁵ is flaw.

Conceivably, from a corporate viewpoint, the consequences of *Kiobel* concerning extraterritorial corporate accountability may seem clear. However, this would be misleading because 1. the Supreme Court did not address the question of corporate liability under the ATCA directly, though, this was because of the concern that it granted *certiorari*¹⁰⁷⁶ in the first

¹⁰⁷¹ Julian G Ku, ‘Kiobel and The Surprising Death of Universal Jurisdiction under The Alien Tort Statute’ (2013) 107 (4) *American Journal of International Law* 835, 841.

¹⁰⁷² *Ibid.*

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ Ralph G Steinhardt, ‘Determining Which Human Rights Claims Touch and Concern The United States: Justice Kennedy’s Filartiga’ (2013) 89 *Notre Dame Law Review* 1695.

¹⁰⁷⁵ *Ibid.*

¹⁰⁷⁶ Sidney S Ulmer, ‘The Supreme Court’s Certiorari Decisions: Conflict as a Predictive Variable’ (1984) 78 (4) *American Political Science Review* 901, 911.

Certiorari is most commonly associated with the writ that the Supreme Court of the United States issues to review a lower court’s judgment. A case cannot, as a matter of right, be appealed to the US Supreme Court; therefore, a party seeking to appeal from a lower court decision may file a petition to a higher court for a writ of certiorari. That writ is the formal order to the lower court to deliver its record of the case for review.

Rule 10 of the Supreme Court Rules lists the criteria for granting certiorari and explains that the decision to grant or deny certiorari is discretionary. A decision to deny certiorari does not necessarily imply that the higher court agrees with the lower court’s ruling; instead, it simply means that fewer than four justices determined that the circumstances of the decision of the lower court warrant a review by the Supreme

place. 2. the Supreme Court's show the foundations for its decision by the minimisation of "international friction" and related separation of powers concerns have been judged unpersuasive by informed legal scholars or, in any event, as insufficient to justify eliding more than three decades of established ATCA precedent.¹⁰⁷⁷ And 3. as Stewart and Wuerth, contested, the "opinions arguably assume the viability of [the ATCA] suits against corporations," therefore, allowing an open door to such actions albeit in an ambivalent manner.¹⁰⁷⁸ In David Stewart and Ingrid Wuerth, opinion, "[the] ambiguities in the majority opinion have already generated spirited commentary on what *Kiobel* will mean for future ATCA cases. The blogospheric spin is well under way".¹⁰⁷⁹

There are many other aspects to the *Kiobel* 2013 cases that does satisfy the requirement of common sense and moral in legal reasoning. This is obviously uncovered and discussed from a variety of perceptions under the auspices of international legal scholar world.¹⁰⁸⁰ Which reflect among other things the foreseeable difficulties in the implication and the position of the ATCA at the connection of overwhelmingly competitive political concerns a fractious relation between the impulses of atrocity concerning extraterritorial corporate human rights violations and political anxieties concerning the foreign policy costs accumulating to an overly "interventionist" US in a world of presumably juridical equal sovereign states.¹⁰⁸¹ It is suggested in this research that, *Kiobel* 2013 appears to have generated as much intense debate as that which preceded it. A possible explanation for this might be that it is overly simplistic

Court. The Court's orders granting or denying certiorari are issued as simple statements of actions taken, without any explanations given for denial. It has been suggested that the Court should indicate its reasons for denial. In *Maryland v Baltimore Radio Show, Inc.*, however, the Court explained that because of practical considerations (to allow the Court to carry out its indispensable duties). Congress has allowed the control of the Court's business to remain within the Court's discretion.

Originally, the writ of certiorari was a proceeding through which a superior court required a lower court to submit the full record of a case for review. In fact, the term comes from Law Latin, meaning "to be more fully informed". Under the current rules and practice of the Supreme Court, however, key elements of the proceedings below are submitted along with a petition for certiorari. (See Supreme Court Rules, Rule 14.) And in some states the old terminology has been replaced. In Arizona, for example, relief formerly obtained by the writs of prohibition, mandamus and certiorari is now obtained through a "special action". Many state appellate courts, however, still used the term to describe the formal instrument by which they accept review of cases from their lower courts. *Maryland v Baltimore Radio Show*, 338 US 912 (1950).

¹⁰⁷⁷ Ralph G Steinhardt, 'Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink' (2013) 107 (4) *American Journal of International Law* 841, 845.

¹⁰⁷⁸ David P Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and The Alien Tort Statute' (2013) 107 (3) *American Journal of International Law* 601, 621.

¹⁰⁷⁹ *Ibid.*

¹⁰⁸⁰ Mark Goodale and Sally Engle Merry, eds. *The Practice of Human Rights: Tracking Law between The Global and The Local* (Cambridge University Press 2007).

¹⁰⁸¹ Thomas H Lee, 'The Three Lives of The Alien Tort Statute: The Evolving Role of The Judiciary in US Foreign Relations' (2013) 89 *Notre Dame Law Review* 1645.

and premature to claim that *Kiobel* has definitively settled matters. Therefore, this research concluded that *Kiobel* signal (and entrench) a disappointing death knell for such transnational human rights litigation strategies, however certainly not likely the end.

4.4. The Effect of *Kiobel* on Global Corporate Accountability and Remedy

This current study found that it is not at all clear that *Kiobel* signals the death knell for ATCA lawsuit for corporate human rights violations outside the jurisdiction of the USA.¹⁰⁸² Certainly, it has been disputed that, even though the Supreme Court decision in *Kiobel* appears to the contrary, the 2013 judgment “adopts a thoughtfulness approach without excluding lawsuit that fits the principle laid down in *Fila’rtiga*.”¹⁰⁸³ Additionally, the Supreme Court decision shows that it is likely that *Kiobel* will invite more ATCA lawsuit precisely because there are many issues that remain unresolved by the decision. This is due to the fact that because “what is law in *Kiobel* isn’t clear and what is clear in *Kiobel* isn’t law”.¹⁰⁸⁴ These findings will doubtless be much scrutinised, but there are some immediately dependable conclusions for *Kiobel* 2013, the case fails to offer solid precedent, and furthermore, the case breaks with precedent by forging (unconvinced doctrinal grounds) a “new presumption” of uncertain application. Therefore, *Kiobel* 2013 signals a disappointing death knell for transnational ATCA lawsuit strategies surely, but not necessarily the death of tort lawsuit. The door for corporate human right violation tort litigation is left open, however, as distinguished above, the ATCA route may be, in any case, a distraction from more direct and productive method of corporate human rights accountability under various tort law mechanism such as negligence, the duty of care and intentional tort.¹⁰⁸⁵ Although this research acknowledges the symbolic, rhetorical and juridical effectiveness of the ATCA, in spite of it’s falling short of delivering meaningful corporate accountability. This study recognised that the progressive pervasive conviction that direct corporate accountability for human rights violations is now overdue, particularly in the light of the universal structural dominance of MNCs and the modern day conceptual supremacy of capitalism.¹⁰⁸⁶

¹⁰⁸² Anna Grear and Burns H Weston, ‘The Betrayal of Human Rights and The Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ (2015) 15 (1) *Human Rights Law Review* 21, 44.

¹⁰⁸³ Gabriel M Wilner, ‘Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights’ (1981) 11 *Georgia Journal of International & Comparative Law* 317.

¹⁰⁸⁴ David P Stewart and Ingrid Wuerth (n 1073).

¹⁰⁸⁵ John G Fleming, *The Law of Torts* (Vol. 1. Law Book Company for New South Wales Bar Association 1987).

¹⁰⁸⁶ Jeffry A Frieden, *Global Capitalism: Its Fall and Rise in The Twentieth Century* (WW Norton & Company

In addition, to evaluating *Kiobel* 2013 correctly, specifically its ambiguity in regards to remedies for extraterritorial corporate human rights violations, it is vital that the Supreme Court decision and the ATCA be observed in comparative law viewpoint, specifically since, as McCorquodale indicated, “the case law in the rest of the world is unlikely to be greatly affected by the ruling”.¹⁰⁸⁷ McCorquodale conclusion is based on the analysis of European Union (EU) regulations and civil law cases on the fact that many of non-US MNCs have their headquarters in Europe. This evidence leads the author to believe that US legislation and jurisprudence are unlikely to have a major impact on a global corporate liability or to be the last result for corporate human rights violations by Europeans MNCs.¹⁰⁸⁸ Of course a variety of methodologies such as Brussels Regulation I has been taken across the EU, which enable claimant to bring corporations before national courts for extraterritorial human rights violations.¹⁰⁸⁹ Similarly, in relations to the ATCA lawsuit, these cases do not put human rights abuses and environmental damages directly in human rights terms. As an alternative, again like the ATCA, they have a tendency to deploy other causes of action (including tort) to drive at the harms caused, which means that the liability for human rights violations and environmental damages is rather frame in tort law than the law of the state or international human rights law.¹⁰⁹⁰

For corporate accountability for human rights violations in the EU, McCorquodale clarifications are based on two EU regulations. Thus, corporate accountability for human rights violations are affected by two European regulations binding on all EU Member States: first, the Brussels I Regulation, which stated that “national courts within the EU have jurisdiction over all who are domiciled in their national jurisdiction” (which for corporations is defined as “the location of a corporation’s” “statutory seat”, “central administration” or “principal place

2007). Capitalism is an economic system where private entities own the factors of production. The four factors are entrepreneurship, capital goods, natural resources, and labour. The owners of capital goods, natural resources, and entrepreneurship exercise control through companies. The individual owns his or her labour. The only exception would be slavery, where it is owned by another individual or a company. Capitalistic ownership means two things to the private entities. First, they control the factors of production. Second, they derive their income from their ownership. That gives them the ability to operate their companies effectively. It also gives them the incentive to maximize profit. In corporations, the shareholders are the owners. Since there so many, each one has little control. They elect a board of directors that manages the company through chief executive

¹⁰⁸⁷ Robert McCorquodale, ‘Waving not Drowning: *Kiobel* Outside The United States’ (2013) 107 (4) *American Journal of International Law* 846, 851.

¹⁰⁸⁸ Jan Wouters and Leen Chanet., ‘Corporate Human Rights Responsibility: A European Perspective’ (2007) 6 *Northwestern Journal of Human Rights* 262

¹⁰⁸⁹ Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuse in The European Union: The Challenge of Jurisdiction’ (2008) 40 *George Washington International Law Review* 939.

¹⁰⁹⁰ Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European law* (2005).

of business)”¹⁰⁹¹ and the second is the Rome II Regulation that imposes a uniform rule dictating that the applicable law of a claim shall be the law of the state where the violation happened, regardless of where the lawsuit is brought.¹⁰⁹² It can therefore be assumed that, subject to restricted exceptions (which include cases where the law of the state of the human rights violations does not effectively protect human rights), the courts in the EU must apply the law of the state where the violations occurred. An implication of this is that the court trialling the case forces neither its own law nor international law on lawsuits that have arisen in the territory of another country, that in turn allow the EU member states to escape the anxieties inferred in *Kiobel* in comparative to the principle of state sovereignty.¹⁰⁹³ The Rome II Regulation creates a harmonised set of rules within the European Union to govern choice of law in civil and commercial matters (subject to certain exclusions) concerning non-contractual obligations, including specific rules for tort/delict and specific categories of tort/delict, unjust enrichment, negotiorum gestio and culpa in contrahendo.. Additionally, in certain circumstances and subject to certain conditions, the parties may choose the law applicable to a non-contractual obligation. Analogous rules were established for contractual obligations by the Rome

¹⁰⁹¹ Robert McCorquodale (1082).

Jurisdiction under the Brussels I Regulation. Article 22 of the Regulation (2012 recast: Article 24) enumerates five specific cases in which the courts of a member state have jurisdiction regardless of the domicile of the parties to the action: plaintiff or defendant. These are:

- In disputes concerning the ownership of and rights in land and tendencies in land, exclusive jurisdiction is held by courts where the land is situated.
- In disputes concerning the validity of the constitution, the nullity or the dissolution of legal persons or their decisions, exclusive jurisdiction is held by courts where the person has its seat as determined by the rules of private international law.
- In disputes concerning the validity of entries in public registers, exclusive jurisdiction is held by the courts of the member state in which the register is kept.
- In disputes concerning the registration or validity of patents, trademarks, designs, or other registrable rights, the courts of the member state in which the registration has been applied for or registered.
- In disputes concerning the enforcement of judgments, the courts of the member state in which the judgment has been or is to be enforced.

The term “regardless of domicile” implies on the one hand that only the subject-matter of the action is relevant for jurisdiction, but not to the residence of the defendant. More specifically, the principal subject-matter of the action must fall within the scope of Article 22. On the other hand, parties do not have the choice of forum in this situation, and consequently, when a national court is seised that does not fall under the exclusive jurisdiction, it must decline jurisdiction. This exceptional case of exclusivity is justified in various ways; ranging from the presence of special legislation which, due to its complexity, “should preferably be applied only by the courts of the country in which it is in force” to interests of “legal certainty”, with the goal to “avoid conflicting judgments”. Sometimes however it is plainly clear why exclusive jurisdiction is needed; take for example the validity of entries in public registers.

¹⁰⁹² 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)

¹⁰⁹³ Indeed, the EU approach is not without its own anxieties. From the standpoint of ensuring genuine human rights protection, relying upon the law of the state of harm can be risky. Success depends upon the sufficiency of that state’s commitment to human rights law and practice and upon the adequacy of its legal mechanisms to ensure meaningful accountability. It is possible that the EU courts would end up applying a low standard of protection.

Convention of 1980. The Rome Convention has, in turn, been replaced by the Rome I Regulation on the law applicable to contractual obligations (Reg. (EC) No. 593/2008).

Similarly, as McCorquodale stated, the UK case of *Chandler v Cape*,¹⁰⁹⁴ which, in a country with long experience in extraterritorial liability questions, finds that the principle of extraterritorial in law can impose liability on a parent corporation in a concept of a duty of care in relation to the health and safety of its subsidiary's employees, [a ruling that suggests] an increased likelihood that UK courts will consider, in contrast to the *Kiobel* [2013] decision, that a parent corporation domiciled in that state has assumed a duty of care towards third parties affected by the operations of subsidiaries located elsewhere, at least where the parent corporation has developed and implemented group-wide policies and practices.¹⁰⁹⁵ As acknowledged and emphasised by McCorquodale, the UK case have developed a legal basis for bringing and deciding corporate human rights violations claims by victims of extraterritorial corporate human rights violations, without having to relied on cases under the ATCA, as a matter of fact rendering *Kiobel* impractical and unlikely to be relevance for cases brought in the UK.

Lastly, McCorquodale concludes that the ATCA cases are widely irrelevant for the development of corporate accountability case law for human rights violations and environmental damages liability. In other countries jurisdictions, the state aspect of human rights responsibility remains to be relevant in corporate liability under international law and international human rights law.¹⁰⁹⁶ Most crucially, the author argued that “none of the violations has been cast directly in human rights terms,” but instead “as a claim in tort for negligence or a breach of contract. Even a case involving the alleged torture and mistreatment of indigenous people was brought as a claim in tort for negligent management and as instigating trespass to the persons”.¹⁰⁹⁷ Thus, the author explanation and the ATCA case law itself, only reinforce the problematic aspect of corporate accountability and the exiting gap in international law and human rights law in regards to direct corporate liability for human rights violations at the international level. MNCs lawsuit approaches, whether in the US. or beyond, leave certain kinds of human rights violation unaccounted for, for instant, the parent corporation liability for

¹⁰⁹⁴ *Chandler v Cape* [2012] EWCA (Civ) 525. See chapter 7 for detail explanation of the case.

¹⁰⁹⁵ Robert McCorquodale (n 1049).

¹⁰⁹⁶ *Ibid.*

¹⁰⁹⁷ *Ibid* at 850.

the supply chain and subsidiary misconduct and the concept of duty of care is unaccounted for.¹⁰⁹⁸

Maybe, though, critically examining *Kiobel* 2013, what is clear is that it will impact greatly in corporate liability in a positive way: the ATCA cases indicated that a domestic court is prepared at least to hear litigations against corporations for human rights abuses and environmental damages. The Supreme Court did so by placing a superficial but ambiguous restriction on ATCA-based lawsuit.¹⁰⁹⁹ In this legal reasoning *Kiobel* 2013 strengthens the justifications for focusing on non-ATCA approach to corporate accountability for human rights violations and environmental damages, which including tort law and the concept of duty of care. Nevertheless, regardless of the fact that, as McCorquodale suggested, “the strength and breadth of the EU cases will continue to develop and in so doing might inspire claims against US corporations outside the United States and also non-ATCA based actions in the US, even the most promising EU litigation strategies do not address corporate human rights abuses in directly human rights terms”.¹¹⁰⁰ However, it is safe to say in this research that even that corporate accountability gap will still remain, thus, what is required is effective mechanism that have a universal application. Possibly, then, *Kiobel* conveniently pulls the focus on effective judicial mechanism for corporate accountability to the restrictions on ATCA lawsuit in the US courts. This, then, invites fresh engagement with a wide range of tort law suit as a possibility to regulate corporate conduct. This view is linked to Dine’s critique, noted in the previous paragraph, of the ATCA as a distraction from an effective, productive, legal concept that can resolve the central problem of corporate accountability.

In addition to corporate accountability, Nolan, Posner and Labowitz suggested that courts are only one among a growing number of legal mechanism to hold corporate accountable for human rights violations.¹¹⁰¹ Both authors contested that the role of the US and other courts are only part of the development of corporate accountability mechanism that is capable of awarding remedies and accountability for human rights violations, which will help shape the rules of business conduct in global economy with respect to human rights.¹¹⁰² The authors have made the case for greater enforcement of effective human rights standards, environmental,

¹⁰⁹⁸ Christopher D Stone, ‘The Place of Enterprise Liability in The Control of Corporate Conduct’ (1980) 90 (1) *Yale Law Journal* 1, 77.

¹⁰⁹⁹ Geoffrey R Watson, ‘Or a Treaty of The United States: Treaties and The Alien Tort Statute After *Kiobel*’ (2013)

¹¹⁰⁰ Robert McCorquodale (n 1082).

¹¹⁰¹ Maya Steinitz, ‘The Case for an International Court of Civil Justice’ (2014).

¹¹⁰² *Ibid.*

and other forms of vigorous accountability system in states where MNCs operate. A thoughtful point is required here, it is vital to know that, this particular approach to corporate accountability will be directly affected by “chronic failures in developing a governmental order based on the rule of law”.¹¹⁰³ Nonetheless, other listed mechanism by the authors include standard-setting by intergovernmental organisations; provisioning of resources by the World Bank; home country reporting requirements and sanctions; and voluntary multi-stakeholder initiatives.¹¹⁰⁴ For example, standard setting, while desirable, relies upon adequate enforcement to become meaningful, otherwise it shall serve no purpose. Also, it is possible that the provisioning of international financial resources will become difficult due to the conditionality measures that will be impose on corporations.

Home state approaches (reporting requirements and sanctions) rely whole on adequate degrees of commitment to human rights based law, practice and upon relevant legal machinery to guarantee meaningful human rights accountability. Also, the voluntary multi-stakeholder mechanism can do much to raise awareness, however, in the long run it will lead to a serious risk of accountability gap. As a whole range of scholarship have disclosed, voluntary mechanism amount to little more than “corporate blue washing” exercises: when it comes to corporate human rights accountability.¹¹⁰⁵ This study argued that the voluntary mechanism is insufficiently in compelling route towards corporate human rights respect.¹¹⁰⁶ This research does acknowledge that the authors have made a valid comment regarding corporate accountability through an international forum, such as courts. What is also clear in the analysis in this study so far has suggested that in the post-*Kiobel* 2013 legal predicaments, corporate human rights accountability before and now is inadequately protected in the face of MNC complexity, power and global influence.¹¹⁰⁷ The various legal approaches developed to protect human rights by employing alternative legal avenues and forms of accountability are ultimately unsatisfying and flaw.¹¹⁰⁸ Even Dine’s imaginative and carefully constructed globalisation

¹¹⁰³ Vivian Grosswald Curran and David Sloss, ‘Reviving Human Rights Litigation after *Kiobel*’ (2013) 107 (4) *American Journal of International Law* 858, 863.

¹¹⁰⁴ Kevin T Jackson, ‘Global Corporate Governance: Soft Law and Reputational Accountability’ (2010) 35 *Brooklyn Journal of International Law* 41.

¹¹⁰⁵ Deborah Doane and N Abasta-Vilaplana, ‘The Myth of CSR’ (2005) 3 (3) *Stanford Social Innovation Review* 22, 29.

¹¹⁰⁶ William S Laufer, ‘Social Accountability and Corporate Greenwashing’ (2003) 4 (3) *Journal of Business Ethics* 253, 261.

¹¹⁰⁷ Anna Grear, ‘Challenging Corporate ‘Humanity’: Legal Disembodiment, Embodiment and Human rights’ (2007) 7 (3) *Human Rights Law Review* 511, 543.

¹¹⁰⁸ Anita Ramasastry, ‘Corporate Social Responsibility versus Business and Human Rights: Bridging The Gap Between Responsibility and Accountability’ (2015) 14 (2) *Journal of Human Rights* 237, 259.

responsive national law to tackle corporate misconduct, fall short.¹¹⁰⁹ However, this research share Dine's fundamental conviction that the time has now come for direct corporate answerability for human rights violations and environmental damages.¹¹¹⁰ Building on Dine's work, this thesis concurs with the author and argue that the time has come to find a corporate duty of care under the tort of negligence.

4.5. Why Tort Law (Tort of Negligence)?

On the most basic level of corporate human rights accountability, the global human rights responsibility on all actor, including none- state actors in the international arena overlaps with straightforward concepts of tort liability and civil responsibility for wrongs one person causes another.¹¹¹¹ Tort law remedies provide s crucial elements for the enforcement of international law both at international level and domestic court.¹¹¹² A possible explanation for this might be that the analysis of the relationship between tort remedies and international law and human rights law is the multi-faceted nature of human rights legal process.¹¹¹³ As noted by Coliver, Green and Hoffman, the overlapping functions of ATCA/TVPA legal process in the US, in which a claimant physical sue perpetrators, civilian and military superiors, and corporations and corporate officers for violations including genocide, war crimes, crimes against humanity extrajudicial executions, disappearances, torture, slavery and force labour, and human trafficking.¹¹¹⁴ The purpose of this lawsuit include holding individuals and corporate perpetrators accountable for human rights violations.¹¹¹⁵ The tort law provides the victims with official and legal acknowledgment and remedy for the harm cause to them.¹¹¹⁶ This development have contributed to the development of international human rights law,

¹¹⁰⁹ Gerard McCormack, *Corporate Rescue Law an Anglo-American Perspective* (Edward Elgar Publishing 2008).

¹¹¹⁰ Peter Muchlinski, 'Implementing The New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 (1) *Business Ethics Quarterly* 145, 177.

¹¹¹¹ Beth Stephens, Michael Ratner, Judith Chomsky, Jennifer Green and Paul Hoffman, *International Human Rights Litigation in US Courts* (Irvington-on-Hudson New York: Transnational publishers 1996).

¹¹¹² George P Fletcher, *Tort Liability for Human Rights Abuses* (Bloomsbury Publishing 2008).

¹¹¹³ Craig Forcese, 'ATCA's Achilles Heel: Corporate Complicity, International Law and The Alien Tort Claims Act' (2001) 26 *Yale Journal of International Law* 487.

¹¹¹⁴ Sandra Coliver, Jennie Green and Paul Hoffman, 'Holding Human Rights Violators Accountable by Using International Law in US Courts: Advocacy Efforts and Complementary Strategies' (2005) 19 *Emory International Law Review* 169.

¹¹¹⁵ Mark W Bina, 'Private Military Contractor Liability and Accountability after Abu Ghraib' (2004) 38 *John Marshall Law School Law Review* 1237.

¹¹¹⁶ Beth Stephens, Michael Ratner, Judith Chomsky, Jennifer Green, and Paul Hoffman. *International Human Rights Litigation in US Courts* (Irvington-on-Hudson, New York: Transnational publishers 1996).

building constituency in the US supporting tort litigation in the auspice of international law.¹¹¹⁷ Similarly, the tort litigation have added to a climate of deterrence, and supporting or catalysing efforts in other states for human rights accountability and remedy.¹¹¹⁸ Minow explain how legal proceedings have promoted reconciliation and healing in a conflicted society.¹¹¹⁹

The concept of tort law allow victims of human rights violations and environmental damages or surviving family members to bring ligation against defendant. This can provide an opportunity for financial remedy¹¹²⁰ that, while perhaps seeming routine and insufficient to victims, does however provide an avenue for redress, and an opportunity for remedy to help the injured victims get back to where they were before the tort occurred.¹¹²¹ Also the enforcement of legal rights in tort law gives the victim's opportunity for the court to validation their claims by providing a formal legal judgment.¹¹²² Likewise, in the case of punitive damages, a claimant will receive the added benefit of a public statement that reflects on the gravity of what the victims, survivors or their lost family member(s) have suffered.¹¹²³ An implication for the defendants is that, court proceedings will provide public accountability for what they have done, and for those who might be tempted to commit the similar human rights violations and environmental damages in future. This will serve as a warning that any individual or corporation that may violate human rights or damage the environment may have serious financial and reputational consequences for their actions.

Tort law also provides a duty of reasonable care for one person to avoid causing harm to another.¹¹²⁴ The notion of duty of care have developed jurisprudence on the doctrine of reasonable care, foreseeable harm, and duty of care.¹¹²⁵ In general, therefore, it seems that the purpose of encouraging for appropriate future corporate behaviour overlaps with the multiple functions of human rights law that contribute to the development of human rights norms and the deterrence of future human rights violations.¹¹²⁶ Another important aspect of tort law is

¹¹¹⁷ Brian C Free, 'Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation' (2003) 12 *Pacific Rim Law & Policy Journal* 467.

¹¹¹⁸ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998.).

¹¹¹⁹ *Ibid.*

¹¹²⁰ Avihay Dorfman, 'What is The Point of The Tort Remedy' (2010) 55 *American Journal of Juris* 105.

¹¹²¹ Roger Paul Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations' (2011)

¹¹²² George P Fletcher, *Tort liability for Human Rights Abuses* (Bloomsbury Publishing, 2008).

¹¹²³ William R Casto, 'The New Federal Common Law of Tort Remedies for Violations of International Law' (2005) 37 *Rutgers Law Journal* 635.

¹¹²⁴ *Ibid.*

¹¹²⁵ Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (Vol. 2. Pluto Press 1998).

¹¹²⁶ Leon Gettler, 'Liability Forges a New Morality' (2005) 3 *The Age*.

that, tort theory crosses legal systems and is commonly included in statutory or common law around the world.¹¹²⁷ In other legal systems, victims of human right violations maybe able to seek remedy both to punish the perpetrators of the abuse through criminal and civil remedies, and receive compensation, in a mechanism that is linked to their criminal claim.¹¹²⁸ For instant, in the civil law system in France, the criminal system is the dominant system, with individuals able to be a *partie civile*, or civil party, to the criminal action.¹¹²⁹

Also, as observed by Stephens in her analysis of whether there are parallel options for human rights victims to the Alien Tort Statute in other countries, the author raised the notion of “translation” among different legal systems.¹¹³⁰ For a concept to be “translated” from one system to another does not require identical implementation, but adherence to the same underlying concept: the mechanical transfer of legal procedure from one system to another is rarely effective.¹¹³¹ A possible explanation for this might be that the common goals of a legal principle must be realised through procedures appropriate to each national judicial system and its universal applicability at international level.¹¹³² It can thus be suggested that at the core of judicial interpretation of legal rules, lies the “commonalities”.¹¹³³ “Victims of human rights abuses around the world seek comparable results through varied procedural models, tailored to the requirements of their local legal systems,” which is relevant to principle in tort law.¹¹³⁴

The extensive critical analysis in this research have explored the common denominator of providing remedies to victims of corporate human rights violations in these multiple sources of law. However, it was acknowledged that to properly compare and translate the concept of corporate liability across jurisdictions, it is necessary to focus on this common core of parallel tests in international and domestic systems rather than the differences in implementation of tort

¹¹²⁷ Paula Giliker, *Vicarious Liability in Tort—A Comparative Perspective* (Cambridge University Press 2010).

¹¹²⁸ Beth Stephens, ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002). Explaining that the division between the civil and criminal actions should be eliminated by states. Robert C Thompson, Anita Ramasastry and Mark B Taylor., ‘Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes’ (2009) “In other countries, the need for accountability may translate into criminal prosecutions or administrative processes instead of civil litigation, or else into hybrid remedies, such as the *action civile*”.

¹¹²⁹ Charles Howard, ‘Compensation in French Criminal Procedure’ (1958) 21 (4) *Modern Law Review* 387, 400.

¹¹³⁰ *Ibid.*

¹¹³¹ *Ibid.*

¹¹³² Craig M Scott, ‘Translating Torture into Transnational Tort: Conceptual Divides in The Debate on Corporate Accountability for Human Rights Harms’ (2001).

¹¹³³ Beth Stephen (1123).

¹¹³⁴ Robert C Thompson and Anita Ramasastry, and Mark B Taylor, ‘Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes’ (2009).

law throughout the different systems. This research argue that tort law can facilitate corporate liability for corporate human rights abuses and accountability for its supply chain and subsidiaries misconduct, and that this concept is consistent with parallel standards in US law, such as ATCA and TVPA.¹¹³⁵ These findings suggest that, common types of actions have resulted in common types of liability. Thus, it is possible to hypothesise that there is availability of remedies to victims of human right violations, and enforcement of human rights standard of tort principles through the concept of a duty of care.¹¹³⁶

4.6. Link between Tort Duty of Care, International Human Rights Law, and International Criminal Law

In a common law jurisdiction, a widespread acceptance of the relationship between tort and criminal law is that tort law provides remedy while punishment is primarily the role of the criminal system.¹¹³⁷ In a jurisdiction such as the US and UK punitive¹¹³⁸ remedy are for gross misconduct.¹¹³⁹ The awarding of punitive remedy in this situations becomes more blurred because the goal of punitive damages is, as the name says, punishment; punitive damages also have the purpose of deterring future violations¹¹⁴⁰ and of naming and shaming the tortfeasor,

¹¹³⁵ Matthew H Murray, 'Torture Victim Protection Act: Legislation to Promote Enforcement of The Human Rights of Aliens in US Courts' (1986) 25 *Columbia Journal of Transnational Law* 673.

¹¹³⁶ Philip Mariani, 'Assessing The Proper Relationship between The Alien Tort Statute and The Torture Victim Protection Act' (2008) 156 (5) *University of Pennsylvania Law Review* 1383, 1438.

¹¹³⁷ Duff RA *Repairing Harms and Answering for Wrongs*, in *Philosophical Foundations of Tort Law*, (John Oberdiek, ed., Oxford University Press, 2014) 212, 16 and Duff RA, *Torts, Crimes, And Vindication: Whose Wrong Is It? In Unravelling Tort and Crime 148-50* (Matthew Dyson ed., 2014).

¹¹³⁸ Clarence Morris, 'Punitive Damages in Tort Cases' (1931) 44 (8) *Harvard Law Review* 1173, 1209. Punitive damages. Also known as exemplary damages, retributory damages or vindictive damages. Damages awarded in excess of the claimant's loss. They are intended to punish the defendant rather than compensate the claimant and are only available in precise and limited circumstances such as where the defendant is guilty of oppressive or unconstitutional action or has calculated that the money to be made from his wrongdoing will probably exceed the damages payable, *Rookes v Barnard* [1964] AC 1129. *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29. The House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789 over-ruled the decision of the Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507 (on which see our February 1993 issue, pp.7-8) and, in doing so, rejected the requirement that, in order to be entitled to recover exemplary damages, the claimant must show that the claim was one in respect of a tort for which exemplary damages had been awarded prior to the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129. One consequence of this decision is likely to be a gradual expansion of the circumstances in which exemplary damages are awarded.

¹¹³⁹ Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law' (1992) *Yale Law Journal* 1795, 1873.

¹¹⁴⁰ John C Coffee, 'Paradigms Lost: The Blurring of The Criminal and Civil Law Models. And What Can be Done About it' (1992) 101 (8) *Yale Law Journal* 1875, 1893, Jerome Hall, 'Interrelations of Criminal Law and Torts: I' (1943) 43 (3) *Columbia Law Review* 753, 779 and John C Coffee, 'Does Unlawful Mean Criminal: Reflections on The Disappearing Tort/Crime Distinction in American law' (1991) 71 *Boston Law Journal* 193.

which enhance both the intentions of deterrence and the declarative function of the foundation of law.¹¹⁴¹ Also, one of the most important questions that have been asked in the past decades is distinction between the criminal and tort law principles. This is due to the fact that crimes are considered committed against society as a whole.¹¹⁴² Similarly, in civil legal systems, these functions are linked when a private party is able to join a criminal action.¹¹⁴³ It is possible, therefore, that the nature of human rights violations further blurs the common distinction between the criminal and civil legal systems.

What is clear in the development of Tort and criminal liability litigation is that both law have been set against each other that sometimes it can be seen as an attempt to avoid any accountability. Therefore, there is a valid argument to finding a legal basis for holding corporations liable in a tort law suit for international human rights law violations. As it has been observe by Posner, “those standing against criminal liability contend that there is no need for it because of civil liability”.¹¹⁴⁴ Though, in a common law system such as the US, tort and criminal law may complement each other and serve as different levers in building accountability within a particular jurisdiction, across national systems, and in the international legal system itself.¹¹⁴⁵ For instance state such as the US, allow a claimant to bring tort claims alleging corporate responsibility for human rights violations and environmental damages in the

¹¹⁴¹ *Ibid.*

¹¹⁴² Johannes Andenaes, *Punishment and Deterrence* (University of Michigan Press 1974).

¹¹⁴³ Mann Kenneth (n 871).

¹¹⁴⁴ *Flomo v Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011).

This suit under the Alien Tort Statute, 28 USC. § 1350, pits 23 Liberian children against the Firestone Natural Rubber Company, which operates a 118,000-acre rubber plantation in Liberia through a subsidiary; various Firestone affiliates and officers were also joined as defendants. The district court granted summary judgment in favour of all the defendants, but the plaintiffs have appealed only from the judgment in favour of Firestone Natural Rubber Company.

And what is “customary international law”? “International law is part of our law, and where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”. *The Paquete Habana*, 175 US 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900); see also *Sampson v Federal Republic of Germany*, 250 F.3d 1145, 1149-50 (7th Cir. 2001); Restatement (Third) of Foreign Relations Law § 102(2) (1987)*Flores v Southern Peru Copper Corp.*, 414 F.3d 233, 247-48 (2d Cir.2003), quoting Louis Henkin, *International Law; 1016 Politics and Values* 29 (1995). Customary international law thus resembles common law in its original sense as law arising from custom rather than law that is formally promulgated.

The Alien Tort Statute was enacted in 1789, when the principal violations of customary international law were piracy, mistreatment of ambassadors, and violation of safe conducts. *Sosa v Alvarez-Machain*, 542 US 692, 715, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), *Sosa v Alvarez-Machain*, supra, 542 US at 729, 124 S. Ct. 2739. Also see, Curtis A. Bradley and Mitu Gulati, ‘Withdrawing from International Custom’ (2010) *Yale Law Journal* 202, 275 and William Blackstone, *Commentaries on The Laws of England* (Vol. 2. Collins & Hannay 1830).

¹¹⁴⁵ Lillian Aponte Miranda, ‘The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability under International Law’ (2007) 11 *Lewis & Clark Law Review* 135.

last thirty years, however, there is still no provision for corporate liability for human rights violations in the US criminal code.¹¹⁴⁶

Posner mention several number of important treaties as examples of the position of civil and administrative remedies where criminal remedies are unavailable.¹¹⁴⁷ The author went on to cite the Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,¹¹⁴⁸ the UN International Convention for the Suppression of the Financing of Terrorism,¹¹⁴⁹ and the UN Convention Against Transnational Organized Crime.¹¹⁵⁰ These treaties permit civil and

¹¹⁴⁶ Yadh Ben Achour to Pamela Hamoto, Permanent Representative of The United States to the United Nations (Oct. 6, 2015). <<https://perma.cc/Z9HG-9C43>> accessed 3 September 2017.

¹¹⁴⁷ Jennifer M Green, 'The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment through the Alien Tort Statute' (2013) 35 *University of Pennsylvania Journal of International Law* 1085.

¹¹⁴⁸ Organisation for Economic Cooperation and Development, 'Organisation for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, November 20, 1997: 1–8' (1998) 3 *Trends in Organized Crime* 77, 82. The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction.

¹¹⁴⁹ UN General Assembly, *International Convention for The Suppression of The Financing of Terrorism*, 9 December 1999, No. 38349. <<http://www.refworld.org/docid/3dda0b867.html>> accessed 3 September 2017.

The objective of the International Convention for the Suppression of the Financing of Terrorism (the Convention) is to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators.

Any person commits an offence within the meaning of the Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or with the knowledge that they are to be used, in full or in part, to carry out any of the offences described in the treaties listed in the annex to the Convention, or an act intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act. Any person also commits such an offence if that person attempts to commit an offence as set forth above or participates as an accomplice in an offence, organizes or directs others to commit an offence or contributes to the commission of such an offence by a group of persons acting with a common purpose. For an act to constitute an offence, it is not necessary that funds were actually used to carry out an offence as described above. The provision or collection of funds in this manner is an offence whether or not the funds are actually used to carry out the proscribed acts.

¹¹⁵⁰ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000. <<http://www.refworld.org/docid/4720706c0.html>> accessed 3 September 2017

The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organised crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organised crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Countries must become parties to the Convention itself before they can become parties to any of the Protocols.

administrative remedies as substitutes to criminal liability.¹¹⁵¹ Similarly, in some legal systems, tort standards may lead to criminal standards for accountability for human rights violations.¹¹⁵² Also, legal scholar such as Payne and Pereira have observed that there is a new development in how countries transitioning from dictatorships and / or civil conflict have addressed corporate complicity.¹¹⁵³ Although “transitional justice”¹¹⁵⁴ legal case against state officials have been mainly criminal prosecutions, however, when it comes to corporate complicity, civil trials have outnumbered criminal trials.¹¹⁵⁵

This observation may support the hypothesis that tort remedies do not contain the same restriction as criminal prosecutions, therefore, its application to corporation will breach the restriction in criminal law principle. Thus, the flexibility offered by tort law will allow courts to find legal responsibility for corporations and their subsidiaries misconduct. Where tort liability is established by the courts at both national and international level. However, the significant difference in the balance of competing interests within a governmental office can of course serve as an impediment to the universal application of tort law.¹¹⁵⁶ Nonetheless, a

The Convention represents a major step forward in the fight against transnational organised crime and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international cooperation in order to tackle those problems. States that ratify this instrument commit themselves to taking a series of measures against transnational organised crime, including the creation of domestic criminal offences (participation in an organised criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.

¹¹⁵¹ *Flomo v Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011) at 1020.

¹¹⁵² Letter from Yadh Ben Achour to Pamela Hamoto, Permanent Representative of The United States to The United Nations (Oct. 6, 2015). <<https://perma.cc/Z9HG-9C43>> accessed 4 September 2017.

¹¹⁵³ Leigh A Payne and Gabriel Pereira, *Accountability for Corporate Complicity in Human Rights Violations: Argentina’s Transitional Justice Innovation? In The Economic Accomplices to The Argentine Dictatorship: Outstanding Debts* (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., 2016) 29, 29, 44.

¹¹⁵⁴ Ruti G Teitel, *Transitional Justice* (Oxford University Press on Demand 2000).

Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades. The aims of transitional justice will vary depending on the context but these features are constant: the recognition of the dignity of individuals; the redress and acknowledgment of violations; and the aim to prevent them happening again.

Complementary aims may include:

- Establishing accountable institutions and restoring confidence in them
- Making access to justice a reality for the most vulnerable in society in the aftermath of violations
- Ensuring that that women and marginalized groups play an effective role in the pursuit of a just society
- Respect for the rule of law
- Facilitating peace processes, and fostering durable resolution of conflicts
- Establishing a basis to address the underlying causes of conflict and marginalization
- Advancing the cause of reconciliation

¹¹⁵⁵ Leigh A Payne and Gabriel Pereira (n 1148)

¹¹⁵⁶ Anne-Marie Slaughter, ‘Disaggregated Sovereignty: Towards The Public Accountability of Global Government Networks’ (2004) 39 (2) *Government and Opposition* 159, 190.

note of caution is due here, survivors of human rights may be able to secure private or public interest lawyers to file a tort and civil claims on their behalf of them. Thus, these claims are more likely to overcome the political limitations than criminal prosecutions.¹¹⁵⁷ There are several possible explanations for this legal reasoning, however, one of this is that the number of cases brought under the ATCA and TVPA far outstripped the number of criminal prosecutions for international human rights violations.¹¹⁵⁸ This is evident in the US government prosecution and deportation of Nazi war criminals, as well as the prosecution of those accused of human rights violations for immigration fraud.¹¹⁵⁹ Nevertheless, only one person such as Chuckie Taylor,¹¹⁶⁰ was criminally prosecuted for the underlying human rights violations (in his case for torture in Liberia).¹¹⁶¹ In fact, no corporation or corporate official has been prosecuted in the US for international human rights violations except under the ATCA, as a tort suit.¹¹⁶² According to these findings, tort cases have the potential to provide remedies for human rights victims while moving the law forward and giving added impetus to criminal prosecutions.

In addition to the flexibility offered by tort law, it is important to note that criminal prosecution around the world varies according to the level of participation afforded to those harmed by the violations.¹¹⁶³ Some countries, such as the U.S., Australia, Belgium, Canada, France, India, Indonesia, and South Africa, give prosecutors “complete enforcement discretion,

¹¹⁵⁷ Steven R Ratner, ‘Belgium’s War Crimes Statute: A Postmortem’ (2003) 97 (4) *American Journal of International Law* 888, 897.

¹¹⁵⁸ Douglas Donoho, ‘Human Rights Enforcement in The Twenty-first Century’ (2006) 3 *Georgia Journal of International & Comparative* 51.

¹¹⁵⁹ Kate Connolly, ‘Trial of Man Deported from US to Germany for Nazi War Crimes to Begin’ (2009) *The Guardian* also see, Jean Ancel, ‘The History of The Holocaust in Romania’ (2016).

¹¹⁶⁰ Elise Keppler, Shirley Jean and Paxton J Marshall, ‘First Prosecution in The United States for Torture Committed Abroad: The Trial of Charles ‘Chuckie’ Taylor, Jr’ (2008) 15 (3) *Human Rights Brief* 4
Mr. Taylor Jr. was convicted and sentenced in 2008 under a United States domestic statute—the Torture Act which establishes the basis for prosecution of United States citizens for crimes of torture committed abroad. Mr. Taylor Jr., a United States citizen by birth, sought a reversal of his conviction on the basis that the “Torture Act is unconstitutional”. According to Mr. Taylor Jr., while the Torture Act derives its authority from the obligations owed by the United States as a signatory to the United Nations Convention Against Torture (CAT) of 1984, the Act “impermissibly exceeds the bounds of that authority, both in its definition of torture and its proscription against conspiracies to commit torture”. Mr. Taylor Jr., also challenged his conviction on several other grounds, including based on a section of the Torture Act which makes it a criminal offense to use or possess a firearm in connection with a crime of violence, that the said provision ‘cannot apply extraterritorially to his actions in Liberia,’ and that his trial was unfair based on several procedural errors, and that the United States District Court erred in sentencing him after his conviction.

¹¹⁶¹ The US federal extraterritorial torture statute, 18 USC. § 2340A (1994).

¹¹⁶² Yolanda S Wu, ‘Genocidal Rape in Bosnia: Redress in United States Courts Under The Alien Tort Claims Act’ (1993)

¹¹⁶³ Leigh A Payne and Gabriel Pereira (n 1148).

with little or no official participation by victims or their representatives”.¹¹⁶⁴ Whiles, other countries, such as Argentina, Germany, Japan, Netherlands, Spain, and Ukraine, allow higher levels of participation by victims, from participating in the criminal proceedings to the court decision and to the appeal of decisions not to prosecute.¹¹⁶⁵ Lastly, one of the most vital assessment of the standards applied in human rights tort cases, the jurisprudence on human rights claims looked to international criminal law to inform analysis in civil cases. For instant, in rulings on the definitions of human rights norms, U.S. courts have frequently cited international criminal tribunal judgments to inform their rulings about the content of customary international law,¹¹⁶⁶ specifically in cases brought under the ATCA and TVPA.¹¹⁶⁷ International criminal law has been a primary source of developing standards, and U.S. and other national courts have looked to international criminal tribunal jurisprudence for guidance when they are ruling on tort cases.¹¹⁶⁸ It can thus be suggested that the international and national legal system, accountability for human rights victims has integrated principles from the international criminal system, as well as other sources of law. Therefore, including the concept of tort law into national legal system will not be problematic, but rather an innovation approach to the development of a binding accountability concept for corporations.¹¹⁶⁹

4.7. The Application of Tort Law in Other Jurisdictions

In theory, the legal system of most countries should offer victims of human rights violations opportunity to seek tort and civil redress against the perpetrator(s).¹¹⁷⁰ Also, the legal developments in the European Union, most notably the introduction of a unified private international law framework, maybe that European courts are better equipped and more likely to allow human rights victims’ access to justice in foreign-cubed scenarios.¹¹⁷¹ In *Lubbe*, the

¹¹⁶⁴ *Ibid.*

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ Andrea Bianchi, ‘International Law and US Courts: The Myth of Lohengrin Revisited’ (2004) 15 (4) *European Journal of International Law* 751,781.

¹¹⁶⁷ Eric Engle, ‘The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge’ (2003) 67 *Albany Law Review* 501.

¹¹⁶⁸ Harold Hongju Koh, ‘International Law as Part of Our Law’ (2004) 09 (1) *American Journal of International Law* 43, 57.

¹¹⁶⁹ Doreen J McBarnet, Aurora Voiculescu and Tom Campbell, eds. *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press 2009).

¹¹⁷⁰ Beth Stephens, ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002).

¹¹⁷¹ Fiona Robertson, ‘Access to Justice for Victims of Human Rights Abuse by Multinational; Does European Civil and Commercial Litigation Provide an Answer?’ (2015) 9 (1) *New Zealand Journal of Research on Europe*.

plaintiffs were employees of the English corporation with a South African subsidiary.¹¹⁷² They alleged that the defendant had breached its duty of care by allowing the employees to be exposed to asbestos, despite the *Lubbe* knowing that exposure “was gravely injurious to health”.¹¹⁷³ The House of Lords granted the employees’ claim for jurisdiction before the UK courts, even though all relevant conduct took place entirely in South Africa. In *Akpan*, a Nigerian farmer, Friday *Akpan*, and a Dutch NGO, *Milieudedefensie*, jointly sued *Royal Dutch Shell Plc* (RDS) with its headquarters in The Hague and its Nigerian subsidiary, Shell Petroleum Development Company (SPDC) for tortious damage before The Hague District Court.¹¹⁷⁴ By applying Dutch procedural rules, the Hague District Court found that it had jurisdiction to hear the case against both RDS and the Nigerian subsidiary.

However, this has not been in cases such as *Dakota Access Pipeline protests*,¹¹⁷⁵ *Chevron*,¹¹⁷⁶ and *Coca-Cola*, “Coca-Cola Company also leads in the abuse of workers” rights,

¹¹⁷² *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL). *Lubbe* was decided under The Brussels Convention on Jurisdiction and The Enforcement of Judgments in Civil and Commercial Matters (27 September 1968), which is a predecessor to the Brussels Regulation.

¹¹⁷³ *Ibid.*

¹¹⁷⁴ *Akpan v Royal Dutch Shell Plc Arrondissementsrechtbank Den Haag* [District Court of The Hague] C/09/337050/HA ZA 09-1580, 30 January 2013.

“Ultimately, the Court found SPDC liable for negligence against Mr Akpan. The Dutch Court reached this decision by applying Nigerian substantive law thereby adjudicating a case between two Nigerian parties using Nigerian law”.

¹¹⁷⁵ Sam Levin, ‘Dakota Access Pipeline Protests: UN Group Investigates Human Rights Abuses’ (2016) *The Guardian*. <<https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses>> access 6 August 2017.

“Native American protesters have reported excessive force, unlawful arrests and mistreatment in jail where activists describe being held in cages. A United Nations group is investigating allegations of human rights abuses by North Dakota law enforcement against Native American protesters, with indigenous leaders testifying about “acts of war” they observed during mass arrests at an oil pipeline protest. Dakota Access pipeline: Native Americans allege cruel treatment. A representative of the UN’s permanent forum on indigenous issues, an advisory group, has been collecting testimony from Dakota Access pipeline protesters who have raised concerns about excessive force, unlawful arrests and mistreatment in jail where some activists have been held in cages”.

¹¹⁷⁶ *Aguinda v Texaco, Inc.*, 850 F. Supp. 282 (SDNY 1994) Judith Kimberling, ‘Indigenous Peoples and The Oil Frontier in Amazonia: The Case of Ecuador and ChevronTexaco, and *Aguinda v Texaco* (2005) 38 *New York University Journal of Law & Business* 413.

Chevron-Texaco lobbied for many years to have this trial moved to an Ecuadorian court anticipating a more favourable judgment. In 2002 the US courts approved the transfer and Chevron-Texaco undertook to respect the decisions of Ecuadorian courts on the case. The Amazon Defence Front then took legal action in Ecuador and as a result, in 2011, an Ecuadorian court sentenced Chevron to pay \$9.6 billion rising to \$18bn without a public apology. Chevron refused to apologise and has never paid the damages. As Chevron-Texaco has moved all its assets from Ecuador, the Amazon Defence Front has filed enforcement petitions in Canada, Argentina, and Brazil for Chevron’s assets to be frozen. Chevron has campaigned against the Ecuadorian judgment being enforced anywhere. Amazon watch reports that Chevron is already spending an estimated \$400 million per year just in legal fees, dwarfing the \$40 million it claims it spent on a woefully inadequate clean-up in Ecuador. Chevron-Texaco has sought to dismiss the validity of the Ecuadorian court judgment by taking action against the Ecuadorian government in the Hague’s Permanent Court of Arbitration though it was the Amazon Defense Front, which is suing them not the Ecuadorian government.

assassinations, water privatisation, and worker discrimination.¹¹⁷⁷ Between 1989 and 2002, eight union leaders from Coca-Cola bottling plants in Colombia were killed after protesting the company's labour practices.¹¹⁷⁸ Hundreds of other Coca-Cola workers who have joined or considered joining the Colombian union SINALTRAINAL have been kidnapped, tortured, and detained by paramilitaries, who are hired to intimidate workers to prevent them from unionising.¹¹⁷⁹ In *Dow Chemical*, the company has been destroying lives and poisoning the planet for decades.¹¹⁸⁰ The company is best known for the ravages and health disaster for millions of Vietnamese and U.S. Veterans caused by its lethal Vietnam War defoliant, Agent Orange. Dow also developed and perfected Napalm, a brutal chemical weapon that burned many innocents to death in Vietnam and other wars.¹¹⁸¹ In 1988, Dow provided pesticides to Saddam Hussein despite warnings that they could be used to produce chemical weapons.¹¹⁸² Nestle USA. is also involved in illegal and forced child labour, which is rampant in the chocolate industry. More than 40 per cent of the world's cocoa supply comes from the Ivory Coast, a country that the US State Department estimates had approximately 109,000 child labourers working in hazardous conditions on cocoa farms.¹¹⁸³ In 2001, Save the Children Canada reported that 15,000 children between 9 and 12 years old, many from impoverished Mali, had been tricked or sold into slavery on West African cocoa farms, many for just \$30 each.¹¹⁸⁴ Pfizer is the largest pharmaceutical company in the world; it is also one of the worst

¹¹⁷⁷ Terry Collingsworth, 'Separating Fact from Fiction in The Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations' (2002) 37 *USFL Review* 563.

¹¹⁷⁸ Lesley Gill, 'Right There with You' Coca-Cola, Labor Restructuring and Political Violence in Colombia' (2007) 27(3) *Critique of Anthropology* 235, 260

¹¹⁷⁹ Jonathan Hills and Richard Welford, 'Coca-Cola and Water in India' (2005) 12 (3) *Corporate Social Responsibility and Environmental Management* 168, 177.

¹¹⁸⁰ Rebecca S Katz, 'The Corporate Crimes of Dow Chemical and The Failure to Regulate Environmental Pollution' (2010) 18 (4) *Critical Criminology* 295, 306.

¹¹⁸¹ Susan Schultz Huxman and Denice Beatty Bruce, 'Toward a Dynamic Generic Framework of Apologia: A Case Study of Dow Chemical, Vietnam, and the Napalm Controversy' (1995) 46 (2) *Communication Studies* 57, 72.

¹¹⁸² Takeshi Uesugi, 'Is Agent Orange a Poison: Vietnamese Agent Orange Litigation and the New Paradigm of Poison' (2013).

In 2001, Dow inherited the toxic legacy of the worst peacetime chemical disaster in history when it acquired Union Carbide Corporation (UCC) and its outstanding liabilities in Bhopal, India. On Dec. 3, 1984, a chemical leak from a UCC pesticide plant in Bhopal gassed thousands of people to death and left more than 150,000 disabled or dying. Dow still refuses to address its liabilities in Bhopal. Dow Chemical's impact is felt globally from its Midland, Michigan headquarters to New Plymouth, New Zealand. In Midland, Dow has been producing chlorinated chemicals and burning and burying its waste including chemicals that make up Agent Orange. In New Plymouth, 500,000 gallons of Agent Orange were produced and thousands of tons of dioxin-laced waste was dumped in agricultural fields.

¹¹⁸³ Adeline Zensius, *Inside The Cocoa Pod: An Analysis of The Harkin-Engel Protocol in Cote d'Ivoire* (Georgetown University 2012.)

¹¹⁸⁴ Elliot J Schrage and Anthony P Ewing, 'The Cocoa Industry and Child Labour' (2005) 18 *Journal of Corporate Citizenship, Ambika Zutshi*, Andrew Creed and Amrik Sohal, 'Child Labour and Supply Chain: Profitability or (mis) Management' (2009) 21 (1) *European Business Review* 42, 63 and Amanda A Humphreville, 'If The Question Is Chocolate-Related, The Answer Is Always Yes: Why Doe v. Nestle

abusers of the human right of universal access to HIV/AIDS medicine.¹¹⁸⁵ Wal-Mart in September 2005, the International Labour Rights Fund filed a lawsuit on behalf of Wal-Mart supplier sweatshop workers in China, Indonesia, Bangladesh, Nicaragua and Swaziland.¹¹⁸⁶ The workers were denied minimum wages, forced to work overtime without compensation, and were denied legally mandated health care.¹¹⁸⁷ Other worker rights violations that have been found in foreign factories that produce goods for Wal-Mart include locked bathrooms, starvation wages, pregnancy tests, denial of access to health care, and workers being fired and blacklisted if they try to defend their rights.¹¹⁸⁸

The limitations of these cases observed above have shown that the vast majority of human rights abuse victims still have no or limited access to judicial remedy in the domestic court and international level.¹¹⁸⁹ Taken together, these findings do support strong recommendations to examine the law for bringing a claim and specifically focuses on ATCA, which is the source for all human rights violation litigation. Other states have also instigated claims against perpetrators, but these have involved the filing of criminal complaints, which demand prosecution rather than a true tort and civil lawsuit.¹¹⁹⁰ Ensuring appropriate judicial systems, remedy, and support for victims for corporate human rights violations and

Reopens The Door for Corporate Liability of US Corporations Under The Alien Tort Statute' (2015) 65 *American University Business Law Review* 191.

Nestle, the third largest buyer of cocoa from the Ivory Coast, is well aware of the tragically unjust labour practices taking place on the farms with which it continues to do business. Nestle and other chocolate manufacturers agreed to end the use of abusive and forced child labour on cocoa farms by July 1, 2005, but they failed to do so. Nestle is also notorious for its aggressive marketing of infant formula in poor countries in the 1980s. Because of this practice, Nestle is still one of the most boycotted corporations in the world, and its infant formula is still controversial. In Italy in 2005, police seized more than two million liters of Nestle infant formula that was contaminated with the chemical isopropylthioxanthone (ITX).

¹¹⁸⁵ Michael A Santoro, 'Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS drugs' (2005) 31 *North Carolina Journal of International Law and Commercial* 923.

Pfizer produces the drug fluconazole (an antifungal used by AIDS patients) under the name Diflucan, and sells it at inflated prices most poor people cannot afford. The company refuses to grant generic licenses of fluconazole to governments in countries like Brazil, South Africa, or Dominican Republic, where patients are forced to pay \$20 per weekly pill, though the average national wage is only \$120 per month. Pfizer also values shareholder profits over safety standards. In Europe in 2005, it withdrew from scientific studies of a new class of AIDS drugs called CCR5 inhibitors, choosing instead to rush its own untested CCR5 inhibitor onto the European market without full information about the drug's side effects.

¹¹⁸⁶ Molly Selvin, 'Wal-Mart Faces Suit by Labor Group' (2005) 14 *Los Angeles Times*.

¹¹⁸⁷ Naomi Jiyoung Bang, 'Unmasking The Charade of The Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases' (2013) 35 *Houston Journal of International Law* 255.

¹¹⁸⁸ Kevin Kolben, 'Labour Rights as Human Rights' (2009) 50 *Virginia Journal of International Law* 449 and *Wal-Mart v Dukes*, 564 US 338 (2011)

¹¹⁸⁹ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press USA 2015).

¹¹⁹⁰ Luc Reydam, 'Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice' (1996) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 18.

environmental damages should be a priority for both domestic (this is the “law or legal system established within a state to govern events, transactions, and persons within or having a connection to that state; also internal, municipal, national, or local law/legal system”)¹¹⁹¹ and international legal system (“international law consists of the rules and principles of general application dealing with the conduct of States and of international organisations in their international relations with one another and with private individuals, minority groups and transnational companies”).¹¹⁹² Taken together, these findings of the ATCA suggest that the U.S. Federal Courts have relied on distinctive sources of authority to decide civil claiming arising from human rights violation committed abroad.¹¹⁹³ The first is, the U.S. judiciary has the Alien Tort Statute (as known as ATCA), which is a unique, but ancient jurisdictional statute that authorises U.S. federal courts to hear claims of violations against the “law of nations” committed abroad against foreigners.¹¹⁹⁴ It appears that victims are able to bring civil lawsuits based on breaches of international law against private entities. Secondly, for the successful plaintiffs, the U.S. courts provide the gateway to potentially exorbitant remedy. Despite the promises of the U.S. as a legal forum for corporate accountability for human rights abuse victims, this research argues that the all too prevalent practice of resorting to U.S. courts is not, in fact, the best way for human rights abuse victims to seek access to remedy and justice. This is because, in *Kiobel*, the Court was adamant to ensure that the fact pattern of the claim was suitable for the ATCA. In deciding whether the case could be brought under the ATCA, the Supreme Court’s sole concern was to preserve US foreign affairs interests.¹¹⁹⁵ Even the minority’s reference to victims deserving remedy for violations of the law of nations was subordinate to the preservation of the good international relations of the United States with other states.¹¹⁹⁶ The Court paid no regard to the availability (or lack thereof) with respect to another alternate forum for the victims of the human rights abuses in the case.

This research argues that it is evident that the Court did not find the claimants’ access to justice to be a matter of its responsibility. While on the other hand, Lord Bingham was anxious to ensure that the litigants did not face a denial of justice and refused a grant to stay in light of the risk that the litigants would not have adequate funding to represent their claim

¹¹⁹¹ John H Currie, *Public International Law* (Irwin Law 2008).

¹¹⁹² Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (Oxford University Press 1994).

¹¹⁹³ The Alien Tort Claims Act (ATCA) of 1789, 28 USC. § 1350; ATS.

¹¹⁹⁴ *Smith Kline & French Labs Ltd v Bloch* [1983] 1 WLR 730 at 733.

¹¹⁹⁵ Eugene Kontorovich, ‘Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends’ (2013) 89 *Notre Dame Law Review* 1671.

¹¹⁹⁶ *Kiobel v Royal Dutch Petroleum Co* (n 810).

properly in South Africa.¹¹⁹⁷ On the other hand, claims under tort law are common and while violations of the Alien Tort Claims Act (ATCA) may be framed as a violation of statutory law (e.g. torture as battery) such redefining “mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden variety municipal tort”.¹¹⁹⁸ Accordingly, the severity of the victim’s harm may not be properly recognised by the Alien Tort Claims Act (ATCA) and the stigma attached to the defendant as an alien is significantly less than if they were a citizen of the home state, for instance. For the purposes of this thesis, it is asserted that the most important factor for a human rights abuse victim is that they can establish jurisdiction. It is possible, therefore, that framing atrocious abuse as a combination of garden variety torts, while unsatisfying, may be necessary in order to ensure that the victims have the right access to remedy and justice.¹¹⁹⁹

It is therefore, argued in this research that tort litigation can create certainty, independence, and impartiality, no presumption against extraterritorially jurisdiction, and human rights law, health and safety, and environmental protection. Thus, *Kiobel*, corporate liability and territorial nexus are two unsettled areas in ATCA litigation, whereas corporate liability is unquestioningly accepted under the Brussels Regulation.¹²⁰⁰ In addition, following the minority judgment in *Kiobel*, it is unclear whether ATCA plaintiffs will also need to prove exhaustion of local remedies, or be precluded from attaining jurisdiction on the basis of *forum non conveniens* or international comity. The minority was not clear in identifying the other avenues that plaintiffs could pursue. In general, therefore, it seems that the ATCA is a unique jurisdictional statute for private claims that assesses liability in accordance with international law, however, the lack of guidance is disconcerting. The requirement that a claimant exhaust local remedies, especially when their home state has a corrupt judiciary, will impose additional

¹¹⁹⁷ *Lubbe v Cape Plc* [2000] 1 WLR 1545 (HL).

¹¹⁹⁸ William S Dodge, ‘Alien Tort Litigation: The Road Not Taken’ (2014).

¹¹⁹⁹ Beth Stephens, ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002).

¹²⁰⁰ Brussels I Regulation. Recital 2; Case C-75/63 *Mrs MKH Hoekstra (Née Unger) v Bestur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR I-01519.

“Moreover, European Union courts have no issue with adjudicating claims that have no substantive connection with its Member States beyond what is required by the Brussels Regulation. The introduction of the requirement that claims touch and concern the territory of the United States in ATCA litigation has brought greater uncertainty to litigants, particularly because of the enormous discretion it gives lower courts, which face the task of applying the Supreme Court’s substantive test.’ The minority in *Kiobel* held that “mere corporate presence” would not provide a sufficient connection to the United States for the minority to find jurisdiction under the ATCA. But jurisdiction will be found under the Brussels Regulation if a corporation has its statutory seat, centre of administration or principal place of business in a Member State.

costs for the claimant, who is already likely to be of limited means.¹²⁰¹ There is also no guarantee that their claim will, in fact, be heard under the ATCA. On the other hand, Member State courts do not have such requirements and cannot stay proceedings in favour of any other court on the grounds of *forum non conveniens*. It is argued here that these features undoubtedly bring certainly a crucial obstacle for human rights plaintiffs.

This observation may support the hypothesis that foreign legislatures may try to thwart plaintiffs' access to justice by enacting laws prohibiting litigation of certain claims.¹²⁰² Another source of uncertainty is that the ability to sue parties related to a foreign government's human rights abuse is far from certain under the ATCA given the Supreme Court's foreign policy concerns.¹²⁰³ This discrepancy could be attributed to the fact that, when human rights abuse originates from a foreign government, national courts may be over caution when ruling on the question of jurisdiction and dismiss a case entirely, even where corporate bodies played a role in the human rights abuse.¹²⁰⁴ The possible interference of national government in ATCA claims cannot be ruled out here. Thus, to the further disappointment of corporate human rights abuse plaintiffs, it is not even clear whether they can sue corporations, especially where they have no or only a nominal connection to the United States. The inability to invoke the ATCA following state sanctioned human rights abuse severely compromises its utility for human rights abuses and environmental damage victims in the host country, seeking an impartial forum for their case. Furthermore, the U.S. federal courts, are constrained by foreign policy

¹²⁰¹ Micaela L Neal, 'The Niger Delta and Human Rights Lawsuits: A Search for The Optimal Legal Regime' (2011) 24 *Pacific McGeorge Global Business & Development Law Journal* LJ 343.

¹²⁰² Angela Walker, 'The Hidden Flaw in Kiobel, Under The Alien Tort Statute The Mens Rea Standard for Corporate Aiding and Abetting is Knowledge' (2011) 10 *Northwestern University Journal of International Human Rights* 119 and Micaela L Neal, 'The Niger Delta and Human Rights Lawsuits: A Search for The Optimal Legal Regime' (2011) 24 *Pacific McGeorge Global Business & Development Law Journal* 343.

'In 1993, the Nigerian military government actually enacted decrees eliminating national court jurisdiction over oil-spill related violations, and any adequate domestic remedy along with it.'

¹²⁰³ Beth Stephens, 'The Curious History of The Alien Tort Statute' (2014) 89 *Notre Dame Law Review* and David Cole, Jules Lobel and Harold Hongju Koh, 'Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in *Trajano v Marcos*' (1988) 12 *Hastings International & Comparative Law Review*, *Trajano v Marcos*, 978 F 2d 493.

After former Philippine President Ferdinand Marcos and his daughter, Imee Marcos-Manotoc, fled to Hawaii in 1986, they were sued in federal court by Agapita Trajano, a citizen of the Philippines who then lived in Hawaii, for the torture and wrongful death of Trajano's son, Archimedes, in the Philippines on August 31, and 1977.1 Marcos-Manotoc did. Sison, Hilao, and Trajano came before Judge Fong in the district of Hawaii. In each case, Marcos moved for dismissal on a variety of grounds pursuant to Fed.R.Civ.P. 12(b) (6). The district court reviewed the possible jurisdictional bases for hearing the case, noting in particular that it assumed that the Ninth Circuit would follow the holding of the Second Circuit that the federal courts have jurisdiction over a case alleging torture under the alien tort statute, 28 USC. Sec. 1350. See *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir.1980).

¹²⁰⁴ Danielle Olson, 'Corporate Complicity In Human Rights Violations Under International Criminal Law' (2015) 1 (1) *International Human Rights Law Journal* 5.

considerations when determining the question of jurisdiction.¹²⁰⁵ Nonetheless, the problematic substantive law is not an issue in ATCA claims because ATCA jurisprudence has determined that the applicable substantive law is customary international law and this is common to all countries. This combination of findings provides some support for the conceptual premise that the ATCA by far is the only mechanism that have the potential of providing remedies for corporate human rights abuses, but, however, fall short.

4.8. The Alien Tort Claims Act (ATCA) of 1789

Enacted in 1789, the ATCA provides that “the district courts shall have original jurisdiction of any civil action by an alien for Tort only, committed in violation of the law of nations or a treaty of the United State”.¹²⁰⁶ Therefore, ATCA provides the U.S. Federal court with subject matter jurisdiction providing the three basic requirements are met: (1) “the claimant must be an alien; (2) that the defendant is liable for the tort; and (3) that the tort violates the law of nations or a treaty to which the U.S. is party”.¹²⁰⁷ However, ATCA remained ambiguous because the statute has failed to provide clarity on the scope of the law, and the courts have failed to provide consistent direction for parties to follow.¹²⁰⁸ Similarly, in *Sosa v Alvarez-Machain*, the Supreme Court held that a detention of a foreign national, who was transferred to the custody of law enforcement officials in less than one day, did not clearly violate any norms of customary international law; therefore, the plaintiff failed to establish a cause of action under the ATCA.¹²⁰⁹ However, on appeal, a three-judge panel of the Ninth

¹²⁰⁵ Louis Henkin, ‘The Foreign Affairs Power of the Federal Courts: “Sabbatino”’ (1964) 64 (5) *Columbia Law Review* 805, 832.

¹²⁰⁶ 28 USC. § 1350; ATS.

¹²⁰⁷ Jeffrey M Blum and Ralph G. Steinhardt, ‘Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after *Filartiga v. Pena-Irala*’ (1981) 22 (5) *Harvard International Law Journal* 3.

¹²⁰⁸ *Emily M Nellermore, ‘Balintulo v Daimler AG, 727 F. 3d 174 (2013): Second Circuit Closes the Door for Victims of International Rights Violations’* (2014) 11 *South Carolina Journal of International Law and Business* 131 and *Balintulo v Daimler AG*, US Dist. Lexis 17474 (2d Cir. Aug. 21, 2013).

The plaintiffs seek damages for violations of customary international law committed by the South African government, allegedly aided and abetted by the South African subsidiary companies of the named corporate defendants-Daimler, Ford, and IBM. In short, the plaintiffs claim that these subsidiary companies sold cars and computers to the South African government, thus making the defendants, their parent companies, liable for the apartheid regime's innumerable race-based deprivations and injustices, including rape, torture, and extrajudicial killings.

¹²⁰⁹ *Sosa v Alvarez-Machain*, 542 US 692, 738 (2004). The facts and procedural history are detailed in the first of the two *Alvarez-Machain* Supreme Court decisions, *United States v Alvarez-Machain*, 504 US 655, 657–59 (1992), and summarised in the recent opinion, *Sosa v Alvarez-Machain*, 542 US 692, 697–98 (2004). A US Drug Enforcement Agency (DEA) special agent was kidnapped and murdered by a Mexican drug cartel in 1985. After an investigation, the DEA concluded that Humberto Alvarez-Machain had participated in the murder. A warrant for his arrest was issued by a federal district court. The DEA, however, was unable to convince Mexico to extradite Alvarez-Machain, so they hired several Mexican nationals to capture him and bring him back to the United States. His subsequent trial went all the way

Circuit affirmed the ATCA judgment against *Sosa* but reinstated the claim against the US government. Taking the views above together indicates the lack of consistency in the application of the ATCA. Preceding the *Sosa* case, some commentators read the ATCA as a jurisdictional grant and nothing more.¹²¹⁰ A possible suggestion, a federal claim under the ATCA must identify the source of a private right to sue to make out a cause of action, which is very difficult in practice because the act lacks clarity and consistency. This is partly because there is no uniform guideline of the text or case law that set out corporate accountability under the ATCA.¹²¹¹ *Filartiga* the District Court held that the ATCA merely provides federal jurisdiction over international law claims.¹²¹² The court articulated that the ATCA does not grant new rights to aliens, but simply allows adjudication of the rights already recognised by international law.¹²¹³ This approach assumes international law can independently support a cause of action in federal court.¹²¹⁴ An alternative approach located a new cause of action within the statute itself.¹²¹⁵ The Supreme Court in *Sosa* focused closely on the words of the statute as well as the intent behind the law.¹²¹⁶ The Court ultimately held that the ATCA does not create a statutory cause of action and merely grants subject matter jurisdiction.¹²¹⁷ Furthermore, the Court instructed district courts to exercise caution when deciding to hear claims allegedly based on the present day law of nations under the ATCA.¹²¹⁸ The Court required that any claim based on present day law of nations must also rest on a norm of international character accepted by the civilised world and defined with specificity comparable to the features of the eighteenth-century paradigms.¹²¹⁹ Moreover, in light of the *Kiobel* case, the Supreme Court conclude with the contrary.¹²²⁰

to the Supreme Court, which found that the government could try a person who had been forcibly abducted, but that the abduction itself might violate international and provide grounds for a civil suit. When the case went back to the district court for trial, Alvarez-Machain was found not guilty for lack of evidence.

¹²¹⁰ Beth Stephens, '*Sosa v Alvarez-Machain*-The Door Is Still Ajar for Human Rights Litigation in US Courts' (2004) 70 5 *Brooklyn Law Review* 33.

¹²¹¹ Hannah R Bornstein, 'The Alien Tort Claims Act in 2007: Resolving The Delicate Balance between Judicial and Legislative Authority' (2007) 82 *Indiana Law Journal* 1077.

¹²¹² *Filártiga v Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹²¹³ *Ibid.*

¹²¹⁴ *Ibid.*

¹²¹⁵ *Ibid.*

¹²¹⁶ *Ibid.*

¹²¹⁷ *Sosa v Alvarez-Machain*, 542 US 692, 712 (2004).

¹²¹⁸ *Ibid.*

¹²¹⁹ *Ibid.*

¹²²⁰ The US Supreme Court dismissed the *Kiobel* case against Shell in Nigeria. The *Kiobel* case was filed by Esther *Kiobel*, the wife of a former activist, and alleges that Shell collaborated with the Abacha regime to violently suppress oil reform activities in the 1990's. The case brings claims for extrajudicial killing, torture, crimes against humanity, and prolonged arbitrary arrest and detention. The ruling effectively blocks other lawsuits against foreign multinationals for human rights abuse that have occurred overseas

Moreover, under the *Sosa* case, the District Courts must determine issues of international law.¹²²¹ This, inevitably, will require District Courts to use their own judgment regarding whether it is good policy to make a cause of action available to victims of corporate human rights violation, who bring their claim to U.S. Federal court.¹²²² Therefore, it is vital when deciding whether a court should have jurisdiction under the international norm clause of the ATCA, in absence of any treaty, or of any controlling executive or legislative act or judicial decision, a court must resort to the customs and usages of civilised nations, however, this has not been the case in *Kiobel*.¹²²³ The evidence from this study suggests that for the ATCA to meet the requirement of present international law and human rights law, the court must survey works of jurists and commentators for actual application of substantive law. The court, therefore, must consider whether the claims “identify a specific, universal and obligatory norm of international law”, however, not a link with the U.S.¹²²⁴ The following conclusions can be drawn from here: in order to trigger an effective ATCA jurisdiction, “civilised nations”¹²²⁵ must generally accept a clearly and unambiguously defined international norm.¹²²⁶ Therefore, it is possible that the global application of the ATCA requires a careful thought for several reasons. First, the eighteenth century understanding of both federal common law and the role of federal courts have to change in order for the ATCA to meet the current dynamics of globalisation. Second, federal courts must avoid recognising new causes of action where Congress has not provided clear guidance. The third, the Constitution delegates foreign affairs to the political branches and these cases often stray into this realm, this must change and the

from being brought in US courts. *Kiobel v. Royal Dutch Petroleum Co. (Shell)* was brought under the Alien Tort Statute (ATS), a US law dating back to 1789, originally designed to combat piracy on the high seas that has been used during the last 30 years as a vehicle to bring international law violations cases to US federal courts.

¹²²¹ *Sosa v Alvarez-Machain* (n 1210).

¹²²² *Ibid.*

¹²²³ David P Stewart and Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute* (2013) 107 (3) *American Journal of International Law* 601, 621.

¹²²⁴ Emily M Nellermore (n 938).

¹²²⁵ Rudolf B Schlesinger, ‘Research on The General Principles of Law Recognized by Civilized Nations’ (1957) 51 (4) *American Journal of International Law* 734, 753. Article 38(1) (c) of the Statute of the ICJ (UN 1945) refers to the general principles of law recognised by civilised nations, not general principles of international law. However, there is reserve about inferring international law from municipal law especially if “Civilised Nations” was intended to mean western nations. A reason for the inclusion of this source of international law is to assist in making decisions where there are gaps in the law. This may allow an international court to avoid declaring the matter is legally unclear, *non liquet*, and thus decline to resolve the dispute in question. Some basic principles of law commonly cited include: The principle of good faith, which is being faithful to a sense of obligation; the bar against a party raising a claim again after it has been settled by judicial decision (*res judicata*); and the bar that precludes taking a position which is contrary to a position already established either by previous admission or action and legally determined as being true (*estoppel*).

¹²²⁶ *Ibid.*

last, Congress does not broadly support the idea that private rights of action provide the appropriate enforcement mechanism for international law norms, this also must change. Consistent with this analysis, lower courts addressing the choice-of-law question have generally held that ATCA claims involve federal common law, this observation have also contributed to the uncertainty and the lack of clarity surrounding the ATCA.¹²²⁷

The ATCA jurisdiction in U.S. federal courts remains unchanged till the revolutionary case of *Filártiga v Peña-Irala* (1980).¹²²⁸ In this case, the family of a Paraguayan man who had been tortured to death brought a civil action against the alleged perpetrators whilst his body was physically present in the U.S. The U.S Second Circuit Court of Appeals held that ATCA provided it with subject matter jurisdiction over the case. Ever since *Filártiga*, claimants have brought numerous civil lawsuit cases against perpetrators of human rights abuses committed on foreign soil through ATCA. Likewise, many claims have been brought against very high-ranking former and current foreign government officials, including presidents, ministers, and current MNCs.¹²²⁹

The Federal court has also entered judgment against, among another person, Bosnian Serb President *Radovan Karadzic*,¹²³⁰ *Armando Fernandez-Larios*,¹²³¹ a member of the Chilean army death squad known as the “Cavaran of Dearth,”¹²³² and Lui Qi, the former mayor

¹²²⁷ *Sosa v Alvarez-Machain* (n 1177).

¹²²⁸ Gabriel M Wilner, ‘*Filartiga v. Pena-Irala*: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights’ (1981) 11 *Georgia Journal of International & Comparative Law* 317.

¹²²⁹ Natalie L Bridgeman, ‘Human Rights Litigation under The ATCA as a Proxy for Environmental Claims’ (2003) 6 *Yale Human Rights & Development Law Journal* 1.

¹²³⁰ Sean D Murphy, ‘Award of Damages Against Bosnian Serb Leader Radovan Karadzic’ (2001) 95 (1) *American Journal of International Law* 143.

¹²³¹ Francisco Rivera, ‘Inter-American Justice: Now Available in a US Federal Court Near You’ (2004) 45 *Santa Clara Law Review* 889.

¹²³² Patricia Verdugo, Marcelo Montecino, and Paul E, Sigmund. *Chile, Pinochet, and the Caravan of Death*. (North-South Center Press 2001).

Following the 1973 military coup by General Augusto Pinochet in Chile, a military death squad known as the Caravan of Death travelled city to city, dragging political prisoners from jail and executing them. Two decades later, CJA and the family of one of the victims brought a civil suit against former Caravan member Armando Fernández Larios. When a Miami jury found Fernández Larios liable for torture, crimes against humanity, and extrajudicial killing it was the first time a Pinochet-era perpetrator had been tried in the United States.

However, a Chilean amnesty law barred prosecution in Chile, and US criminal law did not permit prosecution for either extrajudicial killings or torture committed abroad before 1994.

In 1999, CJA filed a civil suit against Fernández Larios, the Cabello family’s only legal remedy for justice. In 2003, a Miami jury found Fernández Larios liable for torture, crimes against humanity, and extrajudicial killing and awarded \$4 million in damages to the Cabello family. The Cabello family’s victory was a powerful vindication for the survivors of Pinochet’s regime.

of Beijing.¹²³³ The US Supreme Court offered its first substantive opinion on the ATCA in *Sosa v Alvarez-Machain*, in 2004.¹²³⁴ One source of weakness with ATCA is the meaning of the term violations of the law of nations, and what constitutes an actionable violation of that law. This was never clarified or explained in all the cases discussed above. In *Filártiga*, the court held that this phrase refers to “international law not as it was in 1789, but as it has evolved and exists among the nations of the world today,”¹²³⁵ thus the court found that torture qualified because its prohibition was universally recognised, clear, and unambiguous.¹²³⁶

Furthermore, latter courts adopted this standard and added extrajudicial killing, crimes against humanity, genocide, disappearance, unpaid forced labour, and prolonged arbitrary detention.¹²³⁷ This is an indication that the ATCA does not confine itself to any universal principle of international law. Following a vigorous examination of congressional intent in 1789, the Supreme Court in *Sosa* categorised what had formerly been agreed in a court argument that the phrase violations of the law of nations is indeed related to international law. It was found that Federal common law gives a cause of action (or right to bring a claim) for violation of international law and human rights law, and ATCA gives the federal courts jurisdiction to hear such cases.¹²³⁸ In addition, *Sosa* established a new condition for accountability for human rights violations, the violation must be accepted by the civilised world and must be comparable to three eighteenth-century cases of abuse Congress had in mind when it enacted ATCA: (1) “abuse of safe behaviour; (2) breach of ambassador rights; and (3) piracy”.¹²³⁹ However, the court did not explain a list of modern norms that met these conditions, leaving this assignment to the lower courts on a case-by-case basis but advising them to exercise control.¹²⁴⁰ Nonetheless, the analysis here shows that U.S. foreign affairs hold supremacy over the application of the ATCA.¹²⁴¹ The lower courts were able to interpret the

¹²³³ Beth Stephens, Michael Ratner, Judith Chomsky, Jennifer Green and Paul Hoffman, *International Human Rights Litigation in US Courts* (Irvington-on-Hudson New York: Transnational Publishers 1996).

¹²³⁴ Beth Stephens, ‘*Sosa v. Alvarez-Machain*-The Door Is Still Ajar for Human Rights Litigation in US Courts’ (2004) 70. *Brooklyn Law Review* 533.

¹²³⁵ 630 F.2d at 878,881, 884.

¹²³⁶ Ralph G Steinhardt, ‘Fulfilling The Promise of *Filartiga*: Litigating Human Rights Claims Against The Estate of Ferdinand Marcos’ (1995) 20 *Yale Journal of International Law* 65.

¹²³⁷ Armin Rosencranz and David Louk, ‘*Doe v. Unocal*: Holding Corporations Liable for Human Rights Abuses on Their Watch’ (2005) *Chapman Law Review* 135, *Doe I v Unocal Corp.*, 395 F.3d 932, (9th Cir.2002), *Kadic v Karadzic.*, 70 F.3d 232 (2d Cir.1992), *Haliwo v Marcos*, 25 F.3 1467 (9th Cir. 1994), *Trajano v Marcos*, 978 F.2d. (9th Cir. 1992).

¹²³⁸ 542 U.S at 724-25.

¹²³⁹ 542. US at 725d.

¹²⁴⁰ *Ibid*, also see *South Africa Apartheid.*, 346 F. Supp. 2d 538, 547 (S.D.Y.2004).

¹²⁴¹ Harlan Grant Cohen, ‘Supremacy and Diplomacy: The International Law of The US Supreme Court’ (2006) 24 *Berkeley Journal of International Law* 273

new standards to be consistent with the outcome of the case in *Filártiga* and applied it before *Sosa*.¹²⁴²

Likewise, the lower courts have reconfirmed a number of human rights abuses that are actionable under ATCA, such as “torture; cruel, inhuman, or degrading treatment; extrajudicial killing; a crime against humanity; genocide; and prolonged arbitrary detention”.¹²⁴³ Therefore a future lawsuit under ATCA is likely to develop this list created by the lower courts, even though *Sosa* clearly indicates that the list should remain short.¹²⁴⁴ The results of this study indicate that ATCA allows victims of egregious human rights abuses committed abroad to sue those responsible in U.S. federal courts.¹²⁴⁵ Thus, ATCA allow victims of human rights violation to bring forward lawsuits, which may be brought for serious violations of international law such as terrorism, state-sponsored torture and extrajudicial killings, war crimes, crimes against humanity, and genocide.¹²⁴⁶ Taken together, this suggests that when the ATCA was drafted in the eighteenth century, international law dealt primarily with regulating diplomatic relations between states and outlawing crimes such as piracy. However, international law in the twenty-first century has expanded to include the protection of human rights.¹²⁴⁷ In the 60 years from the signing of the Universal Declaration of Human Rights in 1948 to the present decade, universal human rights have moved from being an aspirational concept to a legal reality.¹²⁴⁸

This extraordinary evolution gave the ATCA renewed significance in the late twentieth century to allow victims of human rights abuse to bring forward cases in the US court. Today, the ATCA gives survivors of egregious human rights abuses, wherever committed, the right to sue the perpetrators in the United States, while other jurisdiction do not allow the victims to exercise their legal rights when their human rights is violated.¹²⁴⁹ The ATCA can be seen as promoting US goals of protecting human rights and denying safe haven to human rights

¹²⁴² *Sare v Rio*, PLC, 487 F. 3d 1193, 1201-02 (9th Cir. 2007).

¹²⁴³ *Calbello v Armando Fernandez-Larios*, 402 F. 3d 1148 (11th Cir.2005), *Almog v Arab Ban*, :PLC 471 F. Supp. 2d 257 (E.D.N.Y. 2007), *Doe v Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal 2004), *Doe v Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D.N.Y. Cal. 2004), also see, *Aldana v Del Mont Fresh Produce, N.A., Inc.*, 416 F. 3d 1242 (11th Cir. 2005) (Cruel, inhuman, or degrading treatment claims not actionable)

¹²⁴⁴ *Sosa v Alvarez-Machain*, 542 US 692 (2004).

¹²⁴⁵ William S Dodge, ‘The Historical Origins of the Alien Tort Statute: A Response to the ‘Originalists’ (1996)

¹²⁴⁶ Kenneth C Randall, ‘Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute’ (1985) 18 *New York University Journal of International Law and Politics* 1

¹²⁴⁷ Thomas H Lee, ‘The Safe-Conduct Theory of the Alien Tort Statute’ (2006) *Columbia Law Review* 830, 908

¹²⁴⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 6 August 2017.

¹²⁴⁹ Curtis A Bradley, ‘The Alien Tort Statute and Article III’ (2001) 42 *Virginia Journal of International Law* 587.

abusers. Thus, it could be said that the modern goal of the ATCA is to protect human rights and this should not be negated by U.S. foreign affairs.¹²⁵⁰ Though, the ATCA may be somehow limited to only abusers found in, or with ties to, the United States. Even so, the ATCA does not provide universal jurisdiction over human rights abusers and the ATCA lawsuits typically apply ordinary rules of civil liability. Therefore, ATCA lawsuits generally cannot be brought against foreign states.¹²⁵¹ However, it can thus be suggested that without the ATCA, similar lawsuits would simply be brought in state courts and could result in confusing and conflicting rules that may not provide effective remedy for victims of human rights violations.¹²⁵² Likewise, ATCA cases that are legally unsound or factually unsupported could be dismissed by the courts.¹²⁵³

The ATCA allows the MNC from most industries to be sued, including *Coca-Cola* (accused of aiding murders by Colombian paramilitary groups),¹²⁵⁴ *ExxonMobil* (accused of aiding human rights abuses by the Indonesian military),¹²⁵⁵ *General Motors* (accused of aiding South Africa's apartheid government),¹²⁵⁶ and *Yahoo* (accused of sharing subscriber data with the Chinese government).¹²⁵⁷ Almost all of these suits have been over “aiding and abetting” abuses by foreign governments, rather than direct offenses. Comparing the effectiveness of the ATCA in corporate human rights violations to countries such as France,¹²⁵⁸ Germany,¹²⁵⁹ and the Netherlands,¹²⁶⁰ it is contested here that the ATCA provide better forum for corporate human rights abuses victims than the judicial system in these states because it allow victims of human rights violation to bring forward lawsuits, which may be brought for serious violations

¹²⁵⁰ Marc Rosen, ‘The Alien Tort Claims Act and The Foreign Sovereign Immunities Act: A Policy Solution’ (1998) 6 *Cardozo Journal of International and Comparative Law* 461.

¹²⁵¹ Julian Ku and John Yoo, ‘Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute’ (2004) *Supreme Court Review* 153, 220.

¹²⁵² Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press USA 2015).

¹²⁵³ Joanna E Arlow, ‘The Utility of ATCA and The Law of Nations in Environmental Torts Litigation: Jota v Texaco, Inc. and Large Scale Environmental Destruction’ (2000) 7 *Wisconsin Environmental Law Journal* 93.

¹²⁵⁴ Terry Collingsworth, ‘Separating Fact from Fiction in The Debate over Application of The Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations’ (2002) 37 *US FL Review* 563.

¹²⁵⁵ Brian C Free, ‘Awaiting Doe v. Exxon Mobil Corp.: Advocating The Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation’ (2003) 12 *Pacific Rim Law & Policy Journal* 467.

¹²⁵⁶ Ariadne K Sacharoff, ‘Multinationals in Host Countries: Can They Be Held Liable under The Alien Tort Claims Act for Human Rights Violations’ (1997) 23 *Brooklyn Journal of International Law* 927.

¹²⁵⁷ Chimène I Keitner, ‘Conceptualizing Complicity in Alien Tort cases’ (2008)

¹²⁵⁸ William Laurence Craig, ‘Application of The Trading with The Enemy Act to Foreign Corporations Owned by Americans: Reflections on *Fruehauf v. Massardy*’ (1970) *Harvard Law Review* 579, 601.

¹²⁵⁹ Eric Engle, ‘Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations’ (2005) 20 *John's Journal of Legal Comment* 287.

¹²⁶⁰ Arthur H Dean, ‘The Role of International Law in a Metropolitan Practice’ (1955) 103 (7) *University of Pennsylvania Law Review* 886, 900.

of international law such as terrorism, state-sponsored torture and extrajudicial killings, war crimes, crimes against humanity, and genocide.¹²⁶¹

According to these research, it can be inferred that international law does not allow courts of one country to exercise jurisdiction in civil cases over offenses in other countries.¹²⁶² For this reason, foreign governments, including many close US allies, have filed more than 20 protests with the State Department and Federal Courts in ATCA suits over the past decade.¹²⁶³ The British, Dutch, and German governments are all strong advocates for human rights, and have filed briefs in the *Kiobel* case, arguing that applying the ATCA to acts that take place in other countries and additionally that have no connection to the United States is a violation of international law.¹²⁶⁴ This has cast a cloud over the current dimension of the ATCA and its application in the international arena.

The current development in the courts suggests that the courts reject many proclaimed international law abuses, including temporary detention, parental abduction, sexual relations with a minor, wartime use of defoliants, and different types of environmental problems.¹²⁶⁵ Could this be that the court thinks that national courts should have an applicable mechanism for these violations? What about in a scenario where the national court is paralysed and has no power to enforce any human obligations in its jurisdiction? It can be suggested that the court's view is too narrow and fails to adequately engage the issues facing most victims of human rights violations. Perhaps the appropriate question for the court should be, is there a particular relationship between the victims and the perpetrators to establish a duty of care? Is there any distinction between the acts of the perpetrators, which give rise to the violations rather than foreign affairs issues? The corporation should be liable for the violations of the former but not those of the latter. Likewise, the violations must be preferable to the relationship between the defendant, the tort, and the victims.

¹²⁶¹ Ronen Shamir, 'Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility' *Crime and Regulation* (Routledge 2017).

¹²⁶² David Wallach, 'The Irrationality of Universal Civil Jurisdiction' (2014) 46 *Georgetown Journal of International Law* 803.

¹²⁶³ Daniel Prince, 'Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Tort Statute' (2011) 8 *Seton Hall Circuit Review* 43.

¹²⁶⁴ John B Bellinger III, 'Why the Supreme Court Should Curb the Alien Tort Statute' (2012) *Washington Post*.

¹²⁶⁵ *Sosa*, 542 US at 734-38, *Vietnam Asus'n for Victims of Agent Organ v Dow Chemical Co.*, 517 F. 3d 104 (2d Cir. 2008), *Taveras v Taveraz*, 477 F. 3d 767 (6th Cir. 2007), *Cisneros v Aragon*, 485 F.3d 1226 (10th Cir. 2007), *Flores v S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

Also, in the American continent, the ability of the Inter-American System of Human Rights to bring justice for victims of corporate-related human rights abuses offers a powerful opportunity for the examination of corporate accountability here. It is critical that civil society organisations, the Inter-American Commission on Human Rights (IACHR), and the Inter-American Court of Human Rights (I/A Court) explore their potential more systematically.¹²⁶⁶ Under the framework set up by the Inter-American System, the regional human rights bodies are not competent to declare non-state actors liable for human rights violations. In the past decade, the IACHR and I/A Court have been increasingly compelled to address human rights violations in which corporations have been involved to some degree. The IACHR in particular has held numerous thematic hearings on the threat of corporate activities on human rights,¹²⁶⁷ issued thematic reports to address the issue,¹²⁶⁸ and granted precautionary measures.¹²⁶⁹ However, a review of the Commission's decisions and the Court's jurisprudence demonstrates that although these bodies have addressed cases involving human rights violations by businesses, they have rarely analysed the role played by either the businesses or their complex interactions with the conduct of states.¹²⁷⁰ Most importantly, they have not used these opportunities to develop specific state duties with regard to corporations acting in their jurisdiction.

The recent judgment of the I/A Court in the case of the *Kaliña and Lokono Peoples v Suriname* illustrates this lack of analysis. The case involved human rights violations against

¹²⁶⁶ Ana María Mondragón, 'Corporate Impunity for Human Rights Violations in the Americas: The Inter-American System of Human Rights as an Opportunity for Victims to Achieve Justice' (2016) *Harvard International Law Journal*

¹²⁶⁷ Claudio Grossman, *Awás Tingni v. Nicaragua: A Landmark Case for the Inter-American System* (College of Law, American University 2000).

¹²⁶⁸ Inter-Am. Comm'n H.R., Indigenous and Tribal Peoples' Rights over their Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09. (Dec. 30, 2009); Inter-Am. Comm'n H.R., Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco, OEA/Ser.L/V/II. Doc. 58. (Dec. 24, 2009).

¹²⁶⁹ For example, when corporate activities affect the right to health of communities, indigenous sacred zones, or the right to prior consultation of indigenous peoples while implementing large-scale projects. *See, e.g.*, San Mateo de Huanchor community and members, Peru, Precautionary Measures, Case 504/03, Inter-Am. Ct. H.R., Report No. 69/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (Aug. 17, 2004); La Oroya Community, Peru, Precautionary Measures, Petition 07/270, Inter-Am. Ct. H.R., Report No. 76/09, OEA/Ser.L/V/II.130, doc. 22, rev. 1 (Aug. 31, 2007); Maya Community – El Rosario – Naranjo, Guatemala, Precautionary Measures, Inter-Am. Ct. H.R. (July 14, 2006); Maya Community Sipakapense y Mam, Guatemala, Precautionary Measures, Petition 1566/07, Inter-Am. Ct. H.R., Report No. 20/14, OEA/Ser.L/V/II.150 Doc. 24 (May 20, 2010); Xingu River Indigenous Communities, Pará, Brasil, Precautionary Measures, Inter-Am. Ct. H.R., PM 382/10 (Apr. 1, 2011).

¹²⁷⁰ A paradigmatic example of this approach can be found in the case of the Santo Domingo Massacre in which neither the IACHR nor the Court addressed the role of Occidental Petroleum Corporation (OXY) in Colombian Air Force bombing of the hamlet of Santo Domingo in the department of Arauca, Colombia. *See Santo Domingo Massacre v. Colombia, Preliminary Objections, Merits and Reparations, Inter-Am. Ct. H.R.,(ser. C) No. 259 (Nov. 30, 2012).*

indigenous peoples resulting from the activities of the mining corporation, BHP Billiton-Suralco. This is the first case in which the Court “takes note” of the Guiding Principles on Business and Human Rights.¹²⁷¹ However, it is disconcerting that there is no evidence in the judgment of any argument brought by the parties asking the Court to further develop business and human rights principles in this case. Accordingly, the recognition on the part of the court shows the need for civil society to more forcefully advocate for a stronger commitment of the regional human rights bodies so that they might engage in the search of comprehensive approaches to cases related to corporate human rights abuses. However, the court still have a role to play in overcoming impunity in these cases and in developing appropriate standards that are consistent with the reality faced by affected communities. Having said that, there are some indications that the developing political climate in the Americas¹²⁷² continent will make progress in this area an unachievable goal.¹²⁷³ In addition, this research found that, the legal systems and institutions of countries in the Americas have proven to be weak in preventing corporate human rights abuses and providing effective remedies to the victims. On the other hand, there are large legal vacuums in the existing international systems of responsibility that impede imposing liability in these cases.¹²⁷⁴

Though, it is possible that the international legal system to defined the specific measures states should take to guarantee the full exercise of human rights in the context of corporate activities¹²⁷⁵ and to prevent arbitrary interferences on the part of businesses in the territories and the rights of communities.¹²⁷⁶ These measures should be defined according to

¹²⁷¹ “[T]he Court takes note of the ‘Guiding Principles on Business and Human Rights,’ endorsed by the Human Rights Council of the United Nations, which establish that businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights effects directly linked to their activities. Hence, as reiterated by these principles, ‘States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.’” *Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 224 (Nov. 25, 2015).

¹²⁷² Friends for Earth, ‘What are Donald Trump's Policies on Climate Change and Other Environmental Issues?’ (2017)

¹²⁷³ Norah Bowman, ‘The Elders Said if We Stop Fishing We Will Die, We Will No Longer Exist’: Hannah Arendt’s Black Holes, Canadian Corporate Mining Impunity, and Indigenous Narrative Resistance’ (2018) 29 *Alternate Routes: A Journal of Critical Social Research*

¹²⁷⁴ James R Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press 2012).

¹²⁷⁵ The Precautionary Principle, the Prevention Principle and the Environmental Assessment Principle, Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; Rio Declaration on Environment and Development U.N. Doc. A/CONF. 151/5 (1992); Ramsar Convention on Wetlands of International Importance, Feb. 2, 1971, 996 U.N.T.S. 245.

¹²⁷⁶ *Compare Pueblo Bello Massacre v. Colombia*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 113 (Jan. 31, 2006) with *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 111 (Sept. 15 2005); *see also* Special Representative of the

specific corporate activities and the rights of each subject of protection.¹²⁷⁷ As such, the fulfillment of state obligations must include specific duties such as i) encouraging business to respect human rights when they operate in conflict areas¹²⁷⁸; ii) denying assistance or access to public services to companies implicated in grave human rights violations; iii) encouraging, and if reasonable, demanding that businesses explain how they will consider the effect of their activities on human rights¹²⁷⁹; and iv) requiring businesses with whom the state is entering into commercial transactions with to follow strict human rights standards. Once these specific obligations are developed in the international legal system, the attribution of international responsibility would come to depend on determining the due diligence of the state in fulfilling these standards.¹²⁸⁰ Moreover, the international legal system and the court have the ability to pressure states to guarantee the right to provide access to justice for victims of corporate human rights abuses at the domestic level by reforming their domestic legislation, creating specific remedies for these victims, or other means.¹²⁸¹

4.9. The Application of International Law and Human Rights Law in TVPA and ATCA Cases

In 1992, the U.S. enacted the Torture Victim Protection Act (TVPA),¹²⁸² which provides authority for a civil action against an individual who, under the rule of law of any

Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 1, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011)

¹²⁷⁷ *Perozo et al. v. Venezuela*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 195, ¶ 298 (Jan. 28, 2009); *see also* *Vargas-Areco v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 73 (Sept. 26, 2006).

¹²⁷⁸ Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011). (including, *inter alia*, collaboration in the determination, prevention and mitigation of risks, alongside the assurance of the efficiency of all valid policies, legal regulations and coercive measures to prevent the implication of businesses in grave human rights violations).

¹²⁷⁹ *Ibid.*

¹²⁸⁰ *Compare Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 123 (Sept. 15, 2005). *with* *González and others ("Campo Algodonero") v. Mexico*, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 280 (Nov. 16, 2009).

¹²⁸¹ Given the strong resistance at the international level to recognize human rights obligations for corporations, this is an indirect avenue that is worth exploring; *see also* Principle 25 of the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*: "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." Special Representative of the Secretary-General, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

¹²⁸² The Torture Victims Protection Act (TVPA) 1991.

The Torture Victims Protection Act (TVPA) provides for the filing of civil suits in the United States against individuals who have committed or aided and abetted acts of torture and / or extrajudicial killing.

foreign state, tortured or summarily executed another person unlawfully.¹²⁸³ The TVPA, is a narrowly tailored law that authorises civil suits against foreign government officials for acts of torture or murder committed in their countries,¹²⁸⁴ but the suits are subject to numerous procedural limitations.¹²⁸⁵ The U.S. Supreme Court limited the scope of the TVPA in a manner that will excuse corporations from liability and effectively terminate claims made against corporations under the act for allegations of aiding and abetting torture and extrajudicial killing committed abroad under the foreign colour of law.¹²⁸⁶ Even this narrow statute is unprecedented in international law and risks reciprocal lawsuits against U.S. officials. Nonetheless, this law was specifically intended by Congress to apply to acts in other countries.¹²⁸⁷ The advocates of the TVPA's application to organisations and corporations primarily argued that the TVPA was enacted to extend the D.C. Circuit's *Tel-Oren v Libya Arab Republic* decision to US citizens.¹²⁸⁸ The Supreme Court should not interpret the ATCA, which

Passed in 1991, the statute was intended to codify private rights of action for torture and extrajudicial killing; enhance the remedy already available under the Alien Tort Statute (ATS) by extending it to US citizens tortured abroad; and to carry out the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the US had ratified the year before.

Although both the TVPA and ATCA may be used to pursue claims for torture and extrajudicial killing, they are distinct statutes with their own limitations. First, unlike the ATCA, claims under the TVPA may only be brought against persons who acted under the actual or apparent authority of a foreign nation. Second, TVPA claimants must exhaust all "adequate and available" remedies in the country where the offense occurred, but it is not settled whether this same requirement applies to ATCA claimants. Third, the US Supreme Court's decision on April 18, 2012 in *Mohamad v Palestinian Authority* excluded corporations from liability under the statute.

¹²⁸³ *Cisneros v Araon*, 485, F. 3d 1226 (10th Cir. 2007), *Flore v S. Peru Copper Corp.*, 343 F. 3d 140 (2d Cir. 2003).

¹²⁸⁴ Jennifer Correale, 'The Torture Victim Protection Act: A Vital Contribution to International Human Rights Enforcement or Just a Nice Gesture' (1994) 6 *Pace International Law Review School of Law* 197.

TVPA limitation – In *Mohamad*, a victim's family sued the Palestinian Liberation Authority (PLO) for imprisoning, torturing, and killing their relative, a US citizen, while he was in the West Bank. The Supreme Court determined that the TVPA's use of the word "individual" refers only to "natural persons" and does not include organisations or corporations of any kind.

Conversely, while the ATCA is not limited to individuals and continues to be used against corporations, the US Supreme Court's decision on April 17, 2013 in *Kiobel v Royal Dutch Petroleum Co.* imposed a new requirement that ATCA claims touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application of US law. No such requirement applies to the TVPA, so plaintiffs may continue to bring TVPA claims against foreign defendants for torts committed outside the United States.

¹²⁸⁵ Robert F Drinan and Teresa T Kuo, 'Putting The World's Oppressors on Trial: The Torture Victim Protection Act' (1993) 15 (3) *Human Rights Quarterly* 605, 624.

¹²⁸⁶ *Mohamad v Palestinian Authority* 566 US (2012).

¹²⁸⁷ Christopher W Haffke, 'The Torture Victim Protection Act: More Symbol Than Substance' (1994) 43 *Emory Law Journal* 1467.

¹²⁸⁸ *Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774 – 1984.

The Judges agreed on dismissal of the action. Their reasons for this were diverse and can be summarised as follows: Judge Edwards limited his analysis to allegations made against the PLO. Allegations against the PIO and the NAAA were considered to be too insubstantial. Jurisdiction over Libya was barred by the Foreign Sovereign Immunities Act (p.3). He disagreed with Judge Bork that section 1350 requires plaintiffs to allege a right to sue granted by the law of nations (p. 5). While accepting that the law of

was enacted for a different purpose, to allow U.S. courts to sit in judgment over acts that take place in foreign countries, without a clear congressional mandate. Thus, TVPA lays down four conditions; (1) “the defendant must have committed torture or extrajudicial killings; (2) the defendant must act under actual or apparent authority, or under the law of the foreign state; (3) the claimant is a victim, his or her legal representative, or a person who may be a claimant in a wrongful death action; and (4) the claimant must exhaust all available legal procedures and remedies at the national court where the violation giving rise to the lawsuit took place”.¹²⁸⁹

Congress did not intend the TVPA to be jurisdictional in nature, but rather creates a substantive cause of action. Similarly, the TVPA defines its cause of action with further details. Section 3 contains an in depth definition of extrajudicial killing and torture.¹²⁹⁰ The TVPA also contains an exhaustion of remedies provision, requiring that the claimant exhausts all “adequate and available remedies in the place in which the conduct giving rise to the claim occurred”.¹²⁹¹ Also, House of Representative Report explains the need for this requirement, which “ensures that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred”.¹²⁹² This also “avoids[s] exposing U.S. courts to

nations prohibits torture, Edwards rejected that this law imposes the same responsibility/liability on non-state actors, such as the PLO (pp. 3 and 16).

Judge Bork thus denied existence of a right to sue and stated that this right should not be inferred, thereby guided by the separation of power principles, which caution courts to avoid potential interference with the political branches’ conduct of foreign relations (p. 28).

Judge Robb considered federal courts unable to deal with this case due to the political question doctrine (p. 54). He considered matters regarding the international status of terrorist acts and sensitive matters of diplomacy to be within the exclusive domain of the executive and legislative branches (pp. 54-58).

¹²⁸⁹ Jessica Grunberg, ‘The Torture Victim Protection Act: A Means to Corporate Liability for Aiding and Abetting Torture’ (2011) 61 *Catholic University Law Review* 235.

¹²⁹⁰ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 USC. § 1350 (1994)) [hereinafter TVPA].

¹²⁹¹ *Ibid.*

¹²⁹² John W Brooker, ‘Ford v. Garcia: A Puzzling Fusion of the Command Responsibility Doctrine with the Torture Victim Protection Act’ (2002) 28 *North Carolina Journal of International Law and Commercial Regulation* 701 and House Representative 2092, 102nd Congress (1991-1992).

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from and individual who engages in torture or extrajudicial killing. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

Section 1. Short Title.

This Act may be cited as the ‘Torture Victim Protection Act of 1991

SEC. 2. Establishment of civil action

(a) LIABILITY- An individual who, under actual or apparent authority, or colour of law, of any foreign nation. (1) Subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedy

A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations

unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries”.¹²⁹³ Furthermore, the TVPA subjects claims to a ten year statute of limitations so that the courts “will not have to hear stale claims”.¹²⁹⁴ In this regard, in terms of form, the TVPA and the ATCA differ greatly.¹²⁹⁵ Although the ATCA is short and unclear in nature, the TVPA provides more guidance on human rights accountability. While the ATCA does not provide definitions for what constitutes a “law of nations” or a “tort committed in violation” of that law, the TVPA contains a detailed definition of extrajudicial killing and torture as discussed above. Thus, in contrast, the TVPA have a statute of limitation, while the ATCA does not contain an express exhaustion of remedies requirement or a statute of limitations provision.¹²⁹⁶ The table below¹²⁹⁷ explains the main differences between the two statutes.

As indicated in the table above, unlike the ATCA legislative history, which is largely unknown,¹²⁹⁸ the TVPA have an extensive record of codification. Specifically, the House and Senate Reports list three main purposes for the TVPA.¹²⁹⁹ Unfortunately, the House and Senate Reports do not expressly clarify the relationship between the TVPA and the ATCA.

No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. Definition

Extrajudicial Killing

For the purposes of this Act, the term ‘extrajudicial killing’ means a deliberated killing not authorised by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

Torture

¹²⁹³ *Ibid.*

¹²⁹⁴ TVPA § 2(c).

¹²⁹⁵ Philip Mariani, ‘Assessing the Proper Relationship between the Alien Tort Statute and the Torture Victim Protection Act’ (2008) 156 (5) *University of Pennsylvania Law Review* 1383, 1438.

¹²⁹⁶ Eric Engle, ‘The Alien Tort Statute and the Torture Victims’ Protection Act: Jurisdictional Foundations and Procedural Obstacles’ (2006) 14 *Willamette Journal of International Law and Dispute Resolution* 1.

¹²⁹⁷ Appendix.

¹²⁹⁸ The Supreme Court stated that there is “poverty of drafting history” of the ATS which makes it “fair to say that a consensus understanding of what Congress intended has proven elusive”. *Sosa v Alvarez-Machain*, 542 US 692, 718-19 (2004).

¹²⁹⁹ House of Representatives Report No. 102-367, at 4. II and Senate Report No. 102-249, at 3(1991).

First, the House Report clarifies that the need for the TVPA lies in providing a clear grant by Congress for a private right of action for torture, whose availability under the ATCA Judge Bork questioned in *Tel-Oren v Libyan Arab Republic*. Judge Bork reasoned that the principle of separation of powers required a clear grant by Congress if courts were to consider cases that might affect US foreign policies. The TVPA provides such a grant. Second, the TVPA provides a remedy not only for aliens but also for US citizens who may have been tortured abroad. Its purpose is to “enhance the remedy already available under [the ATCA] [by] extend[ing] a civil remedy also to US citizens who may have been tortured abroad. Third, the Senate Report states that the purpose of the TVPA consists in carry[ing] out the intent of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”. The US ratified this Convention in 1990.

Incidentally, however, the legislative history provides some guidance as to the interaction between the ATCA and the TVPA. Thus, the fact that the TVPA was codified as a note to the ATCA implies that they are intended to interact closely. The legislative history states that the ATCA “has other important uses and should not be replaced”.¹³⁰⁰ This observation may support the hypothesis that both the Senate Report and the House Report state that ATCA “claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350”. Accordingly, the statute should remain intact.¹³⁰¹

These results provide further support for the hypothesis that courts in different circuits diverge in their reading of the legislative history some courts have cited it in support of the suggestion that the TVPA and the ATCA provide two separate claims for torture and extrajudicial killing while other courts have interpreted it as weakening this proposition.¹³⁰² The minority view holds that claims for torture and extrajudicial killing must be brought exclusively under the TVPA. The Seventh Circuit endorsed this view, in *Enahoro v Abubakar*, the Seventh Circuit held that all torture and extrajudicial killing claims should be brought under the TVPA¹³⁰³ and plaintiffs must comply with all requirements of this statute. Thus, it found that the two statutes do not provide “two bases for relief against torture and extrajudicial killing”.¹³⁰⁴ In *Enahoro*, plaintiffs brought a suit against a general of the military junta in Nigeria for atrocities committed from 1993 to 1999.¹³⁰⁵ Plaintiffs only brought claims under the ATCA and did not make a simultaneous claim under the TVPA.¹³⁰⁶ The district court, following precedents from other circuits, held that plaintiffs did not need to plead their case under the TVPA, suggesting that the two statutes offer two separate bases for remedy.¹³⁰⁷ Nonetheless, the Seventh Circuit disagreed with this proposition and overturned the decision of the district court. The U.S. Seventh Circuit declared that unless the TVPA “occup[ied] the field” for torture claims, it would be “meaningless”.¹³⁰⁸ The court further stated that “[n]o one would plead a cause of action under the Act and subject himself to its requirements if he could simply plead under international law”.¹³⁰⁹ The court discussed the limitations the TVPA

¹³⁰⁰ *Ibid.*

¹³⁰¹ Senate Report. No. 102-249, at 5.

¹³⁰² *Enahoro v Abubakar*, 408 F.3d 877, 884 (7th Cir. 2005).

¹³⁰³ *Ibid.*

¹³⁰⁴ *Ibid.*

¹³⁰⁵ Philip C Aka, ‘Nigeria Since May 1999: Understanding The Paradox of Civil Rule and Human Rights Violations under President Olusegun Obasanjo’ (2003) 4 *San Diego International Law Journal* 209.

¹³⁰⁶ *Ibid.*

¹³⁰⁷ *Ibid.*

¹³⁰⁸ *Ibid* at 884, 85.

¹³⁰⁹ *Ibid.*

imposes in requiring exhausting the remedies in the jurisdiction where the conduct occurred and bringing the claim within ten years. The court also found support for its interpretation of the relationship between the ATCA and the TVPA in the legislative history of the TVPA and in *Sosa v Alvarez-Machain*.

The U.S. Seventh Circuit interpreted the House and Senate Reports stating that the ATCA should “remain intact” to mean that “the enactment of the Torture Victim Protection Act did not signal that torture and killing are the only claims which can be brought under the Alien Tort Statute”.¹³¹⁰ Other claims can still be brought under the ATCA. The majority also interpreted *Sosa* as confirming the preclusive effect of the TVPA.¹³¹¹ The court argued that since the U.S. Supreme Court directed courts to exercise “great caution” and require “vigilant door keeping” in finding what claims are allowed under the ATCA and since the court also stated that “a clear mandate” for suits for torture and extrajudicial killing exists under the TVPA,¹³¹² the *Sosa* Court would not approve of utilising the ATCA for torture claims.¹³¹³

The U.S. Seventh Circuit then remanded the case to the district court because plaintiffs had to plead under the TVPA.¹³¹⁴ There are two main advantages to the U.S. Seventh Circuit interpretation of the relationship between the ATCA and the TVPA. First, this interpretation clarifies the relationship between the two statutes in a very straightforward way.¹³¹⁵ By submitting that the TVPA “occup[ies] the field” of claims for torture and extrajudicial killing, it becomes clear that all restrictions contained in the TVPA, such as the exhaustion of remedies and the statute of limitations, always apply. This simplifies the position taken in other circuits, which allows for claims to be brought under both of the statutes but which reads certain conditions from the TVPA into the ATCA in an ambiguous way.¹³¹⁶ Second, requiring all claims for torture and extrajudicial killing to be submitted under the TVPA ensures consistent treatment of aliens and U.S. citizens.¹³¹⁷ This is because the TVPA applies equally to aliens and U.S. citizens while the ATCA applies only to aliens, non-US citizens can circumvent the requirements under the TVPA by bringing claims under the ATCA. The U.S. Second Circuit

¹³¹⁰ *Ibid* at 885-86.

¹³¹¹ Michael Garvey, ‘Corporate Aiding and Abetting Liability under The Alien Tort Statute: A Legislative Prerogative’ (2009) 29 *BC Third World Law Journal* 381.

¹³¹² (n 1252) at 885-86.

¹³¹³ Eugene Kontorovich, ‘Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute’ (2004) 80 *Notre Dame Law Review* 111.

¹³¹⁴ *Ibid*.

¹³¹⁵ Matt A Vega, ‘Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery under The Alien Tort Statute’ (2009) 31 *Michigan Journal of International Law* 385.

¹³¹⁶ Curtis A Bradley, *International Law in the US Legal System* (Oxford University Press USA 2015).

¹³¹⁷ *Ibid*.

interpretation remedies this problem.¹³¹⁸ In the dissenting opinion, Judge Cudahy disagreed with the majority holding. He argued that the legislative history of the TVPA shows Congress meant to expand the TVPA's reach to U.S. citizens and not restrict the application of the ATCA to foreign citizens, on the grounds that the ATCA applies only to aliens.¹³¹⁹

Consequently, the TVPA is not "meaningless," as the majority asserted. Besides, the plain text of the TVPA did not contain any implicit amendment to the ATCA, and since repeals by implications are disfavoured, the relationship between the TVPA and ATCA should not be interpreted as preclusive.¹³²⁰ In addressing the Seventh Circuit argument that *Sosa* supports the majority holding, Judge Cudahy noted the majority "stands *Sosa* on its head" by using it as a support.¹³²¹ Nothing in *Sosa* suggests the preclusive effect of the TVPA. Thus, Judge Cudahy argued that the two statutes "are meant to be complementary and mutually reinforcing".¹³²² The majority circuit courts in the US have also rejected the view followed by the Seventh Circuit in *Enahoro*. They have ruled that the TVPA and the ATCA can be used simultaneously for claims of torture and extrajudicial killing.¹³²³ More expressly with reference to the torture claims, the Eleventh Circuit has ruled that "a plaintiff may bring distinct claims for torture under each statute".¹³²⁴ The Eleventh Circuit supported this interpretation of the relationship between the two statutes through an analysis of the plain meaning of the statutes, canons of statutory interpretation discouraging repeals by implication, *Sosa*, and the legislative history of the TVPA.¹³²⁵

The Torture Victim Protection Act (TVPA) and the ATCA could be seen to share much in common. They serve similar purposes and the TVPA was enacted as a note to the ATCA.¹³²⁶ In a critical examination, it could be contested that TVPA was intended to codify the judgment from *Filártiga* court's interpretation of ATCA in a clear judicial basis, which gives the foundation for a civil claim against a wrongdoer. TVPA, unlike ATCA, covers only torture and

¹³¹⁸ *Enahoro v Abubakar*, 408 F.3d 877, 886-88 (2005) (Cudahy, J., dissenting in part).

¹³¹⁹ *Ibid.*

¹³²⁰ *Ibid* at 887.

¹³²¹ *Ibid* at 889.

¹³²² *Ibid* at 888.

¹³²³ *Cabello v Femandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).

¹³²⁴ *Aldana v Del Monte Fresh Produce, N.A., Inc*, 416 F.3d 1242, 1249-50 (11th Cir. 2005).

¹³²⁵ *Ibid*, also see, *Sosa v Alvarez-Machain*, 542 US 692, 734 (2004) (citing *Paquete Habana*, 20 S.Ct. 290, 299 (1900)).

¹³²⁶ Ekaterina Apostolova, 'The Relationship between the Alien Tort Statute and the Torture Victim Protection Act' (2010) 28 *Berkeley Journal of International Law* 640.

summary execution but gives aliens and US citizens the foundation to bring a civil action against individuals that violate it.¹³²⁷

The US courts have acknowledged that a defendant need not physically commit a given violation to be held liable under ATCA or TVPA.¹³²⁸ Thus, both statutes can be applied to military and civilian leaders who fail to prevent, or punish, the violation of subordinates under the doctrine of superior or command responsibility.¹³²⁹ The courts have also looked at both international and national military law in deciding the definition of superior responsibility, which is close to that applied in the international crime tribunals.¹³³⁰ The Nuremberg court has also confirmed that a defendant may aid and abet human rights abuses committed by others by giving assistance or moral support¹³³¹ this has proved to be the important notion of accountability in cases against MNC defendants that might be connected with human rights violations by local Governments or paramilitaries. The definition of aiding and abetting¹³³² human rights abuses is drawn from international law, in particular, ICTY jurisprudence, and federal common law.¹³³³ Likewise, the court has also upheld claims that the defendant engaged in a conspiracy with others to commit actionable abuses.¹³³⁴

¹³²⁷ 28 USC. § 1350 (2006). It is unclear whether the TVPA is jurisdiction or merely provides a cause of action that gives rise to federal jurisdiction under the ATCA or federal question on jurisdiction, also see; *Kadic* 70 3d at 246 (adopting later view).

¹³²⁸ Penny M Venetis, 'The Broad Jurisprudential Significance of *Sosa v Alvarez-Machain*: An Honest Assessment of The Role of Federal Judges and Why Customary International Law Can Be More Effective Than Constitutional Law for Redressing Serious Abuses' (2011) 21 *Temple Political and Civil Rights Law Review* 41. *Doe v Exxon Mobil Corp.*, 654 F.3d 11, 39-57 (D.C. Cir. 2011); *Romero v Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Flomo v Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Sarei v Rio Tinto, PLC*, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).

¹³²⁹ Koji Kudo, *Command Responsibility and the Defence of Superior Orders* (Diss. University of Leicester 2007). "Command or superior responsibility" is often misunderstood. First, it is not a form of objective liability whereby a superior could be held criminally responsible for crimes committed by subordinates of the accused regardless of his conduct and regardless of what his knowledge of these crimes. Nor is it a form of complicity whereby the superior is held criminally responsible for some sort of assistance that he has given to the principal perpetrators. Instead, superior responsibility is a form of responsibility for omission to act: a superior may be held criminally responsible under that doctrine where, despite his awareness of the crimes of subordinates, he culpably fails to fulfil his duties to prevent and punish these crimes..

¹³³⁰ *Ford v Garcia*, 289 F.3d 1283, 1283, 1287-94 (11th Cir. 2002), Liu Qi, 349 F. Supp. 2d at 1328-34. (acknowledging that doctrine applies to military and civilian superior)

¹³³¹ Koji Kudo, *Command Responsibility and the Defence of Superior Orders* (Diss University of Leicester 2007).

¹³³² George R Wright, 'Negotiating The Terms of Corporate Human Rights Liability Under Federal Law' (2016).

¹³³³ *Khulumani*, 504 F.3d 260, 270-82 (kkkKatzman, J., concurring) (allegations that defendants aided South Africa's Apartheid-era government) *Rio Tinto*, 487 F.3d at 1202-03 (allegations that the defendant aided Papua New Guinea military), *Talisman Energy*, 453F. Supp. 2d at 665-68(allegations that defendant aided Sudan).

¹³³⁴ *Talisman Energy*, 453 F. Supp. 2d at 663-64 (citing *Hamdan v Rumsfeld*, 548 US 557, 609-10, *Cabello*, 402 F. 3d at 1159-60).

4.10. Overview of ATCA in Human Rights cases

The U.S. ATCA 1789 is a classic example of domestic law with extraterritorial jurisdiction that is capable of holding MNCs liable for human rights violations in a foreign country,¹³³⁵ cases such as, *Chiquita Bananas to Face Columbia Torture Claim*,¹³³⁶ *Rio Tinto*¹³³⁷ *Doe v Unocal*,¹³³⁸ and *Jesner v Arab Bank, Plc*¹³³⁹ The Act permits U.S. District Courts to hear civil proceedings of foreign citizens for damages caused by MNCs' business operations "in violations of the law of nations or a treaty of the [United States]".¹³⁴⁰ Nonetheless, it is questionable, whether victims of corporate human rights violation and environmental damages will be in a situation where they are unable to bring a claim for harm under domestic law that they would otherwise be able to under the ATCA. This is because claims under the ATCA must amount to breaches of customary international law that are "specific, universal and obligatory".¹³⁴¹

¹³³⁵ Alien Tort Claim Act 28 USC § 1350.
<https://www.law.cornell.edu/uscode/pdf/uscode28/lii_usc_TI_28_PA_IV_CH_85_SE_1350.pdf>
accessed on 29 June 2015.

¹³³⁶ Douglas M Branson, 'Holding Multinational Corporations Accountable-Achilles' Heels in Alien Tort Claims Act Litigation' (2011) 9 *Santa Clara Journal of International Law* 227. Executives at Chiquita Brands International Inc., the banana label owner that pleaded guilty in 2007 to making payments to Colombian paramilitary groups, were ordered to face US lawsuits claiming they played a role in the torture or killings of thousands of Colombians. Relatives of victims can pursue their claims under the Torture Victim Protection Act, a federal judge in West Palm Beach, Florida, ruled. The families claim Chiquita paid \$1.7 million to the United Self Defense Forces of Colombia, or AUC, to quell labour unrest and prevent leftist sympathisers from infiltrating banana-plantation unions.

¹³³⁷ Stuart Kirsch, 'Mining and Environmental Human Rights in Papua New Guinea' (Palgrave Macmillan UK 2003) *Transnational Corporations and Human Rights* 115, 136.

Residents of the island of Bougainville in Papua New Guinea (PNG) filed suit against Rio Tinto under the Alien Tort Claims Act in US federal court in 2000. The plaintiffs allege that:

- Rio Tinto was complicit in war crimes and crimes against humanity committed by the PNG army during a secessionist conflict on Bougainville;
- environmental impacts from Rio Tinto's Panguna mine on Bougainville harmed their health in violation of international law; and
- In 1988, residents from the Panguna region began protesting Rio Tinto's labour and hiring practices as well as the environmental harm caused by the mine; eventually these protests escalated and some became violent. The PNG Government responded to this uprising with an attack against civilians. A decade-long civil war followed (1989-99), in which Bougainville sought independence from PNG and during which the plaintiffs allege that Rio Tinto was complicit in war crimes and crimes against humanity by the PNG army

¹³³⁸ *Doe v Unocal*, 395 F.3d 932. Complaint alleged that Myanmar's military subjected villagers to forced labour, rape, torture and murder with the knowledge and support of Unocal, a US oil and gas corporation, which created liability under the Alien Tort Claims Act (ACTA)[1]; Whether to be liable under ATCA a non-state actor must engage in state action; Whether Unocal was liable for aiding and abetting the Myanmar military in subjecting villagers to forced labour, rape, murder and torture; Scope of the legal liability of transnational corporations for violations of human rights under ATCA.

¹³³⁹ *Jesner v Arab Bank, PLC* 16-499 (2d Cir. Oct 11, 2017) TBD

¹³⁴⁰ Beth Stephens et al (eds), *International Human Rights Litigation in US Courts* (2nd edn, Martinus Nijhoff 2008).

¹³⁴¹ *Sosa*, 542 US at 734-38.

Hence, it could conceivably be hypothesised that with respect to Member States of the UN, courts are likely to be critical of any nation that does not recognise equivalent liability in tort for such serious conduct.¹³⁴² It can therefore be assumed that the state courts have the option of holding that this lack of recognition constitutes a violation of their mandatory public policy rules, and accordingly substitute their own laws (*lex fori*)¹³⁴³ to the extent that the *lex loci damni* is “manifestly incompatible with the public policy of the forum”.¹³⁴⁴ Similarly, it is questionable whether it is fair to criticise the application of *lex loci damni* over international law considering the U.S. Supreme Court’s enthusiastic use of the presumption against extraterritoriality in *Kiobel*. Since the U.S. Supreme Court has acknowledged that the belief applies to substantive statutes, it follows that the ATCA was recognised as US substantive law when it actually applies international law.¹³⁴⁵ Perhaps if the *lex loci damni* applied instead, U.S. federal courts would be less concerned about imposing U.S. law on other states. Likewise, all substantive law would have coined from the place where the human rights violations occurred; therefore, courts could not apply the presumption against extraterritoriality to the ATCA. According to international legal scholar Dodge, choosing international law over *lex loci damni* as the substantive law under the ATCA provided the “doctrinal hook”¹³⁴⁶ for the U.S. Supreme Court to enforce the presumption against extraterritoriality.¹³⁴⁷ However, the presumption against extraterritoriality may not be very encouraging, as the disadvantage of *lex loci damni* is that domestic law while applicable under the ATCA as international law. A claimant may be disadvantaged if they cannot frame a tortious claim under *lex loci damni* because domestic law

¹³⁴² Simon Baughen, ‘Holding Corporations to Account: Crafting ATS Suits in The UK’ (2013) 2 *British Journal of American Legal Studies* 533

¹³⁴³ Albert A Ehrenzweig, ‘The Lex Fori: Basic Rule in the Conflict of Laws’ (1960) 58 (5) *Michigan Law Review* 637, 688.

In its choice of the applicable law, the court that exercises jurisdiction determines which law to apply to a case that involves foreign parties, foreign transactions, or a number of foreign elements. In a simple world, the court would always apply its own law, the law of the forum (known in Latin as *the lex fori*). Indeed, some modern methodologies, particularly in the United States, favour the *lex fori* approach.

¹³⁴⁴ Th M De Boer, ‘Party Autonomy and Its Limitations in The Rome II regulation’ (2007) 9 *Yearbook of Private International Law* 19, 29 and *Nippon Fire & Marine Ins. Co. v M.V. Tourcoing*, 167 F.3d 99 (2d Cir. N.Y. 1999). “*Ex loci damni* refers to the law of the place where the injury occurs. In other words, if an injury appears in another country, the laws of that country govern. However, this rule is only applied if the tortfeasor had foreseen that the damage would have occurred there. This is a general rule applied under conflict of law”.

¹³⁴⁵ Odette Murray, David Kinley, and Chip Pitts, ‘Exaggerated Rumours of The Death of an Alien Tort: Corporations, Human Rights and The Peculiar Case of *Kiobel*’ (2011)

¹³⁴⁶ Tara M Stuckey, ‘Jurisdictional Hooks in The Wake of *Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce’ (2005) 81 *Notre Dame Law Review* 2101. A doctrinal hook is a statutory clause requiring that the regulated activity have a connection with interstate the action.

¹³⁴⁷ William S Dodge, ‘Alien Tort Litigation: The Road Not Taken’ (2014).

does not recognise the relevant tort.¹³⁴⁸ By contrast, there are a number of disadvantages that claimants in European Member State and other states courts face compared to claims in the United States.¹³⁴⁹ First the research found that, for injuries occurring after January 2009, damages are assessed in accordance with the law of the state where damage arose.¹³⁵⁰ It can therefore be assumed that, one can envisage a situation where damage occurred in a developing state that rewards modest compensation, without the possibility of suing for punitive damages, such that it becomes uneconomical to sue before a faraway European forum. For some African nations, for example, value restorative redress through means such as apologies.¹³⁵¹

Secondly, some Member States in the European Union have introduced additional funding hurdles for plaintiffs by limiting the amount of legal aid they can claim.¹³⁵² However, the United States, in comparison, adopts a “user pays” system such that it encourages victims of human rights violations to bring their case to court. Indeed, the financial advantages offered by the American legal system have been cited as major reasons plaintiffs choose the United States as a forum.¹³⁵³ Likewise on the other hand, it must be remembered that litigation under the ATCA in the United States is likely to be higher than in the European Union because of the delays and inefficiencies in its legal system.¹³⁵⁴ The additional uncertainties raised by the U.S. Supreme Court Judgement in *Kiobel* will only add to the delays and expenses as lower courts struggle to apply the Supreme Court’s cryptic decision.¹³⁵⁵ Furthermore, this research argues

¹³⁴⁸ Jonathan Fitchen, ‘Choice of Law in International Claims Based on Restrictions of Competition: Article 6 (3) of the Rome II regulation’ (2009) 5 (2) *Journal of Private International Law* 337, 370.

¹³⁴⁹ Simon Baughen, ‘Holding Corporations to Account: Crafting ATS Suits in The UK’ (2013) 2 *British Journal of American Legal Studies* 533. ‘It is likely that a UK Court would conclude that the application of Article 4 would be contrary to the public policy of the UK in mandating the application of another country whose domestic legal order had not incorporated the norms of customary international law.’ Rome II Regulation, art 4.

¹³⁵⁰ Rome II Regulation, art 32.

¹³⁵¹ Patrick J. Borchers, ‘Conflict-of-Laws Considerations in State Court Human Rights Actions’ (2013) 3 *UC Irvine Law Review* 45. For example, some African law systems have an emphasis on making apologies as opposed to monetary compensation.

¹³⁵² Michael D Goldhaber, ‘Corporate Human Rights Litigation in Non-US Courts: A Comparative Score Card’ (2013) 3 *UC Irvine Law Review* 127. In the United Kingdom, the operation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK) has limited the “recovery of fees and costs available to human rights plaintiffs as of April 2013”.

¹³⁵³ Attorneys for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, “Brief for the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v Royal Dutch Petroleum*.”

¹³⁵⁴ Samuel R Gross, ‘The American Advantage: The Value of Inefficient Litigation’ (1987) 85 (4) *Michigan Law Review* 734, 757.

¹³⁵⁵ David P Stewart and Ingrid Wuerth, ‘*Kiobel v Royal Dutch Petroleum Co.*: The Supreme Court and The Alien Tort Statute’ (2013) 107 (3) *American Journal of International Law* 601, 621. The Court, in an opinion joined by five justices, held that the presumption against extraterritoriality applies to claims under the ATCA, and nothing in the statute rebuts that presumption. The presumption against extraterritoriality is

that ATCA lawsuit is a “high risk-high return” investment based on the miniscule proportion of successful cases.¹³⁵⁶

Moreover, there may be less favourable disclosure requirements in accordance with the Member State forum’s law as opposed to the United States. This is noted in *Akpan*, *Milieudefensie* case where the Dutch Civil Procedural Code’s restrictive discovery rules meant that it could not access vital documents held by Shell.¹³⁵⁷ *Milieudefensie* alleged that disclosure of those documents would prove Shell’s liability; hence disclosure requirements may play a significant role in the outcome of a case. Lastly, if a claim is regarding a truly foreign cubed state of affairs, the Brussels and Rome Regulations, like the ATCA, are of no benefit. Nevertheless, claims can still be pursued under the Member State’s national private international law rules. This study contested that this is not a completely limiting disadvantage because of the willingness of Member State¹³⁵⁸ courts to secure claimants’ access to justice, as evidenced by *Lubbe* and *Akpan*. In spite of the advantages offered by European civil and corporate human rights abuses case, only a handful of claimants have pursued ATCA compared to lawsuit in European courts.¹³⁵⁹ A possible explanation for this might be that the cultural dichotomy between Europe and the U.S. is different. Thus, in the U.S., it is commonplace that harm done to a person is redressed privately through tort. Consequently, the U.S. legal system

a canon of statutory interpretation that provides that when a statute gives no clear indication of an extraterritorial application, it has none.

¹³⁵⁶ Michael D Goldhaber (n 1328)

¹³⁵⁷ Arthur S Hartkamp, ‘Judicial Discretion under The New Civil Code of The Netherlands’ (1992) 40 (5) *American Journal of Comparative Law* 51, also see, Dutch Civil Procedural Code’s, Book 1 Litigation before the District Courts, the Courts of Appeal and the Supreme Court. Title 1 General provisions. Section 1 Jurisdiction of Dutch courts.

¹³⁵⁸ Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1; Regulation 593/2008 on the Law Applicable to Contractual Obligations [2008] OJ L177/6; Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L199/40. European civil and commercial litigation is unified through the Brussels I, Rome I, and Rome II Regulations. Under the Brussels I (Brussels) Regulation, a forum within the European Union has jurisdiction over any civil and commercial matter if the defendant is domiciled in a Member State. Additionally, once a forum is found to have jurisdiction, it cannot stay the proceedings in favour of a non-Member State forum even if that forum is more appropriate to hear the claim. In other words, jurisdiction where found is mandatory, not discretionary. The Rome Regulations dictate choice of law rules when assessing claims in contract and tort. Under the Rome II Regulation regarding the law applicable to non-contractual obligations (namely, tort or delict), the general rule is that the law of the place where the direct damage occurred, *lex loci damni*, is the applicable law. However, the Regulation has built-in exceptions and “escape clauses”, so it will not always be the *lex loci damni* that applies.

¹³⁵⁹ Michael D Goldhaber (n 1294). Also see, Liesbeth Enneking, ‘The Future of Foreign Direct Liability: Exploring the International Relevance of The Dutch Shell Nigeria Case’ (2014) 10 *Utrecht Law Review* 44.

recognises punitive damages and generally rewards higher overall compensation compared to other developed countries.¹³⁶⁰

Contrary, the prevailing belief in European cultures (the concept of European culture here is referred to shared values, attitudes, standards, and beliefs that characterise European legal rules and define its nature. It may also refer to the idea, values, attitudes and opinions, people in some European society hold with regard to law and the legal system)¹³⁶¹ is that the state should be accountable for prosecuting wrongdoers through the criminal justice system, as opposed to private individuals through the civil system.¹³⁶² Even though tortious lawsuits have the ability to change social and legal practices in U.S., historically they may have had little effect in European countries. Therefore, tort has not been acknowledged as the most effective way to remedy wrongs in European society.¹³⁶³ With the increase in the number of MNCs since the advent of globalisation, however, this research argues that there is no reason victims should not utilise European civil and commercial litigation to secure effective redress.

Accordingly, this thesis argues that the traditional differences between civil lawsuit in the U.S. and European legal systems are merely an interesting reflection opinion and should have little bearing on a claimant's choice of forum. Overall, this study strengthens the idea that the biggest problem facing activists of human rights claims against MNCs is uncertainty. The ATCA provided a possible avenue for bringing international human rights claims before U.S. Federal Courts. Nonetheless the ATCA was enacted in 1789, a time very different from today, which means it requires innovation. Likewise, rather than expanding the decision on its applicability, the U.S. Supreme Court has progressively restricted its scope. This has resulted in a frustrating journey for ATCA claimants who face numerous setbacks even at the jurisdiction stage of the lawsuit. However, the U.S. judicial system might have favourable legal fee rules and the ability to recover enormous damages, but examination should first and foremost be directed towards the plaintiff's ability to effectively pursue a claim for remedy. In addition, following *Filártiga*, the ATCA usefulness as a vehicle for securing human rights may

¹³⁶⁰ Vivian Grosswald Curran, 'Extraterritoriality, Universal Jurisdiction, and the Challenge of *Kiobel v Royal Dutch Petroleum Co*' (2013).

¹³⁶¹ Volkmar Gessner, Armin Hoeland and Csaba Varga, *European Legal Cultures* (Aldershot UK: Dartmouth 1996).

¹³⁶² *Ibid.*

¹³⁶³ Pierre Legrand, 'European Legal Systems are Not Converging' (1996) 45 (1) *International & Comparative Law Quarterly* 52, 81.

have been “somewhat inflated”.¹³⁶⁴ A point of caution is due here, this research found that only a small number of plaintiffs clear the jurisdictional hurdles and even then, corporate defendants frequently encourage settlements (even though there exist uncertainty regarding corporate liability under the ATCA).¹³⁶⁵ The following conclusions can be drawn from the present study, victim reparation, plaintiffs, and their legal counsellors should pursue a substitute avenue, such as tort lawsuit in other international court or the European Union Courts. This because the U.S. judicial system is complex, especially because of the division between federal and state courts. It is respectfully contested that there are no advantages to suing before U.S. federal courts over EU Member State courts or any other international forum. Additionally, and significantly, other international forum and the Member State Courts can offer something extra certainty if the ATCA is not innovated to meet the current dynamics of international law.

4.11. Racketeer Influenced and Corrupt Organisations Act (RICO) and TVPA

In 1970, the US passed the Racketeer Influenced and Corrupt Organisations Act (RICO), which is a federal law designed to combat organised crime in the US.¹³⁶⁶ The Act permits prosecution and civil penalties for racketeering activity performed as part of an ongoing criminal enterprise.¹³⁶⁷ Such action may include illegal gambling, bribery, kidnapping, murder, money laundering, counterfeiting, embezzlement, drug trafficking, slavery, and a host of other illegal business practices.¹³⁶⁸ Thus, U.S. federal acts allow proceedings in U.S. courts for the violations of human rights in a foreign country, such as Racketeer Influenced and Corrupt Organizations Act (RICO)¹³⁶⁹ and TVPA,¹³⁷⁰ which offer some extraterritorial capability in

¹³⁶⁴ Nicola Jägers, Katinka Jesse, and Jonathan Verschuuren, ‘the Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case against Shell’ (2013) 107 (4) *American Journal of International Law* E36.

¹³⁶⁵ Michael D Goldhaber (n 1328).

¹³⁶⁶ Peter D Schellie, ‘Racketeer Influenced and Corrupt Organizations Act (RICO)’ (1986) *Business Lawyer* 1023, 1028.

¹³⁶⁷ Robert G Blakey, and Brian Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies’ (1980) 53 *Temple Law Review* 1009

¹³⁶⁸ Jeff Atkinson, ‘Racketeer Influenced and Corrupt Organizations, 18 USC §§ 1961-68: Broadest of The Federal Criminal Statutes’ (1978) *Journal of Criminal Law and Criminology* 1, 18. To convict a defendant under RICO, the government must prove that the defendant engaged in two or more instances of racketeering activity and that the defendant directly invested in, maintained an interest in, or participated in a criminal enterprise affecting interstate or foreign commerce. The law has been used to prosecute members of the mafia, the Hells Angels motorcycle gang, and Operation Rescue, an anti-abortion group, among many others.

¹³⁶⁹ Racketeer Influenced and Corrupt Organizations Act, Title IX of Organised Crime Control Act (1970) PubLNo 91-452, 84 Stat. 922.

¹³⁷⁰ Torture Victim Protection Act of 1991 Pub LNo 102-256, 106 Stat. 73 (1992) (codified at 28 USC. § 1350 (1994)).

regard to human rights violations, but only indirectly with regard to RICO.¹³⁷¹ Consequently, the RICO Act provides both criminal and civil penalties for victims of human rights abuses.¹³⁷² An implication of this is the possibility that claims can be brought by prosecutors on behalf of the government, or by private individuals.¹³⁷³ Nonetheless, in RICO criminal prosecutions, the jury must be convinced of the defendant's guilt beyond a reasonable doubt. This is the highest burden of proof that exists in the U.S. legal system.¹³⁷⁴ Violations are punishable by up to 20 years in prison.¹³⁷⁵ The sentence can be increased to life in prison if authorised by the underlying crime. Similarly, other offenders may also face a fine of either 250,000 US Dollars, or double the amount of the proceeds earned from the activity.¹³⁷⁶

In general terms, this means that liability for a RICO violation requires that a person be involved in an enterprise that operates through a pattern of racketeering activity.¹³⁷⁷ This raises a couple of questions that will prove important to anyone defending or pursuing a RICO case. The first is a disagreement may arise as to what can be content as the element requiring an enterprise. Could the element requiring an enterprise be corporations, partnerships, and other businesses? Or can corporations, partnerships, and other businesses qualify as enterprises? What about informal organisations, like street gangs and rebels? The Supreme Court considered the issue of enterprises, and stated that an enterprise can be any group with members who are associated in a relationship in order to achieve a common purpose, provided the relationship lasts long enough to allow them to pursue that purpose. In this view, the meaning of enterprises in RICO law, indicates that groups are known as "association-in-fact" enterprises.¹³⁷⁸ An additional question is in relation to the element requiring a pattern of racketeering activity. The RICO Act itself defines the term pattern as two or more acts of

¹³⁷¹ Katie W Wood, 'Racketeer Influenced and Corrupt Organizations Act-Private Cause of Action-No Injury Required beyond Those Caused by Predicate Offenses for Section 1964 (c) Claim' (1985) 55 *Mississippi Law Journal* 167.
<<http://heinonline.org/HOL/LandingPage?handle=hein.journals/mislj55&div=16&id=&page=>>
accessed on 29 June 2015.

¹³⁷² Lan Cao, 'Illegal Traffic in Women: A Civil RICO Proposal' (1986) 96 *Yale Law Journal* 1297.

¹³⁷³ Susan Rose-Ackerman and Bonnie J Palifka, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 2016).

¹³⁷⁴ Gerard E Lynch, 'RICO: The Crime of Being a Criminal, Parts I & II' (1987) 87(4) *Columbia Law Review* 661, 764 and Susan W Brenner, 'RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law' (1993) 2 *William & Mary Bill of Rights Law School Journals* 239

¹³⁷⁵ Craig M Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1979) 65 *Iowa Law Review* 837.

¹³⁷⁶ Paul H Rubin and Robert Zwirb, 'The Economics of Civil RICO' (1986) 20 *UC Davis Law Review* 883.

¹³⁷⁷ Gregory T Magarity, 'RICO Investigations: A Case study' (1979) 17 *American Criminal Law Review* 367.

¹³⁷⁸ David B Smith and Terrance G Reed, *Civil RICO* (LexisNexis 1987).

racketeering activity within a 10-year period.¹³⁷⁹ Conversely, the Supreme Court has considered this issue as well. According to the Court, to qualify as a pattern, criminal activities must be related and continuous.¹³⁸⁰ Understanding of RICO law crimes have the comparable features, which include the same perpetrators, victims, and methods of commission. Therefore, continuity will be established if the crimes occurred over a substantial period of time. Some courts have interpreted this to mean at least one year.¹³⁸¹ This lack of consistency and contradiction make this study doubt the effectiveness of RICO in combating human rights abuses, which does not even mention the high standards of proof required by the prosecution to establish liability.

Additionally, the U.S. Supreme Court holds that private civil RICO suits must allege a “Domestic Injury”.¹³⁸² In *Morrison v National Australia Bank Ltd*¹³⁸³ the U.S. court sought to limit the circumstances in which U.S. law can be invoked to render foreign conduct actionable in the United States,¹³⁸⁴ One possible implication of this is that the U.S. Supreme Court followed the approach it adopted in *Morrison*, beginning with the premise that federal statutes do not apply extraterritorially unless Congress has provided a clear indication of overcoming that presumption. Expressively, the Court applied that principle both to the provisions of the statute that define prohibited conduct and to the provisions that authorise a private cause of action.¹³⁸⁵ Initial observations suggest that it may be the Court (through a majority of four

¹³⁷⁹ Dorean Marguerite Koenig, ‘The Criminal Justice System Facing the Challenge of Organized Crime’ (1998) 44 *Wayne Law Review* 1351.

¹³⁸⁰ Barbara Black, ‘Racketeer Influenced and Corrupt Organizations (RICO)-Securities and Commercial Fraud as Racketeering Crime after Sedima: What Is a Pattern of Racketeering Activity’ (1985) 6 *Pace Law Review* 365.

¹³⁸¹ James L. Pray, ‘Application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to Securities Violations’ (1982) 8 *Journal of Corporation Law* 411.

¹³⁸² *RJR Nabisco Inc. v European Community*, 136 S. Ct. 2090 (Supreme Court 2016).

¹³⁸³ *Morrison v National Australia Bank Ltd*, 561 US 247 (2010).

¹³⁸⁴ *Ibid.* The Supreme Court adopted a framework that emphasised the presumption against the extraterritorial application of US law. Thus, as the Court instructed, “when a statute gives no clear indication of an extraterritorial application, it has none”. Applying that principle in *Morrison*, the Supreme Court held that the Securities Exchange Act of 1934 applied solely to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities”. In other words, plaintiffs could no longer invoke the Act to claim that they had been defrauded in connection with the purchase or sale of securities, unless those transactions occurred in the United States or involved securities listed on a US exchange. The Supreme Court and lower courts subsequently applied the “presumption against extraterritoriality” to bar civil claims brought under other federal statutes, including the Commodities and Exchange Act, the Bankruptcy Code and the Alien Tort Statute. Such precedent also presented a potential obstacle to government agencies bringing criminal or regulatory enforcement cases based on conduct that had occurred outside the United States.

¹³⁸⁵ *Ibid.* In relation to RICO’s prescriptive or “substantive” terms, the Supreme Court unanimously held that “RICO gives a clear, affirmative indication that §1962 applies to foreign racketeering activity but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially” It further emphasised that the extraterritorial application of some RICO predicates, such as money laundering, should not imply the extraterritorial application of all predicate offenses. In this context, the Supreme

Justices) decided that RICO's "civil remedy"¹³⁸⁶ is not coincident with §1962's substantive provisions", and therefore require separate consideration.¹³⁸⁷ The Court noted that "a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion".¹³⁸⁸ Several lines of evidence also suggest that the Supreme Court perceived that permitting private claimants to bring claims for foreign injuries under civil RICO, including high damages, presents a "danger of international friction".¹³⁸⁹ For these explanations, the US Supreme Court scrutinised §1964(c) and decided that it did not overcome the presumption against the extraterritorial application of US law. Considering this evidence, it seems that to sustain future civil RICO claims, claimants must have to assert and prove a domestic injury first before a claim under the Act can be established.

In view of all that has been mentioned so far, one may suppose that the Supreme Court's ruling may have numerous consequences for corporations that conduct its business operations outside the United States, however, it fails to address a number of essential questions. The first notable characteristic of the Court's verdict is its methodical framework.¹³⁹⁰ Instead of examining the extraterritorial applicability of RICO in its entirety, or based solely on the "substantive" terms of the statute that prohibit specified unlawful conduct, the Supreme Court distinctly measured the scope of each statutory provision.¹³⁹¹ In examining each important section or subsection, the Supreme Court applied a two-step analysis outlined in *Morrison*, the

Court did not re-examine, and thus left undisturbed, the Second Circuit's conclusion that certain RICO predicates including wire fraud, mail fraud and violations of the Travel Act do not have extraterritorial reach. Moreover, the Supreme Court made clear that the geographic location of the alleged RICO enterprise was not relevant to this analysis.

¹³⁸⁶ Set forth in 18 USC. §1964(c).

¹³⁸⁷ *Morrison v National Australia Bank Ltd* (n 1358).

¹³⁸⁸ *Morrison v National Australia Bank Ltd.*, 130 S. Ct. 2869, 561 US 247, 177 L. Ed. 2d 535 (2010).

¹³⁸⁹ *Ibid.*

¹³⁹⁰ Genevieve Beyea, 'Morrison v. National Australia Bank and the Future of Extraterritorial Application of the US Securities Laws' (2011) 72 *Ohio State Law Journal* 537.

In a case of far reaching importance to the international securities markets, the US Supreme Court held in *Morrison v National Australia Bank Ltd.*, *US, No. 08-1191* (decided June 24, 2010), that the principal antifraud provisions of the US securities laws, Section 10(b) of the Securities Exchange Act of 1934 (the 'Exchange Act') and Rule 10b-5 there under, apply only to transactions in securities that take place in the United States or transactions in securities listed on a US securities exchange. The Court stated that these key provisions do not have extraterritorial application since Section 10(b) lacks an explicit statement of extraterritorial effect. In so holding, the Court overruled a substantial line of prior Federal Court of Appeals' cases that had allowed claims under Rule 10b-5 if the facts involved either substantial wrongful conduct in the United States or wrongful conduct that had a substantial effect in the United States or on US citizens. The so-called "conduct-and-effects" test had been established in numerous cases involving foreign securities transactions. Eliminating those tests substantially limits the extraterritorial scope of Rule 10b-5 and has broad implications for the international securities markets

¹³⁹¹ *Ibid.*

first, the court determined whether Congress clearly provided for the statute's extraterritorial application and, second the court did not assess whether a case was founded on a domestic application of the law.¹³⁹² Two important themes emerge from the studies, as discussed so far, the method of the U.S. Supreme Court may generate supplementary prospects for perpetrators of human rights abuses to challenge the geographic reach of U.S. statutes, especially in civil lawsuit. An implication of this might be that such efforts will focus exclusively on whether a law prohibits foreign violations and it will also focus on other relevant components of any complex statutory scheme, which may include terms authorising causes of action, other enforcement mechanisms or remedies.

Likewise, the *RJR Nabisco* decision supports two related strategies for corporations looking for a way to resist RICO liability.¹³⁹³ Undeniably, the Court's ruling is constant with the position that the Justice Department advanced in its amicus brief.¹³⁹⁴ These studies clearly indicate that it is likely, that prosecutors will be considerably restricted, as compared to private claimants, in their use of RICO to target conduct occurring outside the United States, particularly in cases where much emphasis was placed on business undertakings of legitimate business operations.¹³⁹⁵ Additionally, to the extent that criminal RICO cases are founded on established wrongdoings happening outside U.S. borders, thus, the courts will have to conclude whether the statutes barring such conduct apply extraterritorially, just as in the civil context.¹³⁹⁶ Conceivably, even more prominently, courts will have to continue considering whether the offenses alleged in civil or criminal cases call for the extraterritorial application of a specific statute or whether, otherwise, claimants and prosecutors may have to assume that the offenses

¹³⁹² Katherine J Florey, 'State Law, US Power, Foreign Disputes: Understanding the Extraterritorial Effect of State Law in the Wake of *Morrison v National Australia Bank*' (2012).

¹³⁹³ Franklin A Gevurtz, 'Building a Wall against Private Actions for Overseas Injuries: The Impact of *RJR Nabisco v. European Community*' (2016) 23 *U.C. Davis Journal of International Law & Policy* 1
RJR Nabisco argues that, because RICO is silent on the matter, the strong presumption is that RICO applies only domestically. The European Community counters that Congress intended RICO to have at least some extraterritorial reach, as indicated by its incorporating predicate, extraterritorial crimes into the definition of "racketeering". The Court's resolution of this case will impact the jurisdictional status of RICO, and business interests on national and international levels. The law of extraterritoriality provides guidance in determining RICO's reach to events outside the United States. The Court applies a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be *Morrison v National Australia Bank Ltd.*, 561 U. S. 247, 255. *Morrison* and *Kiobel v Royal Dutch Petroleum Co.*, 569 U. S. reflect a two-step framework for analysing extraterritoriality issues. First, the Court asks whether the presumption against extraterritoriality has been rebutted i.e., whether the statute gives a clear, affirmative indication that it applies extraterritorially.

¹³⁹⁴ *Ibid.*

¹³⁹⁵ Richard G Strafer, Ronald R Massumi and Holly R Skolnick, 'Civil RICO in The Public Interest: Everybody's Darling' (1981) 19 *American Criminal Law Review* 655

¹³⁹⁶ Jed S Rakoff and Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* (Law Journal Press 2017).

are sufficiently domestic injuries. Lawsuits surrounding these subjects will consequently continue and will not subside until the courts, or Congress, provide greater clarity on RICO.

This study has shown that even though a lot has been said and discussed here, the RICO law closes any perceived loopholes that exempt individuals or organisations who ordered or assisted others in a crime, from prosecution, since they did commit the crime. The other important point about the RICO law is that it gives the U.S. attorney prosecuting a criminal power to seeking a pre-trial preventive order to temporarily seize a defendant's assets and other forfeitable property. Additionally, the attorney may require the defendant to put up a performance bond, which ensures that there is something for the law enforcers to seize in case of a guilty verdict.¹³⁹⁷ This procedures and sanctions satisfied the elements of an effective remedy. However, overall, this study suggests that the U.S. judicial system remains unwilling to allow civil RICO. This is because of the common fear that every civil tort action will convert into a civil RICO claim. This will open the floodgate to allow cases of credit card overcharges by obsessive plaintiffs to bring civil RICO actions for such things such as corporations, where normal class civil action suffice.¹³⁹⁸ Nonetheless, the research argues that even though RICO has achieved some crucial accountability for Racketeer Influenced and Corrupt Organisations Act offenses,¹³⁹⁹ it is restricted and cannot be the appropriate mechanisms for corporate human violation and environmental damages.¹⁴⁰⁰

4.12. Other States with Extraterritorial Application and ATCA

A key strength of the ATCA accountability for corporate human rights 0violation and environmental damages is found in the enactment of law dealing directly with corporate activities in a foreign country. This is enshrined in common law jurisdiction in Australia,¹⁴⁰¹

¹³⁹⁷ Richard D Hartley, *Corporate Crime: a Reference Handbook* (ABC-CLIO 2008).

¹³⁹⁸ US Department of Justice. (2009). Criminal RICO: 18 USC. 1961-1968: A Manual for Federal Prosecutors. *Washington, D.C.: US Dept. of Justice, Criminal Division, Organized Crime and Racketeering Section*, 2 (23) 12.

¹³⁹⁹ Arthur F Mathews, *Civil RICO Litigation* (Law & Business/Harcourt Brace Jovanovich 1985) and Lee Coppola and Nicholas DeMarco, 'Civil RICO: How Ambiguity Allowed The Racketeer Influenced and Corrupt Organizations Act to Expand Beyond Its Intended Purpose' (2012) 38 *New England Journal on Criminal and Civil Confinement* 241

¹⁴⁰⁰ Michael N Glanz, 'RICO and Securities Fraud: A Workable Limitation' (1983) 83 *Columbia Law Review* 1513

¹⁴⁰¹ Sarala Fitzgerald, 'Fitzgerald, Sarala Corporate Accountability for Human Rights Violations in Australian Domestic Law' [2005] *AUJI Human Rights* 2; (2005) 11 (1) *Australian Journal of Human Rights* 2. Australian corporate law does not contain a duty not to breach the human rights of those affected by a company's behaviour. With legislative amendment, or the development of the common law, such a duty is imposed on companies and / or their directors. Sarah Pritchard notes that "common law does not

the U.S.¹⁴⁰² and recently in the UK,¹⁴⁰³ but none of these laws are yet to make it in the statute books, the reason for this is still unclear. It could be said, that developed countries' refusal to allow their national courts to become a platform for bringing litigation proceedings against corporations, poses a significant obstacle to the application of ATCA. This is because the U.S. courts run a risk of being seen as an international forum for corporate liability,¹⁴⁰⁴ thus overloading the U.S. courts and putting U.S. corporations at a disadvantage.¹⁴⁰⁵ These findings suggest that in general, the international legal system may require a new international legal forum beside the ATCA and U.S. legal forum to hold corporate accountable for human rights abuses and environmental damages.¹⁴⁰⁶

necessarily conform to international law, but international law is a legitimate and important influence on the development of common law". Sarah Pritchard, 'The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice' (1995) 2 (1) *Australian Journal of Human Rights* 3, 38. Over time more human rights protections found in international law are imported into the common law through this influence.

In Australian domestic law provides protection for human rights and at times such rights can be enforced against companies. The Australian legislation relevant to employment rights is the *Workplace Relations Act 1996* (Cth) (WRA), the *Race Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth) (SDA), (Cth) (Affirmative Action Act) and the *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOC Act) (Norris 2000: 132). The RDA prohibits employer discrimination on the grounds of race, colour or national or ethnic origins (s 15). The SDA prohibits employer discrimination on the grounds of sex, marital status, pregnancy or family responsibilities (s 14). Further, s 106 of the SDA provides for vicarious liability of employers for acts done by other employees. The Affirmative Action Act requires employers of 100 or more employees to implement affirmative action programs to eliminate discrimination against women and promote equal opportunity for women (s 3).

¹⁴⁰² Ralph G Steinhardt, *The Internationalization of Domestic Law; The Alien Tort Claims Act: an Analytical Anthology*, Ardsley, (New York: Transnational Publishers 1999).

The US *Alien Tort Claims Act* (ATC) has been used to overcome some of the jurisdictional problems that arise when companies commit breaches outside their state of incorporation. The ATCA covers private individuals who commit torts in the course of violating international law.

¹⁴⁰³ Geoffrey Tweedale and Laurie Flynn, 'Piercing the Corporate Veil: Cape Industries and Multinational Corporate Liability for a Toxic Hazard, 1950–2004' (2007) 8 (2) *Enterprise & Society* 268, 296. *Lubbe v Cape Plc* [2000] UKHL 41. The claim was brought by 7,500 South African asbestos miners who sued Cape plc in the UK courts. *Cape plc* contested jurisdiction and the case had to go all the way to the House of Lords before the claimants were given the go-ahead to proceed. The South African government intervened on the claimants' behalf stating that "the allegations against Cape did not take place in a legitimate legal system, and the new SA government cannot afford to determine every wrong of the old regime". The case was settled in 2003. *Guerrero v Monterrico Metals plc* [2009] EWHC 2475 (QB). In June 2009, proceedings were commenced against a UK parent company *Monterrico Metals plc* in the English High Court on behalf of 33 indigenous Peruvians who were allegedly tortured and mistreated at *Monterrico's Rio Blanco* mine in August 2005 following an environmental protest. A worldwide freezing injunction was successfully obtained to prevent *Monterrico* from disposing of assets.

¹⁴⁰⁴ Caroline Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law' (2016) 49 *George Washington International Law Review* 351 and Elizabeth T Lear, 'National Interests, Foreign Injuries, and Federal Forum Non Conveniens' (2007) 41 *UC Davis School Law Review* 559.

¹⁴⁰⁵ Elliot J Schrage, 'Judging Corporate Accountability in The Global Economy' (2003) 42 *Columbia Journal of Transnational Law* 153

¹⁴⁰⁶ Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction; International Law Forum Du Droit International* (Vol. 7. No. 4. Brill Academic Publishers 2005).

Besides, Belgium distinguished between universal jurisdiction,¹⁴⁰⁷ which is exercised by a state in the interests of the international community, and other types of extraterritorial jurisdiction, such as those deriving from the principle of protection or the nationality of the perpetrator or that of the victim.¹⁴⁰⁸ Belgium also considered that there are also customary obligations which require states to incorporate rules of universal jurisdiction in their domestic law in order to try persons suspected of crimes of such seriousness that they threaten the international community as a whole,¹⁴⁰⁹ such as grave crimes under international humanitarian law.¹⁴¹⁰ Finally, in Belgium opinion, customary law enables states which are not parties to the 1984 Convention against torture to prosecute, on the basis of universal jurisdiction, persons suspected of torture who are present in their territory, in view of the nature of the prohibition against torture as a peremptory norm of international law.¹⁴¹¹ Similarly, customary law authorises states to exercise universal jurisdiction against persons suspected of acts of piracy, slavery, or trafficking of persons.¹⁴¹² Thus, the argument that territorial connections also define the scope of extraterritorial jurisdiction is most obvious with respect to the Belgium court's "effective control" cases, which turn on the premise that jurisdiction flows from the state's functional control over territory outside its borders.¹⁴¹³

¹⁴⁰⁷ Kenneth C Randall, 'Universal Jurisdiction under International Law' (1987) 66 *Texas Law Review* 78.

The principle of universal jurisdiction is classically defined as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim". The rationale behind it is based on the notion that "certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim". Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world.

¹⁴⁰⁸ Mark Summers, 'The International Court of Justice's Decision in *Congo v Belgium*: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals' (2003).

¹⁴⁰⁹ Luc Reydam, 'Criminal Jurisdiction Universal Jurisdiction Crimes Against Humanity Immunity of Former Head of State Incorporation of Customary Law into Municipal Criminal Law Prescription (statutes of limitation)' (1999) 793 (3) *American Journal of International Law*.

¹⁴¹⁰ Claus Kreß, 'Universal Jurisdiction over International Crimes and The Institut de Droit International' (2006) 4 (3) *Journal of International Criminal Justice* 561, 585.

This customary obligation to prosecute the perpetrators of grave crimes under international humanitarian law does not exist, in Belgium's view, unless such persons are present in the territory of the State concerned. The fourth, sixth and tenth preamble paragraphs, along with articles 1 and 5 of the Rome Statute, are, for example, evidence of the existence of this customary obligation, particularly in respect of the suppression of crimes against humanity.

¹⁴¹¹ Christine M Chinkin, 'In re Pinochet. United Kingdom House of Lords. Regina v Bow Street Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3) [1999] 2 WLR 827' (1999) *American Journal of International Law* 703, 711.

¹⁴¹² Stephen Macedo, ed. *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2006).

¹⁴¹³ Sarah Miller, 'Revisiting Extraterritorial Jurisdiction: a Territorial Justification for Extraterritorial Jurisdiction under The European Convention' (2009) 20 (4) *European Journal of International Law* 1223, 1246

Belgium is one of the creators in the establishment of universal jurisdiction in respect of grave crimes under international humanitarian law.¹⁴¹⁴ However, the application of this very far-reaching law gave rise to a number of problems in practice, the first that it interferes with foreign politics,¹⁴¹⁵ and the second that it trumps the sovereign rights of state.¹⁴¹⁶ Adding to this, it has been observed that courts in Belgium have the capability to hear cases of human rights violations by, or against any person, anywhere in the world.¹⁴¹⁷ However, Belgian law went farther in the beginning of 1994. Nevertheless, the Belgian legislature repealed provisions for extraterritorial corporate liability in 2003.¹⁴¹⁸ Earlier in 2003, Belgium offered jurisdiction over all humanitarian claims regardless of the crime's connection to the country, the nationality of the plaintiffs or defendants, or the absence of defendants from the proceedings.¹⁴¹⁹ However, this concept has come under constant attack about its scope and application. This forces the Belgian court to accept review of a case against Total Fina Elf based on the same facts underlying the claims brought in the French court. The act of 16 June 1993 which transposed to Belgium law the system of suppression established by the four Geneva Conventions of 1949 and their two protocols of 1977 on the protection of victims of war was extended to the crime of genocide and crimes against humanity by an act of 10 February 1999. Thus, victims of war crimes, crimes against humanity and crimes of genocide may complain before the Belgian courts irrespective of the place of the crime, the nationality of the perpetrator or that of the victim. Under this act, Belgian courts were accorded absolute universal jurisdiction in order to suppress the most serious crimes affecting the international community. Likewise, in the outcome of other controversial claims against high-ranking foreign officials,¹⁴²⁰ the U.S.

¹⁴¹⁴ Malvina Halberstam, 'Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics' (2003) 25 *Cardozo Law Review* 247

¹⁴¹⁵ *F. Hoffman-La Roche Ltd. v Empagran S.A.*, 542 US 155, 164 (2004).

The Court affirmed this proposition three years later, writing: As a principle of general application law, courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.

¹⁴¹⁶ Zachary D Clopton, 'Replacing The Presumption against Extraterritoriality' (2013).

¹⁴¹⁷ *Total lawsuit in Belgium*. In April 2002, four Myanmar refugees filed a lawsuit against TotalFinaElf (now Total), Thierry Desmarest (chairman of Total) and Hervé Madeo (the former director of Total's Myanmar operations) in Brussels Magistrates' Tribunal. The Myanmar refugees brought the lawsuit pursuant to a 1993 Belgian law of universal jurisdiction. This law provides Belgian courts with jurisdiction to hear cases for certain serious crimes, such as crimes against humanity and war crimes, even those committed outside Belgium. This case is the first to be brought under this law against a company rather than an individual.

¹⁴¹⁸ Steven R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 (4) *American Journal of International Law* 888, 897.

¹⁴¹⁹ Roemer Lemaitre, 'Belgium Rules the World: Universal Jurisdiction over Human Rights Atrocities' (2000) 2 *Jura Falconis*.

¹⁴²⁰ Marlise Simons, 'Sharon Faces Belgian Trial after Term Ends' (2003) *The New York Times* and New War Crimes Suits Filed Against Bush, Blair in Belgium, (2003) *Daily Times*.

threatened to move the NATO headquarters out of Brussels unless Belgium revoked the rules.¹⁴²¹ Without the extraterritorial jurisdiction that they had offered, the Belgian court could no longer adjudicate the case against *Total*.¹⁴²² Similarly, it will not be able to pursue allegations brought by Burmese citizens against a French company for human rights violation in Burma.¹⁴²³ Also, although Spanish courts formerly presented a forum for extraterritorial claims, the Spanish Parliament acted to restrict the jurisdiction over human rights cases in 2009.¹⁴²⁴ The former provisions in Spain, in force since 1985, allegations of the most serious crimes in violation of international law triggered jurisdiction, no matter where the actions had taken place.¹⁴²⁵ Controversial cases against individuals followed, including against Augusto Pinochet, raising diplomatic concerns.¹⁴²⁶ Therefore, the new rules now require claims to allege either Spanish victims or perpetrators that are present in Spain before jurisdiction can arise.¹⁴²⁷ The legal theoretical implications of these findings are unclear in the present study, however, what is clear is that ATCA and the application of extraterritorial jurisdiction at present suffer from political interference and the unwillingness of the state to prosecute.

Following this examination, the ATCA offers an anachronistic jurisdiction of human rights violations by MNCs because it has allowed cases such as *Turedi v The Coca-Cola Co.*,¹⁴²⁸

<<http://archives.dailytimes.com.pk/national/20-Jun-2003/war-crimes-suits-filed-in-belgiumagainst-bush-blair>> access 8 August 2017.

¹⁴²¹ Lorna McGregor, 'The Need to Resolve The Paradoxes of The Civil Dimension of Universal Jurisdiction' (2005) 99 *American Society Of International Law Reviews* 125.

¹⁴²² Antonio Cassese, 'The Belgian Court of Cassation v. The International Court of Justice: The Sharon and Others Case' (2003) 1 *Journal of International Criminal Justice* 437.

¹⁴²³ Universal Jurisdiction in Europe, The State of The Art, 18 (2006) 1 *Human Rights Watch* 37, 38. <<http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>> access 8 August 2017.

¹⁴²⁴ Organic Law (L.O.P.J. 1985, art. 23.4), Ignacio de la Rasilla Del Moral, 'The Swan Song of Universal Jurisdiction in Spain' (2009) 9 (5) *International Criminal Law Review* 777-808.

¹⁴²⁵ Joaquin Gonzalez Ibanez, 'Legal Pedagogy, The Rule of Law, and Human Rights: The Professor, The Magistrate's Robe, and Miguel de Unamuno' (2012) 7 *Interdisciplinary Journal of Human Rights Law* 147.

¹⁴²⁶ Naomi Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction' (2000) 35 *New England Law Review* 311.

¹⁴²⁷ Máximo Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and The Transitional Prosecution of International Crimes' (2011) 1 (5) *American Journal of International Law* 105.

¹⁴²⁸ *Turedi v The Coca-Cola Co.*, 2009 US App. Lexis 14794 (2d Cir. July 7, 2009).

Roe v Bridgestone Corp.,¹⁴²⁹ *Abdullahi v Pfizer Inc.*,¹⁴³⁰ *Sarei v Rio Tinto PLC*,¹⁴³¹ and *re South African Apartheid Litigation*.¹⁴³² However, the increasing caseload of ATCA demonstrates that it is likely the U.S. court will limit the application of law to corporate human rights violations in the future.¹⁴³³ Additionally, it can be noted that its jurisprudence is fragmented, it lacks consistency, and is too ambiguous.¹⁴³⁴ Nonetheless, no case has been decided on its merit and the U.S. Supreme Court has not determined the scope of ATCA and its practical content. The reason for this is yet to become clear and has created uncertainty around ATCA application.

Previous studies of business and human rights accountability and remedy have also paid a particular attention to the U.S. ATCA,¹⁴³⁵ which enables foreign nationals to bring a claim in U.S. Federal Courts for violation of customary international law or treaties to which the U.S. is a party.¹⁴³⁶ Also, the Brussels Regulation is the key European instrument on jurisdiction and enforcement issues in civil and commercial matters. It is applied by the courts of all 28 EU member states. European civil and commercial litigation (this is referred to the laws on civil

¹⁴²⁹ *Roe v Bridgestone Corp.*, 257 F.R.D. 159, 172-73 (S.D. Ind. 2009).

¹⁴³⁰ *Abdullahi v Pfizer Inc.*, 562 F.3d 163, 187 (2d Cir. 2009). A group of Nigerian children and their guardians alleged that Pfizer experimented on 200 children suffering from meningitis without their consent or knowledge. At the time of the 1996 meningitis epidemic in northern Nigeria, Pfizer was attempting to obtain Food and Drug Administration (FDA) approval for a new antibiotic Trovafloxacin Mesylate (Trovan). The complainants further alleged that Pfizer purposefully under-dosed the children treated with the well-established and FDA-approved drug Ceftriaxone in order to skew the trial results in favour of Trovan. 11 children died as a result of the trial and many others were left blind, paralysed or brain-damaged. Prohibition on medical experimentation on non-consenting human subjects. Although the US has not ratified or adopted the above international instruments, the ATCA provides that District Courts have jurisdiction in civil actions committed in contravention of the law of nations, or customary international law. The Second Circuit Court of Appeal held that the restriction on medical experimentation without consent is a norm of international law and is capable of being enforced under the ATCA. The Court held that the three-part test to determine whether the restriction was an obligation under customary international law was satisfied. The test required the restriction to be (1) universal in nature; (2) specific and definable; and (3) of mutual concern. The Court gave the following reason for each strand of the test:

(1) The legal principles of the Nuremberg Code and the ICCPR are examples of the normality and universality of this restriction;

(2) The allegations stated that Pfizer carried out these experiments knowingly and purposefully which went beyond a simple isolated case of failing to obtain consent, and would therefore be clearly covered by the restriction on experimentation on non-consenting human beings; and

(3) The case was of mutual concern to both the US and Nigeria as such conduct could foster distrust, reduce co-operation between nations and generate substantial anti-American feeling in the region.

¹⁴³¹ *Sarei v Rio Tinto PLC*, 2009 WL 2762635 (C.D. Calif. July 31, 2009).

¹⁴³² *South African Apartheid Litigation*, 617 F. Supp. 2d 228, 296 (S.D.N.Y. 2009).

¹⁴³³ David P Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) 107 (3) *American Journal of International Law* 601, 621.

¹⁴³⁴ Robert J Delahunty and John Yoo, 'Against Foreign Law' (2005) 29 *Harvard Journal of Law & Public Policy* 291.

¹⁴³⁵ Alien Tort Statute, 28 USC. § 1350.

¹⁴³⁶ Sarah H. Cleveland, 'Alien Tort Statute, Civil Society, and Corporate Responsibility' (2003) 56 *Rutgers Law Review* 971.

<<http://heinonline.org/HOL/LandingPage?handle=hein.journals/rutlr56&div=35&id=&page=>>>
accessed 14 August 2016.

procedure and jurisdiction governing commercial litigation in the EU)¹⁴³⁷ is unified through the Brussels I, Rome I, and Rome II Regulations. Under the Brussels, I (Brussels) Regulation, a forum within the European Union has jurisdiction over any civil and commercial matter if the defendant is domiciled in a Member State. Additionally, once a forum is found to have jurisdiction, it cannot stay the proceedings in favour of a non-Member State forum even if that forum is more appropriate to hear the claim. In other words, the jurisdiction where found is mandatory, not discretionary.

The Rome Regulations dictate choice of law rules when assessing claims in contract and tort. Under the Rome II Regulation regarding the law applicable to non-contractual obligations (namely, tort or delict), the general rule is that the law of the place where the direct damage occurred, *lex loci damni*, is the applicable law. However, the Regulation has built-in exceptions and “escape clauses”, so it will not always be the *lex loci damni* that applies. To bring a suit under the Brussels Regulation, the plaintiff must first establish that its claim is a civil and / or commercial matter. There are a number of European Court of Justice (ECJ) cases determining the principles that may apply when making this assessment. Following ATCA, recent development in the European Union (‘EU’)¹⁴³⁸ even though a substantial progress has been made in regulating corporate conduct, such expositions are unsatisfactory and questionable. Likewise, it seems the U.S. Supreme Court has ended most transnational claims under ATCA (as seen in *Kioble v Royal Dutch Petroleum Co.*),¹⁴³⁹ however, this thesis argued the contrary. Though, the Supreme Court’s application of the “presumption against extraterritoriality” in *Kiobel* case¹⁴⁴⁰ will have a direct and immediate effect on future ATCA

¹⁴³⁷ Rachel A Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007).

¹⁴³⁸ Markus Mayr, ‘Extraterritorial Application of The European Convention on Human Rights and The Access to The Court for Victims of Human Rights Violations of ESDP Missions’ (2010) *BSIS Journal of International Studies* 7.

The civil and / or commercial scope becomes complex where a public authority is involved. If a public authority is acting in its role of performing public functions, it is clear that the situation cannot be a civil or commercial matter. However, not all actions by public authorities are shielded from the Brussels Regulation as public authorities can undertake civil and / or commercial activities. The current EU Regulations underpinning the uniform private international law rules were introduced relatively recently and as such, ATCA like cases are yet to be decided under them. However, a number of cases were decided under the predecessors to the current regulations. Two examples are *Lubbe and Akpan*, which were heard before UK and Dutch courts, respectively. While these cases do not fall squarely under the current regulations, they are useful because the courts’ application of the private international law rules is likely to be consistent in future cases. The EU Member State courts dealt with the three issues common among these cases, namely 1) foreign cubed scenario, 2) corporate defendant and 3) plaintiff’s access to justice, differently.

¹⁴³⁹ *Kioble v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹⁴⁴⁰ *Kiobel v Roy.al Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-67 (S.D.N.Y. 2006), *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2011), *Kiobel v Royal Dutch Petroleum Co.* No. 10–1491 (Breyer J.,

claims pending in U.S. courts, specifically in cases involving corporations accused of complicity in international human rights violations overseas. Indeed, the Supreme Court issued a summary order in another large ATCA case, *Rio Tinto plc v Sarei*, No. 11-649,¹⁴⁴¹ a claim for alleged corporate responsibility for human rights abuses in Bougainville, Papua New Guinea. The U.S. Court of Appeals for the Ninth Circuit held in 2011 that these violations are claims under the ATCA. In 2013, the Supreme Court granted Rio Tinto's *certiorari* petition and vacated the Ninth Circuit's 2011 decision, remanding the case to the Ninth Circuit "for further consideration in light of *Kiobel*".¹⁴⁴² Following ATCA, recent development in the European Union ('EU')¹⁴⁴³ such expositions are unsatisfactory because it seems the U.S. Supreme Court has ended most transnational claims under ATCA (as seen in *Kioble v Royal Dutch Petroleum Co.*).¹⁴⁴⁴ The Supreme Court's application of the "presumption against extraterritoriality" in *Kiobel* case¹⁴⁴⁵ will have a direct and immediate effect on future ATCA claims pending in U.S. courts, specifically in cases involving corporations accused of complicity in international human rights violations overseas. Indeed, the Supreme Court issued a summary order in another large ATCA case, *Rio Tinto plc v Sarei*, No. 11-649,¹⁴⁴⁶ a claim

concurring), slip op. at 7-8 (US Apr. 17, 2013) (quoting *Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) and citing Pierre Leval, 'The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court' (2013) 92 *Foreign Affairs* 16 Justices Ginsburg, Sotomayor and Kagan joined in this opinion.

¹⁴⁴¹ *Sarei v Rio Tinto, PLC*, 671 F.3d 736 (2011).

¹⁴⁴² The Supreme Court granted certiorari in *Daimler Chrysler AG v Bauman, et al.* (docket 11-965). Another appeal from the Ninth Circuit in a case involving alleged ATCA violations this time in connection with alleged complicity in human rights violations in Argentina during the 1980s.

¹⁴⁴³ Markus Mayr, 'Extraterritorial Application of The European Convention on Human Rights and The Access to The Court for Victims of Human Rights Violations of ESDP Missions' (2010) *BSIS Journal of International Studies* 7.

The civil and / or commercial scope becomes complex where a public authority is involved. If a public authority is acting in its role of performing public functions, it is clear that the situation cannot be a civil or commercial matter. However, not all actions by public authorities are shielded from the Brussels Regulation as public authorities can undertake civil and / or commercial activities. The current EU Regulations underpinning the uniform private international law rules were introduced relatively recently and as such, ATCA like cases are yet to be decided under them. However, a number of cases were decided under the predecessors to the current regulations. Two examples are *Lubbe and Akpan*, which were heard before UK and Dutch courts, respectively. While these cases do not fall squarely under the current regulations, they are useful because the courts' application of the private international law rules is likely to be consistent in future cases. The EU Member State courts dealt with the three issues common among these cases, namely 1) foreign cubed scenario, 2) corporate defendant and 3) plaintiff's access to justice, differently.

¹⁴⁴⁴ *Kioble v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹⁴⁴⁵ *Kiobel v Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465-67 (S.D.N.Y. 2006), *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 (2011), *Kiobel v Royal Dutch Petroleum Co.* No. 10-1491 (Breyer J., concurring), slip op. at 7-8 (US Apr. 17, 2013) (quoting *Tel-Oren v Libyan Arab Republic*, 726 F. 2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) and citing Pierre Leval, 'The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court' (2013) 92 *Foreign Affairs* 16 Justices Ginsburg, Sotomayor and Kagan joined in this opinion.

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for alleged corporate responsibility for human rights abuses in Bougainville, Papua New Guinea. The U.S. Court of Appeals for the Ninth Circuit held in 2011 that these violations are claims under the ATCA. In 2013, the Supreme Court granted Rio Tinto's *certiorari* petition and vacated the Ninth Circuit's 2011 decision, remanding the case to the Ninth Circuit "for further consideration in light of *Kiobel*".¹⁴⁴⁷

The most interesting thing about the *Kiobel* case¹⁴⁴⁸ is that the US Supreme Court did not address other questions affecting corporations' conduct in international law. For instance, the U.S. Second Circuit clearly acknowledged in *Kiobel* that international treaties may impose liability on corporations to certain subject matters, such as the prevention of bribery or organised crime. The Supreme Court's opinion did not address these specific policy areas. The *Kiobel* court was not asked to examine the potential international lawsuit that might be made in U.S. courts in cases of expropriation by foreign governments.¹⁴⁴⁹ Also, the court decision is likely not to deter current initiatives by international bodies and NGOs aimed at modifying corporate conduct in countries with a substantial human rights records.

This may partly be the reason why the literature continues to address the concept of corporate accountability and the impact of the ATCA on the statute of MNCs.¹⁴⁵⁰ Perhaps this is also due to the fact that is the beginning of a new accountability concept, rather than the end. In summary, the ATCA remains relevant to the understanding of modern relationship between corporate and international law. It also explains the relationship between home and host state holding corporations accountable for human rights abuses. Even though it could be argued that

¹⁴⁴⁷ The Supreme Court granted certiorari in *Daimler Chrysler AG v Bauman, et al.* (docket 11-965). Another appeal from the Ninth Circuit in a case involving alleged ATCA violations this time in connection with alleged complicity in human rights violations in Argentina during the 1980s.

¹⁴⁴⁸ *Kiobel Case* (n 1151). The defendants were accused of complicity in various human rights violations and crimes committed against the Ogoni in Nigeria, including summary executions, crimes against humanity, torture, inhuman treatment, arbitrary arrest and detention, criminally negligent homicide, indecent assault and ill treatment. The cases were brought under the Alien Tort Claims Act (ATCA, also known as the Alien Tort Statute, ATS) and the Torture Victim Protection Act (TVPA). In the case against Royal Dutch/Shell it was also argued that the company acted contrary to the Racketeer Influenced and Corrupt Organizations (RICO) Act. On 1 September 2002 Royal Dutch Petroleum Company and Shell Transport & Trading Company were summoned by Esther Kiobel (also on behalf of her executed spouse dr. Barinem Kiobel) and 11 other (surviving dependants of) Nigerian activists from the Ogoni area. In 2004 subsidiary SPDC was also summoned.

¹⁴⁴⁹ See 28 USC. § 1605(a) (3) (permitting claims to be brought against foreign states in certain cases 'in which rights in property taken in violation of international law are in issue'); see, e.g., *Kalamazoo Spice Extraction Co. v Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 663 (W.D. Mich. 1985) (permitting company to bring expropriation claim against foreign sovereign). The right of corporate or individual investors to bring direct claims for expropriation or unfair treatment also subsists in numerous free trade agreements and bilateral investment treaties to which the United States is party.

¹⁴⁵⁰ Benjamin Thompson, 'Was *Kiobel* Detrimental to Corporate Social Responsibility: Applying Lessons Learnt from American Exceptionalism' (2014) 30 *Utrecht Journal of International and European Law* 82.

the ATCA is outdated because it is an old legal doctrine, these two dimensions set a legal platform for holding corporations accountable for violations of International Law.

However, the ATCA's aim to hold corporations accountable for human rights abuses abroad does suffer from a number of technical and practical limitations. Firstly, the act was never designed to hold corporations accountable for human rights abuses (it was enacted 200 years ago).¹⁴⁵¹ Secondly, it is common that some national courts such as the UK¹⁴⁵² and the Netherlands¹⁴⁵³ work in an extraterritorial manner, although it is less substantial for the operation of ATCA, the cost is also a limitation factor.¹⁴⁵⁴ The third restriction on ATCA is that courts adopt a narrow interpretation of human rights violations that fall within their jurisdiction. For instance, Joseph and McBeth¹⁴⁵⁵ stress that while some egregious human rights abuses fall within the realm of legislation (such as torture, summary executions, sexual assault, war crimes, crimes against humanity, forced labour, and slavery) others are included only if they are methodical, and some are not included at all (such as environmental damage, forced prison labour, expropriation of private property and restriction of freedom of speech).¹⁴⁵⁶ This means that application of *jus cogens* or customary international norms does not have a significant effect on ATCA as it does for other national and international laws.

ATCA is also restricted by state action requirements. Thus, non-state actors can only be accountable under ATCA if they did not act in accordance with the state official or with significant state assistance.¹⁴⁵⁷ This is a significant setback for ATCA, because the establishment of state action requirement and state assistance is problematic in most ATCA cases. A possible explanation for this might be that state sovereignty and immunity from prosecution or liability,¹⁴⁵⁸ allow the corporate to escape liability where it acts under a state

¹⁴⁵¹ Antonioli Deflorian Luisa, 'Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law before US Federal Courts' (2005) 12 (2) *Indiana Journal of Global Legal Studies* 651, 666.

¹⁴⁵² Aleksandra Dorich, 'Parent Company Responsibility of Corporations for the Acts of Their Overseas Group Subsidiaries' (The European Union/United Kingdom Perspective 2015).

¹⁴⁵³ Larissa. van den Herik, 'The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia' (2009) 9 (1) *International Criminal Law Review* 211, 226.

¹⁴⁵⁴ Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?' (2013) 117 (3) *Journal of Business Ethics* 493, 511.

¹⁴⁵⁵ Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010).

¹⁴⁵⁶ *Ibid.*

¹⁴⁵⁷ *Ibid.*

¹⁴⁵⁸ Joanne Foakes, *Immunity for International Crimes?: Developments in The Law on Prosecuting Heads of State in Foreign Courts* (Chatham House 2011). The doctrine of sovereign immunity stands for the principle that a nation is immune from suit in the courts of another country. It was first recognised by US courts in the case of *The Schooner Exchange v M'Faddon*, 11 US (7 Cranch) 116, 3 L. Ed. 287 (1812).

authority.¹⁴⁵⁹ The final limitation of ATCA is that the court's ability to establish jurisdiction over foreign perpetrators (as with all courts) is limited under foreign relations and politics.¹⁴⁶⁰ The U.S. courts have authority to decide whether or not there is a sufficient link between the foreign corporation(s) against which the case is brought. However, the majority of cases have been dismissed because of the lack of a close relationship between the parent company and its subsidiaries.¹⁴⁶¹ However, this approach by the courts is dismissed in this study because the supply chain and subsidiary's role in limiting liability is economically inefficient.¹⁴⁶² In a more positive vein, the subsidiary is more than a device to limit liability; it is an extraordinarily powerful conflicts device in the law of international business organisations. This aspect of the supply chain and subsidiary is independent of its risk-shifting function.¹⁴⁶³ The subsidiary structure operates as a conflicts device by minimising the number of forums in which a suit may be brought. A unitary firm that has "minimum contacts"¹⁴⁶⁴ with several forums is usually subject to jurisdiction in each of these forums. A firm may, however, conduct activities in one of these jurisdictions through a supply chain or subsidiary. If a suit against the firm arises from

At first, courts espoused a theory that provided absolute immunity from the jurisdiction of a US court for any act by a foreign state. But beginning in the early 1900s, courts relied on the political branches of government to define the breadth and limits of sovereign immunity. A party has an immunity with respect to some action, object or status, if some other relevant party in this context, another state or international agency, or citizen or group of citizens has no (power) right to alter the party's legal standing in point of rights or duties in the specified respect.

Pinochet Case: A former head of state only has immunity with regard to his acts as a head of state but not with regard to acts which fall outside his role as head of state. A head of state may be treated as the state itself and entitled to the same immunities. In common law a former head of state enjoys similar immunities, *ratione materiae*, once he ceases to be head of state. He too loses immunity *ratione personae* on ceasing to be head of state. He can be sued on his private obligations: *Ex-King Farouk of Egypt v Christian Dior* (1957) 24 I.L.R. 228; *Jimenez v Aristeguieta* (1962) 311 F.2d 547. As ex-head of state he cannot be sued in respect of acts performed whilst head of state in his public capacity: *Hatch v Baez* (1876) 7 Hun 596.

¹⁴⁵⁹ Alan O Sykes, 'Corporate Liability for Extraterritorial Torts under the Alien Tort Statute and Beyond: An Economic Analysis' (2011) 100 *Georgetown Law Journal* 2161.

¹⁴⁶⁰ Curtis A Bradley, 'The Costs of International Human Rights Litigation' (2001) 2 *Chicago Journal of International Law* 457.

¹⁴⁶¹ *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). On October 2, 2009, the Court of Appeals for the Second Circuit, in *Presbyterian Church of Sudan v Talisman Energy, Inc.*, held that "the mens rea standard for aiding and abetting liability in Alien Tort Statute actions is purpose rather than knowledge alone. In this case, which involves allegations against a Canadian oil company concerning its purported assistance to the government in Sudan in the forced movement of civilians residing near oil facilities, the court concluded that plaintiffs have not established Talisman's purposeful complicity in human rights abuses". In reaching that conclusion, the Second Circuit stated that "the standard for imposing accessorial liability under the Alien Tort Statute must be drawn from international law; and that under international law a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses". *Sinaltrainal v Coca-Cola Company*, 578 F.3d 1252 (11th Cir. 2009). *Bowoto v Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010).

¹⁴⁶² *Lemon v Kurtzman*, 403 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).

¹⁴⁶³ *In International Shoe Co. v Washington*, 326 US 310 (1945), the Supreme Court adopted a standard personal jurisdiction based on a party having "minimum contacts" with a forum.

¹⁴⁶⁴ *Ibid.*

the subsidiary's activities, the firm is only subject to suit in this one jurisdiction, despite activities in other forums. The subsidiary thus serves a purpose similar to the one served by the *forum non conveniens* doctrine,¹⁴⁶⁵ but yields far more predictable results.¹⁴⁶⁶ It is possible, therefore, that limited liability is certainly justifiable at the shareholder level, not at the parent corporation liability level. Thus, the U.S. Supreme Court judgment is wrong on these facts.

ATCA is also subject to political and international relations between state governments.¹⁴⁶⁷ In *Rendell-Baker v Kohn*, Justice Marshall observed that “[t]he decisions of this Court clearly establish that where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are participants in a joint venture, the actions of the private enterprise may be attributable to the State”.¹⁴⁶⁸ Consequently, uncertainty concerning the precise scope of state action is the doctrine of “proximate cause”¹⁴⁶⁹ invoked by several circuit courts particularly in the Ninth Circuit as a

¹⁴⁶⁵ *Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474, 482-85, 478 N.Y.S.2d 597, 602-03, 467 N.E.2d 245, 250-51 (1984). [The *forum non conveniens* doctrine permits a court having jurisdiction over an action to refuse to exercise its jurisdiction when the litigation could be brought more appropriately in another forum. The word “appropriately” is what a judge chooses to make of it, and there seems to be no such thing as a straightforward *forum non conveniens* case. For example, a court's discretion to dismiss on *forum non conveniens* grounds is usually considered to be conditioned on the existence of an alternative forum having jurisdiction over all parties and having the ability to grant complete relief. See *id.* at 89. But even this rule, which may be the closest *forum non conveniens* comes to predictability, is not ironclad.

¹⁴⁶⁶ *Ibid.*

¹⁴⁶⁷ Matthew E Danforth, ‘Corporate Civil Liability under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations’ (2011) 44 *Cornell International Law Journal* 659. Determining when state and private involvement in a wrongful activity are so conflated that each actor is properly considered a state actor under § 1983 is a key concern of both US constitutional law and ATCA jurisprudence, 513 US 374, 378 (1995) (citing *Edmonson v Leesville Concrete Co.*, 500 US 614, 632 (1991) (O'Connor, J., dissenting)). Yet, as the Supreme Court observed in *Lebron v National R.R. Passenger Corp.*, “our cases deciding when private action might be deemed that of the state have not been a model of consistency”. Courts have identified several different tests applied by the Supreme Court. Compare, for example, the classification offered in *Gallagher v Neil Young Freedom Concert*, 49 F.3d 1442, 1448-51 (10th Cir. 1995), with that set out in *Sandoval v Bluegrass Regional Mental Health-Mental Retardation Bd.*, No. 99-5018, 2000 US App. Lexis 17949 (6th Cir., July 11).

The Supreme Court itself has categorised state action into four classes. *Lugar v Edmondson Oil Co.*, 457 US 922, 937 (1982). First, state action exists where a private party partakes in a public function (citing *Terry v Adams*, 345 US 461 (1953); *Marsh v Alabama*, 326 US 501) or enjoys “powers traditionally exclusively reserved to the State”. *Jackson v Metro. Edison Co.*, 419 US 345, 352 (1974) (holding no state action existed in a case involving actions by a privately owned and operated utility corporation). Second, the Court has discerned state action where state compulsion obliges the private party to commit the wrongful act. *Adickes v S.H. Kress & Co.*, 398 US 144, 170 (1970) (holding that state action might exist where discriminatory actions by restaurant reflected state-enforced custom).

Third, in some instances, the nexus between the state and the actions of a private entity is such that the “the action of the latter may be fairly treated as that of the State itself”.

Last, the Court has invoked a “joint action” test. In *Lugar v Edmondson Oil Co.*, the Court implied that this test might be restricted to cases involving “prejudgment attachments”.

¹⁴⁶⁸ *Rendell-Baker v Kohn* 457 US 830, 847 (1982).

¹⁴⁶⁹ Proximate cause was defined in the case of *Pawsey v Scottish Union & National Insurance Company* (1908) as: “the active and efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source”.

key component of §1983 proceedings. As the Ninth Circuit put it in *Van Ort v Estate of Stanewich*, “although state action and causation are separate concepts, elements of the causation analysis have been used in determining state action.”¹⁴⁷⁰ Nevertheless, the author view does offer some good on the merit of the fact.

This political and international relations limitation was relevant in the Supreme Court decision in *United States v Curtiss-Wrights Export Corp.*¹⁴⁷¹ The court establishes by majority opinion that “the President [is] the only organ of the U.S. government in the field of international relations,”¹⁴⁷² hence the ultimate decision maker. This means that it is only the President that has a *de facto* capacity to act in the name of a state, thus, the ATCA is not apply to state conduct because the state is immune from liability. The view on federal government power creates a conflict for ATCA between powers of the state to be used as a full accountability mechanism for human rights violations. A possible way to overcome this obstacle is by allowing ATCA an element of extraterritorial jurisdiction that permits the U.S. District Court judges and Supreme Court Justices to hear cases that may have an element of international relations. However, this would be very difficult to implement in practice because of the jurisdictional difference that exists at state level,¹⁴⁷³ the fear that the state will become the new legal forum for corporate human rights violation cases,¹⁴⁷⁴ and the foreign policy and political relations of the state.¹⁴⁷⁵ As the recent case such as *Kiobel* has shown, the court has limited the jurisdiction of ATCA in cases that may have the potential to upset foreign policy, international relations and the security of the federal government.¹⁴⁷⁶ Furthermore, at the same time, ATCA does not offer a comprehensive solution for human rights violations by MNCs on

¹⁴⁷⁰ *Van Ort v Estate of Stanewich* 92 F.3d 831, 836 (9th Cir. 1996), cert. denied 519 US 1111 (1997).

The proximate cause analysis is particularly important where the wrong is committed by state agents but prompted at some level by private parties. The leading case is *Arnold v IBM* 637 F.2d 1350, 1355 (9th Cir. 1981). Here, IBM was part of a task force with state officials investigating leaks of trade secrets. As a result of the task force's activities, the plaintiff was arrested and indicted and had his house searched. The case against the plaintiff was later dropped.

¹⁴⁷¹ *United State v Curtiss-Wrights Export Corp.*, 299US 304 (1936). Also see: Pierlings JT Menzel and J Hoffmann, ‘United States v Curtiss-Wright Export Corporation, 299 US 304’ (2005) *Völkerrechtssprechung Mohr Siebeck* 265, 269.

¹⁴⁷² *Ibid.*

¹⁴⁷³ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: an Introduction to The Legal Systems of Europe and Latin America* (Stanford University Press 2007).

¹⁴⁷⁴ John B Bellinger Enforcing Human Rights in US Courts and Abroad: The Alien Tort Statute and Other Approaches’ (2009) 42 *Vanderbilt Journal of Transnational Law* 1

¹⁴⁷⁵ Donald Earl Childress, ‘The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation’ (2011) 100 *Georgetown Law Journal* 709.

¹⁴⁷⁶ Julian G Ku, ‘Kiobel and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute’ (2013) 107 (4) *American Journal of International Law* 835, 841.

a broader concept, especially when there is the likelihood of the defendant to raise *forum non conveniens* as a defence mechanism.¹⁴⁷⁷

Černič and Ho have argued that the U.S. Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co*¹⁴⁷⁸ have signalled the end of future transitional human rights abuses claims under the ATCA, as already discussed.¹⁴⁷⁹ However, this study has taken a contrary view on this stance, hence, it is not the end of ATCA, but rather the beginning of a new legal concept of tort liability under the duty of care. This is also seen in the literature, as it continues to address the concept of corporate accountability through ATCA on the statute of corporate liability.¹⁴⁸⁰ This is because ATCA remains relevant for developing corporate accountability and corporate legal liability for human rights abuses. The development can be seen in two dimensions, the first is that ATCA is the only mechanism that is capable of offering accountability for the victim of human rights violation and the second, ATCA has the ability to offer an effective sanction on the corporation irrespective of the state which the violation happened. The indication for this is that ATCA provides a basis for considering the relationship between the state, the corporation, society, international law, and legal norms, whereas the voluntary mechanism does not. This relationship can be summarised in two dimensions, the first is the state duty within international human rights law, which can be seen through tort and civil law liability as a duty of care, and the second is the relationship between the home and host state in holding corporation accountability for human rights abuses, which can be seen in state positive duty not to allow third party to harm anyone in its jurisdiction.

A possible way of building on the success of ATCA and its fundamental principles is to advocate a new paradigm for bringing an action against the corporation in the form of a tort and civil law principle (the Neighbourhood Principle), which has its route in the application of the tort of negligence. This principle is based purely on the Neighbourhood Principle under the English tort law system and other common law jurisdictions, such as Australia, Canada,

¹⁴⁷⁷ John RWilson, 'Coming to America to File Suite: Foreign Plaintiffs and the *Forum Non Conveniens* Barrier in Transnational Litigation' (2004) 65 *Ohio State Law Journal* 659.

¹⁴⁷⁸ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 165. <https://www.supremecourt.gov/opinions/12pdf/10-1491_16gn.pdf> accessed 20 November 2016.

¹⁴⁷⁹ Jernej Letnar Černič and Tara Van Ho Draft (eds), 'Human Rights and Business: Direct Corporate Accountability for Human Right' (2015). <<https://carlosesposito.files.wordpress.com/2014/10/introduction-11october2014.pdf>> accessed 20 November 2016.

¹⁴⁸⁰ Julian G Ku, 'Kiobel and The Surprising Death of Universal Jurisdiction under The Alien Tort Statute' (2013) 107 (4) *American Journal of International Law* 835, 841 and Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge university press 2017).

Nigeria, South Africa, and New Zealand.¹⁴⁸¹ This approach could have a potential to breach the accountability gap in corporate liability under international law. The neighbourhood principle¹⁴⁸² would provide victims reparation, and also put a strong pressure on corporations to comply with international human rights laws and standards. It would also provide a standard to examine, and develop accountability that will ensure adequate and effective protection for individuals and societies. By taking a tort and civil law approach to accountability, the principle could enhance the understanding of corporate human right's duties by assessing both underlying concepts as well as case studies that question and highlight the inadequacy of the current concept of corporate accountability.

4.13. Reasons for Accountability under Tort Law and Civil Law System

Following the discussion in this chapter so far, it is noted that the U.S. ATCA has its limitations¹⁴⁸³ and the current voluntary mechanism have failed to offer appropriate solution for corporate human rights violations.¹⁴⁸⁴ Additionally, international law has failed to both impose human rights obligations on corporation and provide a mechanism to regulate corporate conduct in the sphere of human rights.¹⁴⁸⁵ A possible explanation for this might be that international law and international human rights law have solely addressed the affairs of

¹⁴⁸¹ Jenny Steele, *Tort Law: Text, Cases, and Materials* (Oxford University Press 2010).

¹⁴⁸² In the law of negligence, the neighbour principle enunciated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580 provides an adequate basis on which to resolve duty of care questions. Lord Atkin outlined the parameters of the duty of care in this field in the following often-quoted terms: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question".

The neighbour principle therefore opens the door to claims in negligence for injured parties by identifying the class of people to whom a duty may be owed in any particular scenario. That class of people includes those who are close enough to be directly affected by the allegedly negligent act and close enough that the alleged tortfeasor should have had their interests in contemplation when acting as he or she did. It is clear that the principle does not throw open the floodgates to unlimited claims, because a tortfeasor will not be held to owe a duty of care to those who are not close enough to be in his or her contemplation at the moment of the tortious act or omission..

¹⁴⁸³ Romesh J Weeramantry, 'Time limitation under The United States Alien Tort Claims Act' (2003) 85 (851) *International Review of the Red Cross* 627, 636. However, for some time this requirement posed additional problems due to inconsistent case law as to what limitations period did apply. For example, in *Forti, et al. v Suarez-Mason* (hereafter Forti), the Federal District Court for the Northern District of California adopted the one-year Californian statute of limitations for personal injury actions. In contrast, in *Estate of Winston Cabello v Fernandez-Lorios*, the Federal District Court for the Southern District of Florida applied the ten-year period contained in the Torture Victim Protection Act of 1991 (TVPA).

¹⁴⁸⁴ Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2007) 6 *Northwestern Journal of Human Rights* 222.

¹⁴⁸⁵ *Ibid.*

state,¹⁴⁸⁶ while excluding private entities from human rights obligations.¹⁴⁸⁷ There is no doubt that the current human rights accountability mechanism does not offer any remedy for the victims of corporate human rights abuses. This present study raises the possibility that, there is no doubt corporate accountability should follow tort law and civil law systems. This is because corporate liability cannot be viewed through the current international law mechanisms, as it does not provide an adequate remedy for corporate human rights abuses.¹⁴⁸⁸

Tort and civil laws can offer two alternative approaches to corporate accountability and award remedy. The first is that remedy awarded by the court can be governed by different jurisdiction laws in tort and civil law principles. This is because tort and civil can be enforced in most judicial system and its legal principle is familiar to some states.¹⁴⁸⁹ The second is that corporate accountability and remedy can be awarded through the domestic and international judicial system. These are particularly important because international law structured in relation to civil liability has no specific stance on the appropriate mechanism for corporate accountability, but rather permits each state to take its own stance and apply the law accordingly. This means that state has the freedom to apply and enforce the principle in their jurisdiction without any significant constraint on the interpretation of the legal rule. After briefly outlining the flaws in the ATCA, international law and human rights with respect to corporate human rights abuses and environmental damages, as well as outlining the benefits under tort law. The next section is an introduction chapter of the neighbourhood principle under the English tort law system. It will also outline the key concept behind the development of the neighbourhood principle.

¹⁴⁸⁶ Tagle de Gonzalo Sánchez, 'The Objective International Responsibility of States in The Inter-American Human Rights System' (2015) 7(2) *Mexican Law Review* 115,133.

¹⁴⁸⁷ Sabina Anne Espinoza, *Should International Human Rights Law be Extended to Apply to Multinational Corporations and Other Business Entities?* (Diss UCL University College London 2015).

¹⁴⁸⁸ Barbara A Frey, 'The Legal and Ethical Responsibilities of Transnational Corporations in The Protection of International Human Rights' (1997) 6 *Minnesota Journal of Global Trade* 153.

¹⁴⁸⁹ Oliver Wendell Holmes, *The Path of The Law* (The Floating Press 2009).

Chapter V

5. Aims and Objectives of Chapter V

The aims and objectives of this chapter are to further argue that the tort of negligence, under the neighbourhood principle test, could be an effective mechanism for holding corporations accountable for human rights violations. This research also goes on to argue that the relationship between the corporation, supply chain corporation, government, society, and the environment gives rise to a positive duty of care, not to cause harm or damage.¹⁴⁹⁰ Adding to the little development in the field of tort law perspectives, this thesis expands on this concept by building on the idea of the duty of care in the framework set out in the neighbourhood principle, to analyse the options available for foreign nationals wishing to hold multinational corporations to account within home country jurisdiction, such as US, UK, or the European Union. This chapter also builds on the legal principle of a duty of care and other legal cases to establish A Framework and Focus Approach of assigning accountability for a supply chain corporation, its business partners and the parent corporation.

In a detailed reflection, it is also observed that the relationship between corporate business operations, suppliers, subsidiary, and human rights violations give rise to a rebuttable duty of care, however, this can be limited in many different circumstances. Similarly, the nature, duration, and type of relationship in a supply chain may be different, however, some corporation in the supply chain may have a higher level of influence over the corporate they do business with, while others do not. A possible reason for this might be that some actors with

¹⁴⁹⁰ Ingrid De Poorter, 'Auditor's Liability towards Third Parties within the EU: A Comparative Study between The United Kingdom, The Netherlands, Germany and Belgium' (2008) 3 *Journal of International Commercial Law and Technology* 68.

Caparo. Court of Appeal: Lord Bingham of Cornhill

The majority of the Court of Appeal (Bingham LJ and Taylor LJ, O'Connor LJ dissenting) held that a duty was owed by the auditor to shareholders individually, and although it was not necessary to decide that in this case and the judgment was obiter, that a duty would not be owed to an outside investor who had no shareholding. Bingham LJ held that, for a duty owed to shareholders directly, the very purpose of publishing accounts was to inform investors so that they could make choices within a company about how to use their shares. But for outside investors, a relationship of proximity would be "tenuous" at best, and that it would certainly not be "fair, just and reasonable".

O'Connor LJ, in dissent, would have held that no duty was owed at all to either group. He used the example of a shareholder and his friend both looking at an account report. He thought that if both went and invested, the friend who had no previous shareholding would certainly not have a sufficiently proximate relationship to the negligent auditor. So it would not be sensible or fair to say that the shareholder did either.

The "three stage" test, adopted from Sir Neil Lawson in the High Court, was elaborated by Bingham LJ (subsequently the Senior Law Lord) in his judgment at the Court of Appeal. In it he extrapolated from previously confusing cases what he thought were three main principles to be applied across the law of negligence for the duty of care, (foreseeability, and proximity, fair, just and reasonable).

special knowledge or skills might induce reliance by victims from other supply chain corporation, while other corporation do not. Thus, an implication of this is that the supply chain relationship with a special characteristics that goes beyond an “arm’s length” transaction can trigger factors for legal liability of a contractual partner for labour and human rights violations occurring in its supply business operations. Going beyond the “arm’s length transaction” between specific contractual parties in a special relationship does create a legal duty of care. The purpose of the duty of care here, will help to establish the legal paths to accountability for human rights abuses in the global supply chains. Therefore, what is essentially being said is that the duty of care will provide an affirmative and interpretive instrument to support the push for tort liability, for human rights violations in the global economy, which is grounded in existing legal principle such as the duty of care. This is because the underlying rationale behind this approach is an attempt to overcome the legal obstacle between the law, the economic and social realities prevailing in the global production network.

Additionally, through the use of tort of negligence, this chapter highlights the positive grounds, which victims can rely on to bring a successful claim against corporations. It further argues that that tort of negligence should be expanded and modified to reflect the development of parent corporation and subsidiary accountability and the circumstances surrounding business operations. Finally, it establishes a *prima facie* case for corporate accountability and the role international court/tribunal could play in a corporate duty of care. In conclusion, this chapter offers a meaningful understanding of the duty of care and practical solution for accountability of human rights violations and remedy through tort law if the corporation and its subsidiary undertakings are carried out negligently.

5.1. The Foundation of Tort Law

Generally, tort law can be observed well before the Roman times, when the law of ancient communities was based on the law of civil wrongs, rather than criminal law.¹⁴⁹¹ Roman and Germanic Tort Laws have their origins in the blood feuds and the principles of vengeance;¹⁴⁹² the French system was established through basic principles of the Napoleonic Codes; and Anglo-American liability framework has its foundation in separate torts based on

¹⁴⁹¹ Henry Sumner Maine, ‘Ancient Law: It’s Connection with The Early History of Society and Its Relation to Modern Ideas 1861’ (1986) *New York: Dorset*.

¹⁴⁹² Wendell Holmes Oliver, *The Common Law* (Harvard University Press 2009).

the Writ System.¹⁴⁹³ Whilst it could be contended that the law of tort varies from jurisdiction to jurisdiction, it has evolved in very diverse ways, responding to different cultural, political, and social influences. As a result, the Industrial Revolution and the liberation of Western society brought the expansion of, and significant changes to, tort law¹⁴⁹⁴ resulting in the development of the tort of negligence¹⁴⁹⁵ (as acknowledged by Enneking) “while industries and businesses grew with their technological and scientific know-how, so did the groups of people, employees, and consumers, as well as other third parties that were exposed to the risk of the faulty product, hazardous materials, or potentially harmful production process”.¹⁴⁹⁶

Tort law protects rights held by individuals. As noted by Blackstone, individual rights included the absolute rights of personal security, life, liberty, and property¹⁴⁹⁷ as well as the respective rights that individuals attained as members of the community, and standing in innumerable relations to each other.¹⁴⁹⁸ Therefore, these rights allow the victim of a private wrong to seek a remedy by bringing the appropriate form of action, such as a writ of trespass for the breach of that right.¹⁴⁹⁹ However, a breach of the duty of care (*damnum*) alone is not enough to give rise to a judicial remedy, rather it could warrant a cause of action only if the defendant suffered a legal injury, meaning a violation of a legal right (*injuria*).¹⁵⁰⁰

A factual harm without a legal injury is known as *damnum absque injuria* and provides no basis for relief.¹⁵⁰¹ Whilst, factual injury alone is not enough to give rise to redress, legal injury alone is enough to warrant some action. A typical example of this is an action in trespass, where the appropriate action for redress is a direct, forcible invasion of a right, a claimant needs only to prove the violation of the legal right.¹⁵⁰² An example of this rule is the 1348 case of *I de S et ux. v W de S*.¹⁵⁰³ Additionally, in the English case *Ashby v White*, Chief Justice Holt

¹⁴⁹³ Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (Oxford University Press 2008).

¹⁴⁹⁴ *Ibid.*

¹⁴⁹⁵ *Ibid.*

¹⁴⁹⁶ Liesbeth FH Enneking, ‘Foreign Direct Liability and Beyond-Exploring The Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability’ (2012).

¹⁴⁹⁷ William Blackstone, *Commentaries on the Laws of England* (Vol. 3. Garland Pub 1978). “Referring to “the public rights and duties, due to the whole community, considered as a community, in it [s] social aggregate capacity”; also see, Caleb Nelson, ‘Adjudication in the Political Branches’ (2007) *Columbia Law Review* 559, 627.

¹⁴⁹⁸ *Ibid.*

¹⁴⁹⁹ William Blackstone, *Tracts, Chiefly Relating to The Antiquities and Laws of England* (3d ed. Oxford Clarendon Press 1771).

¹⁵⁰⁰ Andrew F Hessick, ‘Standing, Injury in Facts, and Private Rights’ (2007) 9 *Cornell Law Review* 275.

¹⁵⁰¹ Theodore Sedgwick, Arthur G Sedgwick and Joseph Henry Beale, *A Treatise on The Measure of Damages* (Baker Voorhis 1891).

¹⁵⁰² Ralph Sutton, *Personal Actions at Common Law* (Butterworth & Company Publishers 1929).

¹⁵⁰³ *I de S et ux. v W de S*, *Y.B.Lib. Ass. folio 99, Placitum 60* (Assizes 1348), reprinted in William L Prosser, John W Wade and Victor E Schwartz, *Torts: Cases and Materials* (2010).

rejected the idea that a claimant could not bring an action in the case arising from the violation of a right if he suffered no harm.¹⁵⁰⁴ This implied that tort law and remedy for the violation of rights has been well-known in human existence, ever since the Romans.¹⁵⁰⁵ Chief Justice Holt clarified that “[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal”.¹⁵⁰⁶

In response to the argument presented in this case, he contested that an action on the case was “not maintainable because there is no hurt or damage to the plaintiff”. The Chief Justice Holt further explained that “surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right”.¹⁵⁰⁷ Irrespective of the claim, the violation of the right is what must be taken into consideration. Therefore, Chief Justice Holt stated, “[I]n an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it does him no damage; for it is an invasion of his property, and the other has no right to come there.”¹⁵⁰⁸

A point to note, furthermore, even though Chief Justice Holt’s opinion was in dissent,¹⁵⁰⁹ his judgment succeeded on appeal in the House of Lords.¹⁵¹⁰ Chief Justice Holt correctly stated the law books in relation to law in nineteenth century England¹⁵¹¹ and the

¹⁵⁰⁴ *Ashby v White* (1703) 92 ER 126.

¹⁵⁰⁵ David Ibbetson, ‘How The Romans Did for Us: Ancient Roots of The Tort of Negligence’ (2003) 26 *University of New South Wales Law Journal* 475.

¹⁵⁰⁶ Ralph Sutton (n 1472)

¹⁵⁰⁷ *Ibid.*

¹⁵⁰⁸ *Ibid.*

¹⁵⁰⁹ The justices in the majority provided different reasons for their conclusions. Justice Gould said that Ashby suffered no injury because Parliament might conclude that Ashby had no right to vote. See at 942–43, 92 Eng. Rep. at 129. Justice Powys concluded that Ashby had suffered neither wrong nor damnum, and that even if he had suffered injury it was so minor as not to warrant redress. See at 943–46, 92 Eng. Rep. at 130–31. Justice Powell argued that Ashby had failed to demonstrate damage and therefore could not bring an action on the case. See at 948–49, 92 Eng. Rep. at 13.3

¹⁵¹⁰ Louis L Jaffe, ‘Suits Against Governments and Officers: Sovereign Immunity’ (1963) *Harvard Law Review* 1, 39.

¹⁵¹¹ *Embrey v Owen* 6 Exch 353 at 370, 368, 155 Eng. Rep. 579, 585 [1851]. “Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable, as was laid down in the case of *Ashby v White* by Lord Holt, and in many subsequent cases”.

United States.¹⁵¹² Tort protects rights of the individual from the unjustified interference of the enjoyment of the personal rights and personal property rights, which are derived from law.

In the twentieth and twenty-first centuries, tort litigation has been seen as a mechanism that has evolved from private law and is now viewed as a mechanism for compensation in protecting modern rights. Therefore, as explained in Chapter IV above, in the brief foundation of tort law, it is argued that tort law is a mechanism and fundamental part of the socio-cultural framework in which it is rooted.¹⁵¹³ The indication here is that tort law has a great ability to reflect on ever-changing societal and corporate behaviours and practices. This is evident in the realisation of women's rights by acknowledging them as individual persons before the law rather than as the property of their husbands. This furthermore allows women to sue in their own rights for personal injuries.¹⁵¹⁴ This study has argued that tort law could provide a similar protection to victims of corporate human rights violation. This is because tort law places much emphasis on the judiciary to exercise a strong and effective remedy through reparation for victims whose rights have been violated.¹⁵¹⁵

5.2. The Different Theoretical Perceptions of Tort Law

As it has been examined above, the foundation of tort law has been separated and scrutinised in this research through a diverse viewpoint, in order to establish the fundamental purpose of the concept of tort law in this study. Following the foundation of tort law, it is observed that tort law is divided into two schools of thought; tort as an economic concept, and tort as justice concept,¹⁵¹⁶ that offers remedy for victims whose rights have been breached by corporations. This principle creates two recognised duties under tort law that are as follows: the responsibility not to harm the people in your contemplations; and strict liability, in which

¹⁵¹² *Webb v Portland Mfg. Co.*, 29 F. Cas. 506, 508 (Story, Circuit Justice, C.C.D. Me. 1838) (No. 17,322); *Parker v Griswold*, 17 Conn. 288, 304 (1845). “The principle that every injury legally imports damage, was decisively settled, in the case of *Ashby v White* Professors Woolhandler and Nelson suggest that American law did not clearly adopt the rule that *injuria absque damno* was actionable and point to a statement of Joseph Story in his commentary on the law of agency that “to maintain an action, both [wrong and damage] must concur; for *damnum absque injuria*, and *injuria absque damno*, are equally objections to any recovery”.

¹⁵¹³ Mauro Bussani and Marta Infantino, ‘The Many Cultures of Tort Liability’ in Mauro Bussani and Anthony J Sebok (eds) *Comparative Tort Law: Global Perspectives* (Publisher Edward Elgar 2015).

¹⁵¹⁴ Leslie Bender, ‘Tort Law's Role as a Tool for Social Justice Struggle’ (1997) 37 *Washburn Law Journal* 249.

¹⁵¹⁵ *Ibid.*

¹⁵¹⁶ Gregory C Keating, ‘Distributive and Corrective Justice in the Tort Law of Accidents’ (2000) 74 (193) *Southern California Law Review*.

conduct is governed by a duty not to injure or cause harm to a person;¹⁵¹⁷ and fault liability in which a person conduct carry a duty not to injure a person or cause harm to the person, (negligence act, recklessly, or intentionally).¹⁵¹⁸ Therefore, the fundamental claim is that tort law should be seen as an element to offer remedies for the victim and a deterrent element to stop the future breach of rights. In this understanding, strict liability and fault liability area, are, therefore, efficient mechanisms to protect person rights. Likewise, it allows all actors to only take cost-justified precaution,¹⁵¹⁹ not to harm their neighbour, as well as deterrence mechanism,¹⁵²⁰ to prevent future harm.

Lastly, along similar lines, tort law should be seen as either a mechanism of social policy¹⁵²¹ or as an expression of one's rights and duties, irrespective of the gravity of the rights and the duties.¹⁵²² Likewise, the non-instrumental theory of tort law should be seen as a mechanism derived to the interpretation of tort as a method of providing corrective justice,¹⁵²³ which should be at the core of every remedy for a wrongful act,¹⁵²⁴ such as corporate human

¹⁵¹⁷ Steven Shavell, 'Strict liability versus Negligence' (1980) 9(1) *The Journal of Legal Studies* 1, 25, also see, John J Kircher, 'The Four Faces of Tort Law: Liability for Emotional Harm' (2006) 90 *Marquette Law Review* 789

The legal duty of care concerns the relationship between the Defendant and the Plaintiff. A professional person owes to his or her client a duty to exercise reasonable care and skill in the performance of the task required of him or her. There are a number of situations in which the Courts recognise the existence of a duty of care, for example, employer to employee, doctor to patient, solicitor to client and manufacturer to consumer. Lord Atkin stated: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". The duty described above arises not only as an implied (if not expressed) term of the contract of engagement between the professional and his or her client, but also concurrently in tort. In some circumstances, the professional may owe a duty of care in tort to third parties. Breach of the tortious duty gives rise to liability in the tort of negligence. Kenneth S Abraham, 'Strict Liability in Negligence' (2011). Strict Liability does not depend on actual negligence but that is based on the breach of an absolute duty to make something safe.

Strict liability differs from ordinary negligence because strict liability establishes liability without fault. In other words, when a defendant is held strictly liable for harm caused to the plaintiff, he is held liable simply because the injury happened. The fact that the harm that the plaintiff suffered is not the defendant's fault makes no difference. Strict liability for negligence typically involves cases where the plaintiff was injured either by the defendant's animal or by an abnormally dangerous activity that the defendant had undertaken. For example: David stores highly flammable propane tanks on his property. Lightning strikes, setting the tanks on fire. The fire goes on to damage Saul's property. Although lightning strikes are an act of God and are not in any way David's fault, he is liable under the rules of strict liability simply because Saul suffered harm. The elements required for establishing a case of strict liability are the same duty, breach, cause, and harm elements required for establishing a case of ordinary negligence.

¹⁵¹⁸ Jules Coleman, Scott Hershovitz and Gabriel Mendlow, 'Theories of the Common Law of Torts' (2003).

¹⁵¹⁹ *Ibid.*

¹⁵²⁰ *Ibid.*

¹⁵²¹ Gary T Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter' (1994) 42 *UCLA Law Review* 377.

¹⁵²² *Ibid.*

¹⁵²³ Richard A Posner, 'Instrumental and Noninstrumental Theories of Tort Law' (2013) 88 *Indian Law Journal* 469.

¹⁵²⁴ *Ibid.*

rights violations. This is crucial because it challenges the core economic concept of tort by including tort of negligence in the ordinary moral conception of the corporate act and responsibility, carelessness, and wrongdoing, harm, and reparation.¹⁵²⁵ Following this illustration, this study argues that tort law provides effective accountability, such as the right to truth, the right to justice and the right to effective reparation. Thus, this can be extended to corporate and supply chain wrongful act at homes or host state.

5.3. Tort of Negligence

The lack of corporate accountability is further (partially) persevered by international voluntary mechanisms,¹⁵²⁶ such as corporate social responsibility¹⁵²⁷ initiatives,¹⁵²⁸ which are not legally binding. However, the concept CSR is a subject that has links with many areas of law, including international law and European law, corporate law and corporate governance, tort law and contract law, procedural law, labour and environmental law, and criminal law.¹⁵²⁹ All of these areas contribute importantly to the development of CSR, and ultimately respond to the serious challenges victims face under corporate human rights abuses.¹⁵³⁰ Similarly, Detta

¹⁵²⁵ Jules L Coleman, 'Practice of Corrective Justice' (1995) 37 (1) *Arizona Law Review* 5.

¹⁵²⁶ John Ruggie, 'Report of the Special Representative of The Secretary-General on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework' (2011) 29 (2) *Netherlands Quarterly of Human Rights* 224, 253.

¹⁵²⁷ Andreas Georg Scherer and Guido Palazzo, 'Globalization and Corporate Social Responsibility' (2008). Corporate Social Responsibility (CSR) is a concept within businesses whereby companies ensure the integration of social and environmental activities within their business operations for the good of society. This does, however, involve many parties and over the past few years CSR has been at the forefront of many large multinationals marketing campaigns to prove to consumers that they (the companies) are not just all about profits and market share, but how they can benefit the community at local, national and international levels. It is a key concept within all business as society is more aware through research, the media and interest in the world as whole. It is now part of business culture.

¹⁵²⁸ Justine Nolan, *The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law Human Rights Obligations of Business: Beyond The Corporate Responsibility to Respect?* (Cambridge University Press 2013).

¹⁵²⁹ Tineke Lambooy, 'Legal Aspects of Corporate Social Responsibility' (2014) *Browser Download This Paper*.

¹⁵³⁰ Tineke Elisabeth Lambooy, 'Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR: Developments 2000-2010 and Case Studies' (Diss. Faculty of Law, Leiden University 2010).

In the context of CSR, as has also been mentioned by Nolan, a large variety of private self-regulatory instruments related to social or environmental aspects of economic activities, such as codes of conduct or private labels, have emerged. Some have been adopted unilaterally by multinational companies, others have been developed together with NGOs or international institutions. These instruments often have acquired legal effect under private law because they have become part of supply chain contracts and under labour law if they have been referred to in labour agreements. Carola Glinski ("Competing Transnational Regimes under WTO Law") argues that such private regulatory instruments can also acquire legal effect in public international law when they would qualify as "international standards" under World Trade Organisation (WTO) law. She explains that the concept of "international standards" in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) plays an important role: "[S]tates are required to base their technical (e.g. environmental) regulations on international standards

offers a working definition for CSR which insists on going beyond the minimal in protecting and promoting human rights¹⁵³¹. He proposes an approach to employing disclosures in regulating CSR to promote human rights.¹⁵³² His proposal is based on Section 116 of France's Nouvelles Régulations Économiques and California's Transparency in Supply Chains Act of 2010.¹⁵³³ Temitope reviews the book *'Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption'* by Adeyeye.¹⁵³⁴ He describes that in the book the author takes a stand that a CSR approach should be adopted to curb the involvement of multinational companies in corrupt practices, particularly in developing countries. Corruption is considered a CSR issue which should be regulated in an effective manner.¹⁵³⁵ The Earth Charter also promotes a corruption-free society: "Eliminate Corruption in all Public and Private Institutions".¹⁵³⁶

It may be the case, therefore, that CSR and corporate due diligence¹⁵³⁷ traditionally focus on flagging the legal risks that might emerge from a company's contracts or financial obligations. A target company might express support for a set of voluntary third-party CSR

and are provided a justification for their technical regulations that are in accordance with these standards". The references to "international standards and be regarded as "collision norms", according to Glinsky. When public and private norms compete, the most legitimate public or private standard for governing the problem at hand should be chosen. Depending on the situation, a private standard or label could be more legitimate with regard to the interests concerned than a public norm. Factors that constitute legitimacy are for example the level of participation of relevant stakeholders in the drafting of the norm and whether the decision-making process can be considered a democratic process; the type of the public interest at stake also plays a role.

The argument put forward by Glinsky is reminiscent to the Earth Charter's provisions alluding to democracy, e.g. the provision to "Strengthen democratic institutions at all levels inclusive participation in decision making". Earth Charter. <<http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>> access 9 August 2017

¹⁵³¹ Jeffrey A Van Detta, 'Sexual Orientation, Human Rights, and Corporate Sponsorship of the Sochi Olympic Games: Rethinking the Voluntary Approach to Corporate Social Responsibility' (2014) 30 *Utrecht Journal of International and European Law* 99.

¹⁵³² *Ibid.*

¹⁵³³ In this context, the Earth Charter's provision 12.a which is like Van Detta also emphasises that discrimination in all its forms, such as that based on race, colour, sex, sexual orientation, religion, language, and national, ethnic or social origin, should be eliminated, and that each organisation has a vital role to play ("The way forward") and to provision 10.d. that requires that MNEs "act transparently in the public good".

¹⁵³⁴ Adefolake O Adeyeye, *Corporate Social Responsibility of Multinational Corporations in Developing Countries: Perspectives on Anti-Corruption* (Cambridge University Press 2012).

¹⁵³⁵ Ako Rhuks Temitope, 'Re-Defining Corporate Social Responsibility (CSR) in Nigeria's Post-Amnesty Oil Industry' (2012) 3(1) *African Journal of Economic and Management Studies* 9, 22.

¹⁵³⁶ Earth Charter, The Earth Charter also emphasises to: "Ensure that decision making addresses the cumulative, long-term, indirect, long distance, and global consequences of human activities" (6.c) and to "Act with restraint and efficiency when using energy, and rely increasingly on renewable energy sources such as solar and wind" (7.b).

¹⁵³⁷ Ralph Hamann, Paresha Sinha, Farai Kapfudzaruwa and Christoph Schild, 'Business and Human Rights in South Africa: An Analysis of Antecedents of Human Rights Due Diligence' (2009) 87 (2) *Journal of Business Ethics* 453, 473 and Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 (1) *Business Ethics Quarterly* 145, 177.

protocols, but not give them much legal weight because they are not binding contracts or laws enforced by a government. Yet signing on to these statements brings with its legal risk. A typical example is where corporations can require their subsidiaries or suppliers to comply to minimum human rights stands, and publicly state that they monitor compliance and respond to recognised breaches by either requiring developments or ending the business relations. The importance of CSR for mining companies has changed rapidly. The government of Canada last year announced an “enhanced” CSR strategy that threatens to cut off diplomatic support to Canadian companies with operations overseas who fail to comply with some recognised international standards.¹⁵³⁸

Even then, however, it is hard to pin down the nature of those legal responsibilities. It is one thing for a public company to issue mandatory disclosure about events or risks that might be material to investors. Nonetheless, what about voluntary disclosures? What if a court determines that voluntary CSR compliance is akin to a form of advertising? The company making those statements would be held to the legal standard for false and misleading advertising. That is a different legal test from those that might arise in the tort claims. It is also further argued that the corporation that has undertaken to carry out subsidiary human rights duties could, nonetheless owe its victims a duty of care.¹⁵³⁹ As explained by Hasselback, “CSR reporting has legal liability in a number of different manners, we are not there yet in terms of understanding what those mean”.¹⁵⁴⁰ The findings of this study suggest that CSR is going through an interesting transition from public relations exercise to something that triggers concrete legal liabilities. While the precise nature of those legal responsibilities might be unclear, there is no doubt there is some legal liability when a corporation makes a CSR commitment. Thus, the obvious response for corporations is to abide by the statements made. Thus, the question is, do corporations owe a duty of care to the subsidiary and the community

¹⁵³⁸ David Scheffer and Caroline Kaeb, ‘The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under The Alien Tort Statute and The Case for a Counterattack Strategy in Compliance Theory’ (2011) 29 *Berkeley Journal of International Law* 334.

Companies may have a complete defence to any allegations. Even so, the issue should be whether companies are exposing themselves to potential claims by not keeping an eye on the CSR ball. So far, it look like it is possible that plaintiff-side counsel can bring human rights suits where the corporation act contrary.

¹⁵³⁹ Madeleine Conway, ‘New Duty of Care Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains’ (2014) 40 *Queen's Law Journal* 741.

¹⁵⁴⁰ Drew Hasselback, ‘Investigating a Target Company's CSR Claims is now a Standard Part of Transaction Due Diligence, Lawyers say’ (2015).

John Smith, a partner with Lawson Lundell LLP in Vancouver, says that as a general governance proposition, a company shouldn't state what it's going to do unless it plans to follow through and actually do it.

to act in a reasonable way so as not to harm society through its business operation, either directly or indirectly? When and where does this duty of care arise? This is perhaps a factual question.

It is observed as well that a claim of a duty of care was rejected in the US Court of Appeal for the Ninth Circuit decision in *Doe I v Wal-Mart Store, Inc* in 2009.¹⁵⁴¹ Wal-Mart Stores, Inc. (Wal-Mart) (defendant) required its international suppliers to agree to follow Wal-Mart's work-conditions standards policy under the suppliers' contracts with Wal-Mart. The agreement with suppliers gave Wal-Mart the right to inspect the overseas facilities of suppliers and penalise suppliers for violating the policy. In general, therefore, it seems that Wal-Mart Stores Inc. has assumed responsibility and has exercised control over the subsidiary operational policy and working condition. However, this judgment was not given a proper critical analysis by either the court or legal scholars. Likewise, the fundamental flaws in the Ninth Circuit decision have not been brought to light, as well as the flaw in applying the concept of a duty of care. The findings of this study suggest that the tort of negligence was not given a proper consideration in the case, where a corporation conducts its business activities, in conjunction with its subsidiary, where it has assumed responsibility to protect the victims from injury caused by the subsidiary (third party) and the victims can rely on the corporation undertaking for remedy. Another possible explanation for this is that the corporation may owe the victim a duty of care in the appropriate circumstances, where it is found that its conduct falls below the reasonable man standard (reasonable corporate standard, what corporate ought to do and what it ought not to do) and where it have indicated or shown to have taken responsibility of the subsidiaries business operations and policies.

Nonetheless, to understand where the duty of care arises, first, it is imperative to establish the concept of duty of care, how the duty of care is established, the situation that gives rise to a duty of care and the fundamental implication that underline a duty of care. This is because the liability element in the tort of negligence does not take the form of negation, but rather has a conditional form, which is manifested in the standard of applicability of the standard of the tort of negligence, which is the duty of care. Therefore, the tort of negligence conditions encompasses a conduct-based as opposed to a combined action, the intent based duty of care as it is a duty of care, a duty that only implies that an actor who possesses that ability to intentionally or knowingly comply with it, or put differently, has the ability but

¹⁵⁴¹ 572 (3d) 677 (9th Cir 2009) [Wal-Mart Stores 9th Cir].

chooses not to exercise it. In this interpretation, where the duty of care is owed, the negligence condition should allow the imposing of liability for the foreseeable harmful outcomes of the actor negligent conduct.¹⁵⁴²

In this notion, it can be said that the duty of care potential has two elements harming and caring, hence the negligence element comprises two duties.¹⁵⁴³ These two elements impose a disjunctive norm, which demands that one does not cause or bring harm by one's negligent conduct.¹⁵⁴⁴ The disjunctive nature of negligence norm is reflected in 1. the evidence that avoiding a breaching duty of care through a negligence conduct can be achieved either by not causing harm (irrespective of whether one did or did not take care not cause harm); or 2. taking a reasonable care (to the appropriate extent) to alleviate the harm (irrespective of whether or not one action caused the harm). Therefore, in a situation where an actor who is subject to negligence (via duty of care) fails to meet both disjunctives that compromise the negligence element, i.e. harm through careless conduct, shall violate the duty of care and should be liable for its conduct. Therefore, a duty of care sets a standard for an actor's conduct. In other words, a duty to do, omissions, or a duty to succeed and not a duty to try to mitigate a harm. Contrary to this, in a situation where an actor lacks the ability to perform as a rational agent, the act, a duty of care should mandate or where the situation is such that the actor does not have the capacity to prevent harm, (due to lack of ability) then the actor should not be responsible or should not be at fault for failing to comply with a duty of care and should not, therefore be found liable for the negligent conduct.

5.4. The Neighbourhood Principle Duty of Care

The concept of duty of care has been established by the decision made by the courts in legal cases over the years.¹⁵⁴⁵ Specifically, the law on duty of care has its origin in the famous case; *Donoghue v Stevenson* (1932).¹⁵⁴⁶ The fact of *Donoghue v Stevenson* began when Mrs Donoghue and a friend went to a café for a drink. Mrs Donoghue asked for a ginger beer, which her friend bought. It was supplied, as was customary at that time, in an opaque bottle. Mrs

¹⁵⁴² Herbert Lionel Adolphus Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008).

¹⁵⁴³ Dan B Dobbs, *The Law of Torts* (Vol. 2 West Group 2001).

¹⁵⁴⁴ Ori J Herstein, 'Responsibility in Negligence: Why the Duty of Care is Not a Duty "to Try"' (2010) 23 (02) *Canadian Journal of Law and Jurisprudence* 403, 428.

¹⁵⁴⁵ Harold Luntz, David Hambly and Robert Alexander Hayes (n 400)

¹⁵⁴⁶ *Donoghue v Stevenson* [1932] AC 562 (HL Sc).

Donoghue poured out and drunk some of the ginger beer, and then poured out the rest. At that point, the remains of a decomposing snail fell out of the bottle. Mrs Donoghue became ill later and sued the manufacturer.¹⁵⁴⁷ In the case, the House of Lords agreed that manufacturers owed a duty of care to the end consumer of their product.

Hence, the ginger beer manufacturers had breached the duty, causing harm to Mrs Donoghue, and she was entitled to claim damages. In this view, the duty of care is about the relationship, and it must be shown that the particular wrongdoer stood in the required relationship to the victim such that he/she came under obligation to use care toward him. This relationship is referred to as proximity, thus to establish a duty of care, the victim must establish that the wrongdoer ought to have foreseen the breach of the duty of care to the victim. Therefore, duty means proximity, in the legal sense (this has nothing to do with geographical proximity) and proximity means the level of closeness of relationship required for that particular kind of violation.¹⁵⁴⁸ Accordingly, in order to establish a duty of care, it must be shown that;

- “Some damage was foreseeable to foreseeable violations;
- there is a sufficiently close relationship between the parties to establish a duty in that class of case (proximity); and
- that it is just and reasonable to impose a duty of care”.¹⁵⁴⁹

To be clear, the duty of care concept is a means of justifying or refusing to impose liability in law against a wrongdoer. Therefore, a duty of care protects against interference with the victim’s rights, livelihood, including the environment, health, and wellbeing of people close to them. In this understanding, it is argued that a duty of care protects against three types of harm, damage to property and economic loss,¹⁵⁵⁰ which is an extension of human rights violation and environmental damages.

¹⁵⁴⁷ Catherine Elliott and Frances Quinn, *English Legal System* (Pearson Education 2008).

¹⁵⁴⁸ John G Fleming, *An Introduction to The Law of Torts* (Clarendon P 1967).

¹⁵⁴⁹ Harold Luntz, David Hambly and Robert Alexander Hayes (n 400)

¹⁵⁵⁰ John G Fleming, *The Law of Torts* (Vol. 1. Law Book Company for New South Wales Bar Association 1987).

5.5. Establishing the Neighbourhood Principle of Duty of Care

5.5.1 *Donoghue v Stevenson* (1932)

According to Lord Atkin; we are solely concerned with the question of whether, as a matter of law in the circumstance alleged, the defendant owed any duty to the pursuer to take care. Lord Atkin, went further to state that it is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigations, and it is sufficient to say whether the duty exists in that circumstance. The result is that the Courts have engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinction based on the particular relations of the one side or the other, whether manufacturer, salesman, or landlord, customer, tenant, strange, and so on. In this way, it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified.¹⁵⁵¹

Nonetheless, the duty which is common to all the cases where liability is established must logically be based upon some element that is common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition, the more likely it is to omit essential or to introduce non-essential. The attempt was made by Brett MR in *Heaven v Pender*, in a definition to which Lord Atkin referred to later in the judgment.¹⁵⁵² As framed, it was demonstrated too wide, though it appears to Lord Atkin that if the concept of duty of care is properly limited, it will be capable of affording a valuable practical guide. Lord Atkins further pointed out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but an instance.¹⁵⁵³

Therefore, the liability for negligence, whether it is styled as such or treated as it is in other systems as a species of culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay, but acts or omission which any moral code would

¹⁵⁵¹ Paula Giliker and Silas Beckwith, *Tort* (Sweet and Maxwell 2000).

¹⁵⁵² *Heaven v Pender* [1883] 11 QBD 503. <<https://www.leeds.ac.uk/law/hamlyn/donoghue.htm>> accessed 18 December 2016.

¹⁵⁵³ Lord Atkin, 'Donoghue v Stevenson' [1932] 562 AC 580. <http://www.scienze giuridiche.uniroma1.it/sites/default/files/docenti/alpa/Donoghue_Stevenson.pdf> accessed 18 December 2016.

censure, cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.¹⁵⁵⁴ In this view, the rule of law arises which limit the range of complainants and the extent of their remedy.

“The rule that you are to love your neighbour becomes law, you must not injure your neighbour, and the lawyer’s questions, who is my neighbour?¹⁵⁵⁵ Receive a restricted reply, you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour, who, then, in law is my neighbour? The answer seems to be persons who are closely and directly affected by the act that the one ought reasonably to have them in contemplation as being so affected when one directing the mind to the acts or omissions which are called into questions”.¹⁵⁵⁶

It appears to Lord Atkin that the doctrine of *Heaven and Pender*, as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity introduced by Lord Esher and Smith LJ in *Le Lievre v Gould*.¹⁵⁵⁷ Lord Esher, highlight that the case established under certain circumstances, one man may owe a duty to another man, even though there is no contract between them. Therefore, if one man is near another, or is near the property of another, a duty lies upon them not to do that which may cause a personal injury to that other or may injure his property.¹⁵⁵⁸ So Smith LJ; the decision of *Heaven v Pender*, was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other.¹⁵⁵⁹ In this view, it was said that the judgment sufficiently states the truth if proximity be not confined to merely physical proximity, but be used, as the Court think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care of would now be directly affected by his careless act.¹⁵⁶⁰

¹⁵⁵⁴ *Ibid.*

¹⁵⁵⁵ Robert FV Heuston, ‘Donoghue v. Stevenson in Retrospect’ (1957) 20 (1) *Modern Law Review* 1, 24.

¹⁵⁵⁶ Neil MacCormick, ‘Donoghue v. Stevenson and Legal Reasoning’ (1991) *Donoghue v. Stevenson and the Modern Law of Negligence, Continuing Legal Education of British Columbia, Vancouver* 191, 213.

¹⁵⁵⁷ *Le Lievre v Gould* [1893] 1 QB 491. <http://www.iclr.co.uk/assets/media/vote/1915-1945/Donoghue_ac1932-1-562.pdf> accessed 18 December 2016.

¹⁵⁵⁸ Dilan A Esper and Gregory C Keating, ‘Putting ‘Duty’ in Its Place: A Reply to Professors Goldberg & Zipursky’ (2008) 41 *Loyola of Los Angeles Law Review* 8, 15.

¹⁵⁵⁹ Richard Kidner, *Casebook on Torts* (Oxford University Press 2012).

¹⁵⁶⁰ *Ibid.*

Furthermore, Lord Macmillan, humbly appears to have stated that the diversity of view which exhibited in such cases such as *George v Skivington*¹⁵⁶¹ on the other hand and *Blacker v Lack and Elliot*,¹⁵⁶² on the other hand, took two extreme instances in a duty of care. As explained by the fact in the discussion of the topic of duty of care, which was engaged in the Lordships' attention, indicate two rival principles of the law to find a meeting place where each has contended for supremacy. On the other hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally well-established doctrine that negligence apart from contract, gives a right of action to the party injured by that negligence, thus the use of negligence in the case, of course, in its technical legal term, implied a duty owed and neglected.¹⁵⁶³

Therefore, the illustration from Lord Macmillan is that the fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action found on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about the contract. Accordingly, the "best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for the negligence in carrying him".¹⁵⁶⁴ Therefore, there is no reason why the same set of facts should not give a person a right of action in contract and another person a right action in tort,¹⁵⁶⁵ against corporations.

Where, as in cases present like *Donoghue v Stevenson*, so much depends upon the avenue of approach to the question of the duty of care. If one begins with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer; and thus the plaintiff, if they are to succeed, is driven to try to bring himself or herself with one or other of the exceptional cases where the strictness of the rule that none but a party to the contract can be found on a breach of that contract has been mitigated in the public interest, as it has been in the case of person who issues a chattel which is dangerous or which he or she

¹⁵⁶¹ *George and Wife v Skivington* [1869] LR 5 Ex 1.

¹⁵⁶² *Blacker v Lake & Elliot, Ltd* [1912] 106 L.T. 533. <<http://www.scottishlawreports.org.uk/resources/dvs/page-text/pages/Respondents-Case-Page-10.html>> accessed 18 December 2016.

¹⁵⁶³ *Ibid.*

¹⁵⁶⁴ Jenny Steele, *Tort Law: Text, Cases, and Materials* (Oxford University Press 2010).

¹⁵⁶⁵ Tony Weir, *A Casebook on Tort* (Sweet & Maxwell 2004).

knows to be in a dangerous condition.¹⁵⁶⁶ If on the other hand, one disregards the fact that the circumstance of the case at one stage includes the existences of a contract of sales between the manufacturer and retailer and approaches the question by asking whether there is evidence of carelessness on the part of the manufacturer. Or whether they are owed a duty to be careful in a question with which the party who has been injured in consequence of his want of care. The circumstance that the injured party who was not a party to the incidental contract of sales becomes irrelevant, and his title to sue the manufacturer is unaffected by the circumstance.¹⁵⁶⁷

The law takes no cognisance of carelessness in the abstract. The law concerns itself with carelessness only where there is a duty to take care and where the failure in that duty have caused damage. Therefore, in such circumstances, carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.¹⁵⁶⁸ What, then, are the circumstance which gives rise to this duty of care? In the daily contract of social and business life, human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relations give rise to a duty to take care as between those who stand in that relation to each other.¹⁵⁶⁹ Hence, the ground of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstance of the human race. Therefore, the categories of negligence are never closed but constantly evolving. Consequently, the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Likewise, where there is room for a variety of opinion, it is in determining what circumstance will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side to a right to have taken care. Hence, when the requirement of fault and duty of care is met, the tort will regulate the behaviour of actors in society when that behaviour falls within that sphere it is the tort's purpose to regulate.

¹⁵⁶⁶ William Lloyd Prosser, *Cases and Materials on Torts* (Foundation Press 1952).

¹⁵⁶⁷ Dominick R Vetri, *Tort Law and Practice* (LexisNexis/Matthew Bender 1998).

¹⁵⁶⁸ Kenneth S Abraham, *The Forms and Functions of Tort Law* (West Publishing Company 2002).

¹⁵⁶⁹ Brenda Mothersole and Ann Ridley, *Tort of Negligence A-Level Law in Action* (Macmillan Education UK 1995).

5.5.2. *Anns v Merton London Borough Council* (1978) Test of a Duty of Care

Following *Donoghue v Stevenson*, there was little development of duty of care concept until it was suggested in *Dorset Yacht v Home Office*¹⁵⁷⁰ that a duty should exist whenever damage was foreseeable. However, the concept of duty of care prompts the question, what is, or ought to be, reasonably foreseeable? This is something which may ultimately depend on the imagination of the individual judge; thus, what one judge perceives to be reasonably foreseeable, another may consider unusual. Consequently, the modern reformulation of Lord Atkin's neighbourhood principle can be found in the dictum of Lord Wilberforce in *Anns v Merton London Borough Council*.

Lord Wilberforce; through the trilogy of cases in this house, *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, and *Dorset Yacht Co Ltd v Home Office*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be the approach in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any consideration which ought to negative or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.¹⁵⁷¹

The position was this: the wrongdoer owed the claimant a duty to take reasonable care (provided that it was reasonably foreseeable that a failure to take reasonable care by the wrongdoer would cause damage to the claimant) unless there was some policy reason as to why not to impose a duty of care on the wrongdoer.¹⁵⁷² This prompted Lord Goff in *Smith v Littlewood* to acknowledge the broad general principle of liability for foreseeable damage is so widely applicable that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not.¹⁵⁷³ The first stage test appeared to present

¹⁵⁷⁰ *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

¹⁵⁷¹ *Anns v Merton London Borough Council* [1978] AC 728.

¹⁵⁷² Kirsty Horsey and Erika Rackley, *Kidner's Casebook on Torts* (Oxford University Press USA 2015).

¹⁵⁷³ *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18, Also see; Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 (1) *Oxford University Commonwealth Law Journal* 95, 106.

almost no hurdle almost everything is foreseeable if one is to think about it long enough. This meant that most of the work when it came to restricting claims, was left to the second stage policy. The fact that the first hurdle of Lord Wilberforce's test was so readily jumped was at the heart of the huge expansion of the tort of negligence in the late 1970s and early 1980s, during which the court seemed reluctant to refuse claims of the any vaguely sympathetic claimant who came before them.¹⁵⁷⁴ Lord Wilberforce's two-stage test soon fell disfavour. This is because it was seen to be behind the unprecedented, and increasingly unpopular, expansion of the tort of negligence. As noted by Lord Roskill's leading opinion in *Junior Books v Veitchi*.¹⁵⁷⁵ Thus, the test was rejected in *Yuen Kun-yeu v Attorney General of Hong Kong*¹⁵⁷⁶ and *Anns* itself was subsequently overruled by *Murphy v Brentwood District Council*.¹⁵⁷⁷ Therefore, the broad general principle with its two-part test envisaged in *Anns* has thereby swept aside, leaving the courts to impose duties of care only when they could find precedent in comparable factual situations.

5.6. Modern Approach to the Law of Negligence

Tort has developed over the year through case law in England, thus, case law established that there is a number of factual situations in which a duty of care is to now known to be owed. For example, drivers owe a duty of care not to injure pedestrians, and employers owe a duty of care to take a reasonable step to protect their employees from injury.¹⁵⁷⁸ Nonetheless, there are still situation in which it is not clear whether there is a duty of care, and

¹⁵⁷⁴ *McLoughlin v O'Brian* [1983] 1 AC 410. <<http://www.pierre-legrand.com/mcloughlin-v-obrian.pdf>> accessed 19 December 2016.

¹⁵⁷⁵ *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520.

¹⁵⁷⁶ The claimant deposited money with a licensed deposit taker, regulated by the Commissioner. He lost his money when the deposit taker went into insolvent liquidation. He said the regulator was responsible when it should have known of the difficulties.

Held: The requirements for a duty of care were a foreseeability of harm, and a close and direct proximity. The commissioner had no day to day contact with the deposit taker, and no especial proximity to the plaintiff. The nature of the statute gave no warranty that could properly have been relied upon by the plaintiff.

Lord Keith identified the issue at stake: "The foremost question of principle is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the Ordinance, to exercise reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in fraudulent or improvident fashion". Lord Keith analysed the nature of the power exercisable by the defendants and the circumstances in which it would fall to be exercised.

¹⁵⁷⁷ *Murphy v Brentwood District Council* [1991] 1 AC 398.

¹⁵⁷⁸ John Hamilton Baker, *An Introduction to English Legal History* (MICHIE 1979).

following the move toward a tighter test after *Anns* was overruled, the Supreme Court set down a new test in *Caparo Industries plc v Dickman* (1990)

5.6.1. *Caparo Industries plc v Dickman* (1990)

In *Caparo*, where a case raises an issue of law, as opposed to an issue purely of fact, the defendant can make what is called a striking out application, which effectively argues that even if the facts of what the claimant says happened are true, this does not give them a legal claim against the defendant. Therefore, cases where it is not clear whether there is a duty of care as a subject matter, the case may be striking out, where essentially the defendant is saying that even if they had caused the harm alleged to the claimant, there was no duty of care to them and so there can be no successful claim in negligence.¹⁵⁷⁹

Where a striking out application is made, the court conducts a preliminary examination of the case, in which it assumes that the facts alleged by the claimant are true, and from there, decides whether they give rise to an arguable case in law, so in a case involving a duty of care, they would be deciding whether, on the facts before them, the defendant may owe a duty of care to the claimant. If not, the case can be dismissed without a full trial. If the court finds that there is an arguable case, striking out the application without being dismissed, and the case can then proceed to full trial (unless settled out of court).¹⁵⁸⁰

5.7. The Notion of a Duty of Care in Caparo Test

The basic test for a duty of care is now the one set down in *Caparo v Dickman*. This applied to the duty of care question in negligence cases and those which fall into any of the rules on the tort of negligence. In some cases, it is also applied alongside with the special rules in a group of negligence cases, and some legal scholar suggest that those special rules are in fact simply a more detailed application of the principles in the *Caparo* Test.¹⁵⁸¹ The test requires the court to ask three questions

- Was the damage reasonably foreseeable?;

¹⁵⁷⁹ *Caparo Industries plc v Dickman* [1990] UKHL 2.

¹⁵⁸⁰ Tom Allen, 'Liability for References: The House of Lords and *Spring v Guardian Assurance*' (1995) 58 (4) *Modern Law Review* 553, 560.

¹⁵⁸¹ Catherine Elliott and Frances Quinn (n 1483).

- Was there a relationship of proximity between the defendant and the claimant?; and
- It is just, fair, and reasonable to impose a duty in this situation?

The essential point of this case is that all cases of negligence need the requisite level of proximity between the parties, example sufficient level of relationship. In cases of personal injury and damage to property, this requirement will be satisfied by foreseeability, but in other cases, such as psychiatric injury, economic loss, closer relationship between the parties will be necessary to establish liability. The dissatisfaction with the *Anns* test lay in the objection that there should, or indeed could, be any test for establishing a duty of care in negligence. Therefore, in *Caparo* Lord Bridge stressed the inability of any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care was owed.¹⁵⁸² In his Lordship's opinion¹⁵⁸³ in addition to the requirement of foreseeability of damage, "necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. Furthermore, his Lordship stressed that "novel categories of duty ought to be developed incrementally and by analogy with established categories of duty."¹⁵⁸⁴ Lord Bridge immediately sought to scotch any encouragement to view the foregoing as merely representing the substitution of one test of duty for another;" according to his Lordship;¹⁵⁸⁵ "[T]he concepts of proximity and fairness are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope".¹⁵⁸⁶

This research shall argue that an attempts to retard the expansion of liability through the abandonment of tests or principles will be viewed as ultimately self-defeating. Regardless of Stapleton's view that there is no test for a duty of care and that there can be no "duty test,"¹⁵⁸⁷

¹⁵⁸² *Caparo Industries plc v Dickman* (n 1515).

¹⁵⁸³ *Ibid.* at 617, 618.

¹⁵⁸⁴ *Ibid.* at 618.

¹⁵⁸⁵ *Ibid.* at 618.

¹⁵⁸⁶ *Ibid.*

¹⁵⁸⁷ Jane Stapleton, 'Duty of Care Factors: A Selection from The Judicial Menus' in Cane P and Stapleton J (eds),

the daily business of advising clients, drafting pleadings, framing submissions for court, and even drafting of judgments creates an irrepressible incentive for lawyers to distil principles, guidelines and indeed tests from appellate judgments. Over time, several Law Lords appear to have arrived at the inevitable conclusion that *Caparo* did indeed establish what may be described as a framework test for the creation of a duty.¹⁵⁸⁸ It may be seen therefore that the Supreme Court has transmitted distinctly mixed signals to practitioners concerning whether the analysis of the duty question should take place according to tests and frameworks, or instead be decided with reference to the selection of random factors. This inconsistency has been unhelpful to legal representative and lower court judges, to put it mildly. Steele has observed, eg, how “in *Caparo* the elements of the test (especially the ‘proximity’ part of it) have been declared (whether boldly or despairingly) to have no content, yet at the same time, they continue to be talked about and apparently applied”.¹⁵⁸⁹ In the years following *Caparo*, however, the issues referred to in that case have not uniformly been adopted as the starting point for the analysis of whether a duty of care should be imposed in a novel situation. Putting to one side psychiatric harm cases where discrete guidelines have been developed,¹⁵⁹⁰ the case law reveals that other concepts such as assumption of responsibility and distributive justice have emerged to play an increasingly significant role in discussions about the duty of care. However, as will be demonstrated in this thesis, diverging judicial viewpoints have rendered these concepts largely unintelligible to those whose task it is to apply them, however, there is no doubt that this the notion of duty of care is an appropriate doctrine for corporate accountability.

5.8. The Meaning of Reasonable Foreseeability

This element of the test has its foundation in the original neighbour principle developed in *Donoghue v Stevenson*.¹⁵⁹¹ Essentially, the courts must ask whether a reasonable person in

The Law of Obligations: Essays in Celebration of John Fleming (Oxford University Press Oxford 1998).
¹⁵⁸⁸ *Ibid.* Statements to this effect have been evident in some of the more recent decisions of the House of Lords in negligence. So in *JD v East Berkshire Community Health NHS Trust* [2005] 2 AC 373 [2005] UKHL 23 concerning the liability of social workers and health care professionals towards parents, Lord Bingham spoke (at [2]) of “applying the familiar test laid down in *Caparo*”. In *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495; [2005] UKHL 24 concerning the liability of the police towards victims and witnesses of crime, Lord Steyn stated (at [17]) that “counsel accepted that the issues must be resolved in the framework of the principles stated in *Caparo*”.

¹⁵⁸⁹ Jenny Steele, ‘Scepticism and The Law of Negligence’ (1993) *Cambridge Law Journal* 52, 437.

¹⁵⁹⁰ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *Page v Smith* [1996] AC 155.

¹⁵⁹¹ Percy H Winfield, ‘Duty in Tortious Negligence’ (1934) 34(1) *Columbia Law Review* 41, 66.

the defendant's position would have foreseen the risk of harm. A modern case which shows how this part of the test works is *Langley v Dray* (1998),¹⁵⁹² where the claimant was a policeman who was injured in a car crash when he was chasing the defendant, who was driving a stolen car. The Court of Appeal held that the defendant knew, or ought to have known, that he was being pursued by the claimant, and therefore in increasing his speed he knew or should have known that the claimant would also drive faster and so risk injury. Therefore, the defendant had a duty not to create such risk and he was in breach of that duty.

Hence, for a duty to exist, it must be reasonably foreseeable that damage or injury would be caused to the particular defendant in the case, or to a class of people to which he or she belongs, rather than just to people in general.¹⁵⁹³ In other words, the duty is owed to a person or class of person, and not to the human race in general. A good, if old, example of this principle can be seen in *Palsgraf Long v Long Island Railroad*.¹⁵⁹⁴ The case arose from an incident when a man was boarding a train, and a member of the railway staff negligently pushed him, which caused him to drop a package he was carrying. The box contained fireworks, which exploded, and the blast knocked over some scales, several feet away. They fell on the claimant and she was injured. She sued, but the court held that it could not reasonably be foreseen that pushing the passenger would injure someone standing several feet away. It is reasonably foreseeable that the passenger himself might injure, but that did not in itself create a duty to other people.

That does not, however, mean that the defendant has to be able to identify a particular individual who might foreseeably be affected by their actions; it is enough that the claimant is part of a class of people who might foreseeably be affected. This was the case in *Haley v London Electricity Board* (1965).¹⁵⁹⁵ The defendant dug a trench in the street in order to do repairs. Their workmen laid a shovel across the hole to draw pedestrian's attention to it, but the claimant was blind, and fell into the hole, seriously injuring himself. It was agreed in court that the precautions taken would have been sufficient to protect a sighted person from injury, so the question is whether it was reasonably foreseeable that a blind person might walk by and be at risk of falling in. The Court of Appeal said that was it, the number of blind people who lived in London and were used to walking about themselves meant that the defendant owed a duty to his class of people. Thus, it shall be said that a duty is owed if the harm can be reasonably

¹⁵⁹² *Langley v Dray* [1998] PIQR P 314.

¹⁵⁹³ Catherine Elliott and Frances Quinn, *As Law* (Pearson Education 2006).

¹⁵⁹⁴ *Palsgraf v Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

¹⁵⁹⁵ *Haley v London Electricity Board* [1965] AC 77, also see; Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (Oxford University Press 2008).

foreseeable by the defendant and it can be extended to all those who might reasonably be expected to be in his or her contemplation, including blind pedestrians.

5.9. The Meaning of Proximity

“In normal language, proximity means closeness, in terms of physical position. In law, however, it has a wider meaning, which essentially concerns the relationship, if any, between the defendant and the claimant.”¹⁵⁹⁶ Hence, in *Muirhead v Industrial Tank Specialities*, Goff LJ pointed out that this does not mean that the defendant and claimant must know each other, the situation they are both in meant that the defendant could reasonably be expected to foresee that his or her actions would cause damage to the claimant.¹⁵⁹⁷

An implication of this might be that, the notion of proximity can be observed as another simple way of showing the foreseeability test, as the case of *Caparo v Dickman* itself illustrated. The claimant, *Caparo*, was a company who had made a takeover bid for another firm, Fidelity, in which they already owned a large number of shares. When they were deciding whether to make the bid, they had used figures prepared by *Dickman* for Fidelity’s annual audit, which showed that Fidelity is making a healthy profit.¹⁵⁹⁸ However, when the takeover complete, *Caparo* discovered that Fidelity was in fact almost worthless. They sued *Dickman*, and the House of Lords had to decide whether *Dickman* owed them a duty of care. They pointed out that the preparation of annual audit was required under the Companies Act 1985,¹⁵⁹⁹ for the purposes of helping existing shareholders to exercise control over a company. An audit was not intended to be a source of information or guidance for the prospective new investor, and therefore could not be intended to help existing shareholders, like *Caparo*, to decide whether to buy more shares. The audit was effectively a statement that was put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement, for any one of a variety of purposes which the maker of the statement has no reason to contemplate.

Furthermore, proximity may also be expressed in terms of a relationship between the defendant and the activity which caused harm to the claimant, as defined by Lord Brennan in *Sutradhar v Natural Environmental Research Council* (2004),¹⁶⁰⁰ as proximity in the sense of

¹⁵⁹⁶ Catherine Elliott and Frances Quinn (n 1563).

¹⁵⁹⁷ *Muirhead v Industrial Tank Specialities Ltd and Other* [1986] QB 507.

¹⁵⁹⁸ Margaret Brazier and Harry Street, *The Law of Torts* (Lexis Pub 1993).

¹⁵⁹⁹ Companies Act 1985. <http://www.legislation.gov.uk/ukpga/1985/6/pdfs/ukpga_19850006_en.pdf> accessed 19 December 2016.

¹⁶⁰⁰ *Sutradhar v Natural Environment Research Council* [2006] 4 All ER 490; [2006] UKHL 33.

a measure of control over and responsibility for the potentially dangerous situation.¹⁶⁰¹ An example of this kind of proximity can be seen in *Watson v British Boxing Board of Control*, where the claimant was the famous professional boxer Michael Watson, who suffered severe brain damage after being injured during a match. He sued the Board, on the basis that they were in charge of safety arrangements at professional boxing matches, and evidence showed that if they had made immediate medical attention available at the ringside, his injuries would have been less severe. The Court of Appeal held that there was sufficient proximity between Mr Watson and the Board to give rise to a duty of care, because they were the only body in the UK which could license professional boxing matches and therefore had complete control of and responsibility over a situation which could clearly result to Mr Watson (the claimant) if the Board did not exercise reasonable care.¹⁶⁰²

In *Sutradhar*, the claimant was a resident of Bangladesh, who had been made ill by drinking water contaminated with arsenic. The water came from wells near his home, and his reason for suing the defendant was that, some years earlier, they had carried out a survey of the local water system, and had neither tested for nor revealed the presence of arsenic. The claimant argued that the defendant should have tested for arsenic, or made public the fact that they had not done so, so as not to lull the local people into a false sense of security. The Supreme Court, however, held that the defendant had no duty of care to users of the water system because there was insufficient proximity.¹⁶⁰³ Mr Sutradhar himself had never seen the defendant's report, and so his claim had to be based on the idea that they owed a duty to the whole population of Bangladesh. The Supreme Court said this could not be the case, the defendant had no connection with the project that had provided the wells, and no one had asked them to test whether the water was safe to drink. They had no duty to the people or the government of Bangladesh to test the water for anything and were simply doing general research into the performance of the type of wells that happen to be used in that area. Therefore, the fact that someone had expert knowledge of a subject did not impose on them a duty to use that knowledge to help anyone in the world who might require such help. Proximity required a

The Lords may have turned full circle since its decision in *Caparo* may be found in the judgment of Lord Bingham in *Customs and Excise Commissioners v Barclays Bank plc* [2006] 3 WLR 1; [2006] UKHL 28.

¹⁶⁰¹ *Ibid.*

¹⁶⁰² *Watson v British Boxing Board of Control* [2001] QB 1134.

¹⁶⁰³ *Sutradhar v Natural Environment Research Council* (n 1570).

degree of control of the source of Mr Sutradhar's injury, namely the drinking water supply of Bangladesh, and the defendants had no such control.

5.10. The Meaning of Fair, Just and Reasonableness

In practice, the requirement that it must be just and reasonable to impose a duty of care often overlaps with the previous two in *Watson* and *Sutradhar*, for example, the arguments made under the heading of proximity could equally well be seen as arguments relating to fair, just, and reasonableness.¹⁶⁰⁴ It was obviously more fair, just, and reasonable to expect the Boxing Board to supervise a match properly since that was their job, then it was to expect the researcher in *Sutradhar* to take responsibility for a task that was not their job and which they had never claimed to have done.

Where fair, just, and reasonableness are specifically referred to, it is usually because the case meets the requirements of foreseeability and proximity, but the court believes there is a sound public policy reason for denying the claim. An example is *McFarlane v Tayside Health Board*. The claimant had become pregnant after her partner's vasectomy failed and claimed for the cost of bringing up her child. The court denied her claim, on the basis that it was not fair, just, and reasonable to award compensation for the birth of the healthy child, something most people, they said, would consider a blessing.¹⁶⁰⁵

Likewise, in *Commissioner of Customs and Excise v Barclays Bank plc*, the government's Customs and Excise departments was owed large sums in an unpaid VAT by two companies, who had accounts with the defendant bank. Customs and Excise went to the court and obtained what is called freezing injunction, which restricted the two companies access to the money they had in the bank. The bank was notified of the order, and should have prevented the companies from withdrawing money, but, apparently because of negligence, they failed to do so, which meant that the two companies were able to take out over two million and Custom and Excise were unable to recover all the money owed.¹⁶⁰⁶ They sued the bank,

¹⁶⁰⁴ Catherine Elliott and Frances Quinn (n 1563).

¹⁶⁰⁵ *MacFarlane and Another v Tayside Health Board* [2000] 2 AC 59.

¹⁶⁰⁶ Observing the court decision in life of: *Murphy v Brentwood District Council*, the House of Lords chose to overrule its earlier decision in *Anns*, putting to rest the concept that pure proximity was sufficient to impose liability on a builder for pure economic loss sustained by successive purchasers of the property. However, the restrictive approach taken in *Murphy* has prompted attempts to create exceptions to this blanket prohibition against recovery, the most notable being the "complex structure theory". Under the theory, complex structures such as houses are deemed to be composites of distinct elements, and damage to one element of the structure caused by defects in another may give rise to a claim for physical damage.

claiming that it owed them a duty of care. The Supreme Court held that it was foreseeable that Customs and Excise would lose the money if the bank was negligent in handling the freezing injunction, and that this suggested there was also a degree of proximity. However, the decisive issue was whether it was fair, just, and reasonable to impose a duty. The House of Lord stated that where a court order was breached, the court had the power to deal with that breach, this would usually be enough to ensure that banks complied with such orders, and there was nothing to suggest that the order created any extra cause of action. In addition, it was unjust and unreasonable that the bank should become exposed to a liability which could amount to much more than two million that was at stake in this case when it had no way of resisting the court order and got no reward for complying with it.

In summary, the negligent act of a person, that cause loss or damage to his or her property should give rise to a duty of care. The creation of danger,¹⁶⁰⁷ control over dangerous property,¹⁶⁰⁸ or a dangerous situation,¹⁶⁰⁹ may give rise to a duty of care. Therefore, as the law implied, you are to take care not to cause harm or injure your neighbour. Hence, in this context, the concept of duty of care imposes a legal obligation on humanity not to cause harm or bring harm to anyone in their contemplation, which extends to corporations, as well as another actor in society. In this notion, the currently established duty of care is also extended to a parent company to ensure that the operations of its foreign subsidiaries are conducted in an appropriate manner to protect the local citizens of the communities with whom the subsidiary interacts.¹⁶¹⁰ Therefore the victim could argue that, under the principle of duty of care in tort law, if a duty of care can be established, then a parent corporation and its subsidiary can be found liable for negligence if the direct action of each result in human rights violations and environmental damage.¹⁶¹¹ Likewise, if these elements are satisfied, the court should find that the victims had

The theory was first raised in *D & F Estates* by Lord Oliver and Lord Bridge, and adopted by Recorder Jackson QC in *Jacobs v Moreton*. It was on these bases that the Court of Appeal in *Bellefield Computer Services Ltd v E Turner & Sons Ltd* refused to apply the theory, and that HHJ Humphrey Lloyd QC in *Payne v Setchell Ltd* held that the approach was no longer tenable.

¹⁶⁰⁷ Lord Hoffmann's Explanation of *Home Office v Dorset Yatch Co* [1970] AC 2004 in *Stovin v Wise* [1996] AC 923 at 948.

¹⁶⁰⁸ *Australia Safeway Stores Pty v Ltd v Zaluzna* (1987) 162 CLR 479.

¹⁶⁰⁹ *Ibid.*

¹⁶¹⁰ José Engrácia Antunes, *'Liability of Corporate Groups: Autonomy and Control in Parent-Subsidiary Relationships in US, German and EU Law: an International and Comparative Perspective* (1994).

¹⁶¹¹ "The test of fairness is a test which may principally involve considerations of policy". The most significant example of this approach occurred in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633,13 concerning the liability of local authorities towards victims of child abuse, where in the leading judgment Lord Browne-Wilkinson meticulously considered a number of policy-type factors under the heading of whether it would be fair, just and reasonable to impose a duty of care. Lord Browne-Wilkinson repeated this approach in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, concerning the liability of a local authority towards children it had taken into its care, where his Lordship commented (at 559): "In

pleaded all the essentials required to support the establishment of a duty of care. Consequently, the court should allow the issue of whether a duty of care should be recognised in corporate and subsidiary human rights violations to proceed to trial.

5.11. The Modern Application of Tort Law to Corporate Human Rights Violations

5.11.1. Corporation Duty of Care in the Supply Chain/Agent

The complexities in the global supply chain and the structure of the supply chains may vary from one business operation to the other and could change over the duration of the business operation.¹⁶¹² What this means is that the corporate supply structure may vary depending on the business model being used by a specific corporate, and the buying/selling agreements between the buyer and the seller, in relation to the business operation between the same supplier but with regard to different products. Thus, what might be clear in this scenario is that the volume of business between the purchasers and the suppliers can differ greatly. Furthermore, similar corporate in the supply chain may be a supplier and a purchaser at the same time with a varying level of market share and power in each product position. A possible effect of this might be that it will be impossible to offer a one size fits all approach to the question of corporate accountability for human rights violations in the supply chain. Now, to overcome this predicament, the concept of duty of care being an advocate in this thesis established the legal paths that might enhance accountability in this scenario, but it is also clear that it does not aim to provide definitive answers for every possible human rights violation that occurred in the supply chain.

Bearing these difficulties in mind and the different relationship in the supply chain, a duty of care provides a general legal tool and the flexibility as far possible, so that it can be used to the diverse supply chain relationships. However, what is important for the court to recognise is that the factual matrix of each case may differ, which can lead to different outcomes for corporate liability in the supply chain. Therefore, the aim of the duty of care is to

a wide range of cases public policy has led to the decision that the imposition of liability would not be fair and reasonable in the circumstances, eg some activities of financial regulators, building inspectors, ship surveyors, social workers dealing with sex abuse cases". More recently, Lord Bingham in Customs and Excise Commissioners spoke in terms of the "third, policy, ingredient of the threefold test" (at [15]). However, other decisions have suggested that the concept of policy might operate on a discrete level, and that it might continue to be used as a long stop to deny a duty of care even after the three elements of *Caparo* have been considered.

¹⁶¹² University of Essex, 'Improving The Paths to Business Accountability for Human Rights Abuses in The Global Supply Chains; A Legal Guide' (2017) *Essex Business and Human Rights Project*.

establish a common ground for corporate accountability in the supply chain. This is because the key challenges facing victims of corporate human rights abuses in the supply chain arise from the contractual nature of the relationship (assuming a contract is in place, which may not be so) and the indirect/weak connection between the suppliers/buyers and their business partners that goes beyond the first-tier relationships. In this situation it is particularly difficult to establish when a supply chain corporate owes a duty of care to the victims in its supply chain; to found a causal link between the harm and the actions or omissions of the corporation, specifically for abuses happening beyond the first tier of their supply; and to strike the right balance between establishing accountability for victims of human rights abuses and, avoiding this being a factor that dissuades corporations from engaging with their supply and using their leverage to improve standards.

A possible implication of this could be that the risk of a legal liability under the duty of care could push supply chain corporation to develop business ethics that incorporate human rights standards as the principle of its business operations in the supply chain. The important point to note here is that to prevent business from pushing their legal responsibility further down the supply chain tiers, the court must result to the novel duty of care being advocated in this thesis to ensure that the supply chain corporation do not exempt themselves from human rights violation that occurred in its business operation with the supplier. Thus, the best approach for the court to establish legal liability is to consider the different level of a duty of care for different supply chain relationship.

From the explanation given above and in this section, the scope of the supply chain duty of care is limited to four categories; 1. powerful influential purchasers and suppliers, or those that possess or should possess some types of expert knowledge or skills¹⁶¹³ (including major brands falling under the group of what supply chain management literature calls “leads firms” as well as SMEs¹⁶¹⁴; 2. social auditors, as entity possessing special knowledge and instilling reliance on their expertise by businesses and third parties (consumers, workers and communities); 3. contractual partners of the firms recognised in 1; and 4. third parties (example labour force and communities) whose human rights have been violated by the acts and omission of the corporation recognised in 1, 2, and 3.

¹⁶¹³ *Ibid.*

¹⁶¹⁴ Offshoring Manufacturing SMEs, ‘Manufacturing Small and Medium Size Enterprise’s Offshore Outsourcing’ (2013).

The criteria established here is aimed at recognising the concrete difference that can be made by taking a human right centred approach in holding corporation accountability for human rights abuses. The duty of care places an importance on the severity of the injuries suffered by victims, example the concept of duty of care will enable remedy for physical injuries in the notion of human rights violations and environmental damages. Bringing human rights duty of care into the interpretation of tort law principles will help the victims to show the severity of the human rights abuses and the injuries suffered. However, to establish a novel duty of care in the supply chain, the victims must prove number of factors, these are;

- Number of tiers in the supply chain;
- The nature of relationship between purchaser and suppliers/agent and third parties/social auditors and suppliers (contractual and non-contractual);
- Duration of the relationship;
- Size of the corporations involved, purchaser and supplier(s), of particular importance economic capacity;
- Nature of business activity and type of industry; and
- The violation in question; labour rights and/or human rights and whether the claim can be formulated in civil liability term.

The question for the court is to determine;

- Who are the claimants, and do they have legal standing: individual victims (example employees in the supplier factory or consumer) or groups of individuals (example indigenous communities);
- Who are the defendants, and do they have legal standing: purchasing corporation or supplier?;
- What are the standards for admissibility of evidence?;
- Who bears the burden of proof? Can the burden of proof be shifted towards the defendant?;
- What are the applicable law to (a) the procedure and (b) the substance of the claim?;
- Are class actions or group claims admissible in the jurisdiction selected for the lawsuit; and
- Is legal aid available to cover the cost of litigation?

5.11.2. The Application of Duty of Care in the Supply Chain Context

The important question for the court is to ask what the elements of a special relationship between the supply chain corporation are that would enable holding one corporate responsible for human rights violations and environmental damages taking places in the supplier's business operations. Whiles, the thesis acknowledges that human rights and labour law are distinctive in nature and scope, injuries or losses caused as a result of their breach can both give rise to a duty of care claim. For example, a violation of the right of life,¹⁶¹⁵ prohibition of inhuman treatment, prohibition of slavery¹⁶¹⁶ or respect for health can give rise to a duty of care claim for death, physical injury or psychiatric damages. A possible explanation for this might be that a violation of the right to just and favourable condition of work could give rise to tort claims for property or personal damage. Therefore, what is important to prove in this case is whether:

- The defendant owes a duty of care to the claimant through assumption (Focus Framework Approach) or imposition (Determinate Framework Approach) of responsibility; and
- When does the relationship between the parties give rise to an imposition or assumption of responsibility necessary for a duty of care?

Further to these questions, the court must apply the three-stage (*Caparo Test*) analysis in this thesis to identify whether the defendant owes the claimant a duty of care. These three-stage analyses are:

1. Harm must be reasonably foreseeable
2. Proximity of the relationship between the claimant and the defendant
3. It must be fair, just, and reasonable that the law imposes a duty of a given scope on one party for the benefit of the other.

Further to this analysis, the court must also prove the defendant breach of that duty and causation, which is the harm suffered by the claimant as the result of the defendant breach of the duty. In this understanding, what is essentially being said here is that for the court to establish a supply chain accountability, three important conditions must be met. These are;

¹⁶¹⁵ Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press USA 2008).

¹⁶¹⁶ Marie-Bénédicte Dembour, *Who Believes in Human Rights: Reflections on the European Convention*. (Cambridge University Press 2006).

1. The defendant (example a purchaser or agent) owed a duty of care to the claimant (example worker in the supplier factory);
2. Breach of that duty and
3. Ham suffered by the defendant as a consequence of that breach.

However, though, the most challenging aspect of applying tort of negligence to supply chain relationship is to show that the supply chain corporation owed a duty of care to prevent/mitigate harm to the victims of the human rights violation in its supply chain business operations. Nonetheless, the court can address this complication by referring to the *Attorney General v Hartwell (British Virgin Islands)* case¹⁶¹⁷, it is observed by the court that “a duty of care is a duty owed in law by one person or class of person to another particular person or class of person. This comprises an obligation to take reasonable care to ensure that the person or persons to whom the duty is owed do not suffer a particular type or types of damages”.¹⁶¹⁸ What is essentially being said by the court is that, to determine what the legitimate scope of the duty of care is, it is essential to ask whether a supply chain actor is within the cycle of people that owe a duty to take care to avoid damage to certain potential victims.

Of course, to date, there has not been a case or a judicial determination of the ground and reach of this duty in the supply chain context. However, what is clear in a novel context in which a finding of negligence is possible, the courts have applied the three-stage test examined in *Caparo v Dickman*¹⁶¹⁹ to determine whether a duty of care exists. When determining the existence of a novel duty of care, it is as vital for the court to bear in mind that “categories of negligence are never closed”.¹⁶²⁰ Thus, his Lord’s view have been reaffirmed in English courts as an incremental approach to extended duties of care to a novel situation by analogy.¹⁶²¹ In this view, the tort of negligence draws a distinction between acts and omissions. A leading court case in the UK has explained this distinction in the following words. “Liability for positive acts of carelessness is well recognised, but liability for failure to act is treated differently with ‘duties for affirmative action’ being imposed only in exceptional circumstances”.¹⁶²² What is clear from this statement is that most supply chain cases

¹⁶¹⁷ *Attorney General v Hartwell (British Virgin Islands)* [2004] 1 WLR 1273 Privy Council.

¹⁶¹⁸ *Ibid.*

¹⁶¹⁹ *Caparo Industries plc v Dickman* [1990] 2 AC 605 HL.

¹⁶²⁰ *Donoghue v Stevenson* [1932] AC 562, per Lord Macmillan.

¹⁶²¹ *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 and *Chandler v Cape plc* [2012] EWCA Civ 52.

¹⁶²² Simon F Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2012).

concerning human rights abuses are likely to be failing under the “omission” group. This is due to the fact that in the majority of cases, it is not the positive acts of the defendant that will cause the harm, but its failure to do its share to prevent the abuses taking place with the supply chain. In an English term, this means the duties to act to protect A (victims) from acts of B (contractual partner), this also means fixing tort liability in relation to another person’s harmful conduct.

However, before the court moves to establish that a supply chain corporation failed to do its share to prevent the violation in question, the claimant must first determine whether the defendant had a legal duty to do something to prevent these harm in the first place. In order to examine the existence of such a duty to act, it is important for the court to assess whether a duty arises from the relationship between the parties which gives rise to an “imposition or assumption of responsibility”. This position is vital because the facts of a case are of utmost importance in deciding whether a new situation can be brought within the existing principle such that a duty of care will be held to exist. In determining whether such an imposition or assumption of responsibility exist, it is imperative for the court to result to the principle that distinguishes between cases of physical injury, psychiatric injury¹⁶²³ (particularly secondary victims), and pure economic loss.¹⁶²⁴ If the court applies this principle, they will be able to find a duty of care where the injury in question is related to the supply chain operations.

¹⁶²³ The law adopts a restrictive approach in awarding damages for negligently inflicted psychiatric injury. In addition to the Caparo test for imposing a duty of care, the courts have laid down several obstacles which must be satisfied by claimants in order to establish liability for negligently inflicted psychiatric injury. Firstly there must be an actual psychiatric injury. *Alcock & ors v Chief Constable of South Yorkshire* [1992] AC 310 House of Lords. “Lord Oliver set out the distinction between primary and secondary victims. A primary victim one involved immediately or immediately as a participant and a secondary victim one who is no more than a passive and unwilling witness of injury to others. The claimants were all classed as secondary victims since they were not in the physical zone of danger. For secondary victims to succeed in a claim for psychiatric harm they must meet the following criteria:

- A close tie of love and affection to a primary victim
- Witness the event with their own unaided senses
- Proximity to the event or its immediate aftermath
- The psychiatric injury must be caused by a shocking event.

¹⁶²⁴ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 HL. The court found that H&P's disclaimer was sufficient to protect them from liability and Hedley Byrne's claim failed. However, the House of Lords ruled that damage for pure economic loss could arise in situations where the following four conditions were met:

- a fiduciary relationship of trust & confidence arises/exists between the parties;
- the party preparing the advice/information has voluntarily assumed the risk;
- there has been reliance on the advice/info by the other party, and
- such reliance was reasonable in the circumstances.

To assess whether the relationship between a supply chain corporation and the victims of human right violations in its business operations gives rise to an “imposition or assumption of responsibility”,¹⁶²⁵ the court must examine the *Caparo* test laid in this thesis. Thus, what is essential to determine is that there might be, in any given situation, two ways of fixing a duty of care on a supply chain corporation: taking the Focus Framework Approach, meaning responsibility for damage done arises from an act that falls below a standard of reasonable care, with foreseeable damage, as could happen when a driver negligently causes an accident, injuring a pedestrian. The Determinate Framework Approach widens the enquiry for the imposition of a duty of care on the supply chain corporation. It determines the relationship between various actors that could share the responsibility for the harm caused to the victims. An implication of this could be that if a driver is an employee then there must be a good reason for deciding that the employer shares responsibility, not because the latter helped cause the injury but because there is a good reason of policy for adding the employer as the responsible party. What is being said here is that the latter might have greater resource available to remedy the victims, or might have a level of knowledge that will be desirable for the victims to rely on in order to prevent the accident. These two approaches are distinct, but yet are at certain points able to complement each other. The Focus Framework Approach can, for example, fix responsibility on a party who has taken a dangerous course of action, while the Determinate Framework Approach can ask which other parties should have taken to prevent the danger from arising.

5.11.3. Assumption of Responsibility, the Determinate Framework and Efficient Approach

The Determinate Framework, consist of a situation in which the supply chain corporation assumed responsibility through its actions vis-a-vis its business partner’s employees, thus, creating a special relationship between itself and its supply chain partners. Therefore, where the assumption of responsibility is not explicit, in order to assess whether the defendant is nevertheless deemed to have taken on or assumed such a responsibility towards

¹⁶²⁵ *Smith v Littlewoods Organisation Ltd* [1987] AC 241 HL. see *Lamb v Camden London Borough Council* [1981] QB 625 but will do so in appropriate cases (*Dorset Yacht v Home Office* [1970] AC 1004). The general rule relating to omissions is that no liability arises for a pure omissions but there exist exceptions to this where there is a special relationship, an assumption of responsibility, where the defendant is in control of a 3rd party that causes the damage, where the defendant is in control of land or dangerous thing”.

the victims, the court must also result to the *Caparo* test. The test laid down in *Caparo* is the ingredients of duty of care that set the standard for a reasonable foresight of the injury, proximity of relationship between the supply chain corporation and the claimant, and the fairness/reasonableness of imposing a duty. However, it is important to also acknowledge that there is no specific definitions of the legal text establish in *Caparo*. Hence, they are viewed as “convenient labels” to examine a duty of care in light of the circumstance of each case.¹⁶²⁶

5.11.4. Foreseeability of Human Rights Abuses in Supply Chain Relationships

For a claimant to establish a duty of care, the harm must be reasonable foreseeable. The essential question to the court is whether the injury suffered is within the reasonable contemplation of the defendant. This question trigger two factors in a duty of care case, these two factors are the subjective factor and the objective factor. The subjective factor in this thesis is referred to the nature of the relationship. What this means is that did the purchaser give specific instruction to suppliers (labour and human rights conditionality), compliance monitoring, audits and human rights due diligence, while the objective factor is about the level of risk for the human rights abuses, an interpretation of this is country context: prevalence of labour and human rights abuses, industry-specific risks and the extent to which abuses are publicly known.

Applying the subjective and objective factors to a duty of care case will help to examine the foreseeability of the injury by the supply chain corporation. This means, the defendant is required to investigate whether the injury suffered by the victim was within the reasonable contemplation of the supply chain corporation. In determining the reasonable foreseeability of human rights abuses, the focus should be on the knowledge that the person in the position of the defendant would be expected to possess in relation to the abuses suffered by the victims as a result of the supply chain corporation act or failure to act. This approach was examined in *Attorney General V Hartwell*¹⁶²⁷ “one of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of reasonable care, harm of the relevant description might be suffered by the plaintiff or member

¹⁶²⁶ *Caparo Industries plc v Dickman* [1990] 2 AC 605 HL, per Lord Bridge of Harwich.

¹⁶²⁷ *Attorney General V Hartwell (British Virgin Islands)* [2004] 1 WLR 1273. 1) *Referring to Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

of a class including the plaintiff'.¹⁶²⁸ However, the question here is, what would make human rights violations and environmental damages foreseeable in the supply chain context? In this thesis, the answer to the question can be found in the examination of the knowledge that a person in the position of a particular supply chain corporation has or should have had in relation to the damaging consequences of its acts or omission suffered in its supply chain. Addressing the duty of care by determining the knowledge of the defendant will potentially capture a wide group of victims, and thus the courts can also limited this requirement by the proximity and fairness element argued from the beginning of this chapter.

A possible way to achieve this is by the courts focusing on the relationship a purchase has with the suppliers, including its suppliers beyond the first-tier. A purchaser's knowledge (or presumed knowledge) of the human rights abuses as the result of it acts or omission can be determined by first looking at the features of the relationship it has with its suppliers (subjective factor). This approach is adequate because not every purchaser will be in a position to reasonably foresee human rights abuse resulting from its act or omissions. There mere act of purchasing from a supplier is not likely to satisfy this prong of the *Caparo* test. When a purchaser gives specific instructions to its suppliers in relations to the standard concerning the way which the product is made (such as labour and human rights standards), and monitors suppliers compliance with its standards, then it can be inferred that this is an indication of the foreseeability of the harm, resulting from the suppliers' failure to comply with these standards.

Nonetheless, the most important, is for the court to determine the type of standard-setting and monitoring is relevant in the first-tier relationship. If this is clear, then there can be a strong presumption of foreseeability where the supply chain corporation has carry out human rights due diligence for its supply chain relationship. A second contributory factor to the foreseeability examination in the supply chain context is the level of risk for labour and human rights violation prevalent in the country where the supplier is located or the level of risk inherent in the product or industry in question, for example conflict minerals and oppressive government. This is an objective factor, thus, what this mean is that if a purchaser is aware of or should have been aware of such a risk, this is an indication of foreseeability of the harm. For example, sub-standard working conditions in garment factories in Bangladesh,¹⁶²⁹ are well-publicised. Now if a brand subcontractor production of its branded goods to a garment factory

¹⁶²⁸ *Ibid.*

¹⁶²⁹ Muhammad Islam Azizul and Craig Deegan, 'Motivations for An Organisation Within a Developing Country to Report Social Responsibility Information: Evidence from Bangladesh' (2008)21 (6) *Accounting, Auditing & Accountability Journal* 850, 874.

in Bangladesh, then the foreseeability of the human rights violation is heightened. In these cases, foreseeability can be present for suppliers beyond the first-tier. This is so because brands often trace each stage of the production process in their supply chain to ensure quality product. Even though the measurability of product quality and standards may be stronger than the measurability of labour and human rights standards, the ability to trace the former illustrates at least an ability to acquire knowledge concerning labour and human rights conditions in a supply chain. If the court is satisfied that all these elements are present, then the court should be in a position to impose a duty of care on the defendant.

5.11.5. Proximity of Human Rights Abuses in Supply Chain Relationships

Proximity is shorthand for Lord Atkin's neighbour principle. It means that there must be legal proximity, i.e. a legal relationship between the parties from which the law will attribute a duty of care to protect a person from harm. However, proximity also means physical closeness or closeness of the relationship between the party. What is essential in the examination of proximity is the question of whether the defendant has conducted itself in such a way that the claimant is entitled to rely upon the defendant relation to give a subjective matter (assumption of responsibility). Also, the court must determine whether the person that suffers the harm (example employee of a supplier) has a close interest in a contract between the other parties (example between the supplier and a purchaser) and is affected by the non-compliance of one of those parties. In addition, it is recommended in this thesis that the court must use the following parameters to establish proximity in the supply chain context. These parameters are;

- Monitoring and standard-setting through Code of Conduct;
- Monitoring compliance and imposition of a sanction for failure to comply;
- The volume of transactions and the duration of the relationship between the purchaser and supplier; and
- Outsourcing of the manufacture of self-branded product.

What is also important for the court to bear in mind before applying the principles indicated above is that proximity captures the closeness between the defendant and the claimant. It is not restricted to physical closeness, but also extend to certain close and direct relations where the human rights abuser knows or should have reasonably known that the careless act or omission

complained of directly affects the victims.¹⁶³⁰ Though, it is important to bear in mind that the element of foreseeability alone is not sufficient to find a duty of care. Therefore, there is a need for some indicators of proximity, which include physical, circumstantial or causal proximity.¹⁶³¹ The prerequisite for the proximity of relationship will also be fulfilled where it can be shown that the defendant has assumed responsibility to the claimant. This was explained by Deane J, in *Sutherland Shire Council v Heyman*¹⁶³² “an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken where the other party ought to have known of such reliance”.¹⁶³³ In a legal term, what this means is that cases, which conclude that a voluntary assumption of responsibility has been identified, the finding has been that the defendant has so conducted him/herself that the claimant is entitled to rely upon the defendant to act appropriately in relation to the subject matter of the duty of care. This, in Dam view, “in many of these situations the ‘relier’ is a person who has a close interest in a contract between other parties and is affected by the non-compliance of one of those parties”.¹⁶³⁴ An implication of this is that, where a purchaser sets labour and human rights standards in contract or purchase orders, the beneficiaries of these conditions would clearly have a close interest in the fulfilment of those contractual obligations.

However, a substantial challenge to establishing proximity between a purchaser and victim of human rights abuse in the supply chain corporation is the difficulties of overcoming the argument that the defendant, (example the purchaser), cannot be held liable for failing to prevent another party, (example the supplier), from abusing the human rights of a third party, which could be the supplier’s employees or the indigenous people in the community. *Prima facie*, the purchaser is, at best, merely in a contractual relationship with the supplier, and as such has no duty to control the latter to prevent inflicting harm on the third parties since in principle there can be no liability for an omission to act.¹⁶³⁵ However, if the relationship between the purchaser and the supplier goes beyond an ‘arm’s length’ transaction, depending on the level of closeness of the relationship, there can be sufficient proximity between the human rights violation to the third parties and the purchaser. Having said that, before the court determines proximity, the court must take into consideration a number of factors. It might be

¹⁶³⁰ J Steele, *Tort Law: Text, Cases and Materials* (3rd ed. OUP Press 2014).

¹⁶³¹ *Sutherland Shire Council v Heyman* [1985] [1985] 50 ALR 1.

¹⁶³² *Ibid.*

¹⁶³³ *Ibid.*

¹⁶³⁴ Cees Van Dam, *European Tort Law* (OUP Oxford 2013).

¹⁶³⁵ *Sutradhar v Natural Environment Research Council* [2004] 4 All ER 490.

possible to take some or all these factors together in examining proximity. For example, a purchaser's monitoring suppliers through standard-setting in supplier contracts and monitoring compliance,¹⁶³⁶ especially when non-compliance is attached to sanctions,¹⁶³⁷ could illustrate closeness. The standard-setting might be via incorporating a Code of Conduct stipulating the labour and human rights standards expected from the supplier in the commercial contract, or by direct contractual reference to relevant international standards.

Additionally, the volume of purchases and the long-term nature of a relationship with a supplier could also contribute to the factor to determine proximity.¹⁶³⁸ Another indicator that the court can use for proximity could be the outsourcing of the manufactured by the supplier under its own brand. Though, it is important for the court to bear in mind that in determining both foreseeability and proximity, the correct approach is to focus on knowledge and closeness vis-à-vis the particular risks and injury in question. Thus, the purchase might not be involved or have any influence over how the supplier runs its business in general but if it is involved in and has influence over, for example, working conditions or health and safety in the workplace of the supplier, then this might illustrate foreseeability and proximity to the victims for the injury suffered due to inadequate safety.

5.11.6. Fair, Just and Reasonable, To Assign Human Rights Duty of Care in Supply Chain Relationships

The question here is whether it is fair, just and reasonable to assign human rights duty of care to a supply chain corporation? The answer to the question is subjective and objective, which requires the court to examining the elements of fairness in assigning a duty of care to an actor. This thesis advocate that, the court needs to examine seven elements to determine whether it is fair, just and reasonable to assign a duty of care to supply chain corporation. These seven elements are:

- Allocation of responsibility between purchaser and supplier, who should bear the primary responsibility? Is it possible to hold both parties responsible jointly and severally?;

¹⁶³⁶ *Watson v British Boxing Board of Control* [2001] QB 1134.

¹⁶³⁷ Sarah A Altschuller and Amy K Lehr, 'The French Duty of Vigilance Law: What You Need to Know' (2017). <<http://www.csrandthelaw.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/>> accessed 28 February 2018.

¹⁶³⁸ Simon F Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2012).

- Damage recovery: can an adequate remedy be obtained from the primary wrongdoer?;
- Leverage of certain supply chain corporation in the market can contribute to preventing future human rights abuses;
- The disparity between public image promoted by the company and actual human rights performance (brand salience);
- Materiality of the business relations, outsourcing manufacture of brand good;
- The severity of harm: violation giving rise to human rights abuse; and
- Heightened risk due to the high volume of orders with unreasonable short deadline at an unreasonably low price.

Fairness/reasonable can be seen as another qualifier to identifying a duty in a novel situation. Its role is to “limit the duty of care in an exceptional situation where the criterion of proximity is satisfied, but where there is, nevertheless, an overriding public or general interest in denying a particular type of claim”.¹⁶³⁹ While in many cases fairness can be seen as a consequence of proximity of relationship,¹⁶⁴⁰ the role of this distinct element appears to act more as a guide against the expanding of the duty of care in a novel situation. In a supply chain context, even if the claimant can establish foreseeability of the harm and proximity, the court might oppose fixing a duty on a supply chain corporation for human rights abuses taking place under the principle of fairness. The question though, to the court is whether it is fair to hold a purchaser of good responsible for workplace human rights abuses suffered by the employee of its supplier. The responsibility of a supplier that arose from its own actions is not ruled out by also holding the purchaser liable. This is especially vital where damages cannot be recovered from the supplier itself, because the latter is bankrupt, or ceased to exist, or remedies at the local level are unavailable or ineffective for other reasons.

There are several reasons that can contribute to the fairness assessment in the supply chain context. For example, if a purchase is branding and marketing as its own the good manufactured elsewhere under the hazardous working condition, it might be seen fair to hold the purchaser responsible for the human rights violation that is committed; in the name of producing that brand. It is also imperative for the court to bear in mind the fact that, while knowing intimately all aspect of the business from productions to sales, many brands might not be manufacturing any of their branded products themselves. They might have outsourced manufacturing entirely

¹⁶³⁹ *Stovin v Wise* [1996] UKHL 15.

¹⁶⁴⁰ *Ibid.*

to a different state which have lower human rights standard than they would be in the countries where the brands are sold.¹⁶⁴¹ A duty on certain influential purchasers might promote better labour and human rights standard in the supply chain business operations. Another important consideration in examining fairness is the public image painted by the corporation to its investors, stakeholders and consumers. It is vital for corporate reputation and consumer confidence that the business in question does not profit from exploitation and human rights abuses. If a corporation acquires goodwill from its consumers after making public commitments that claim compliance with international minimum standard of labour and human rights throughout their supply chain¹⁶⁴² but then fail to fulfil those commitments, arguably it would be fair to hold it accountable for its failings that caused the injury to employees and communities within their supply chain operations.

Similarly, courts should take into consideration the creation or heightening of the risk of injury when the purchaser sets strict and unreasonable deadlines, at an unreasonably low price.¹⁶⁴³ Another consideration often is taken into account in the fairness examination is whether extending liability to novel situations would cause ‘floodgates’ of the lawsuit and indeterminate liability. Courts have considered this argument especially when examining cases regarding pure economic loss¹⁶⁴⁴ and psychiatric injury, as they consider these types of cases to have a tendency of ‘ripple’ effects.¹⁶⁴⁵ Though, while many labour and human rights violations in the supply chain might come about in physical harm or property damage, some might merely result in a pure economic loss (like unpaid wages, forced over-time, debt-bondage) or psychiatric injury (family members of deceased victims). In these circumstances, it is adequate to say that the court should confine the duty to clearly restrict and set the parameter for a class of lawsuit, as set out in *Caparo* case. If the court follows the parameter set out in *Caparo*, at least the employees of first-tier suppliers with which the purchaser has a direct contractual relationship could be treated as a clearly limited and defined class of claimants.¹⁶⁴⁶ Therefore, an assumption of responsibility will more readily be recognised

¹⁶⁴¹ ITUC, ‘Frontlines Report: Why is The Global Business Model in Such Bad Shape?’ (2016) <https://www.ituc-csi.org/IMG/pdf/pdffrontlines_scandal_en-2.pdf> accessed 28 February 2018.

¹⁶⁴² Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis and Jane Wright, ‘Supply Chain Liability: Pushing The Boundaries of the Common Law?’ (2018) 8 (3) *Journal of European Tort Law* 261, 296.

¹⁶⁴³ Yann Queinnec and William Bourdon, ‘Regulating Transnational Companies: 46 Proposals’ (2010).

¹⁶⁴⁴ *Murphy v Brentwood District Council* [1991] 1 AC 398. “Declining to follow its previous ruling in *Anns v Merton London Borough Council* [1978] AC 728.

¹⁶⁴⁵ *Woodland v Maxwell and another* [2015] EWHC 273 (QB), [2015] All ER (D) 162.
Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1973] QB 27.

¹⁶⁴⁶ *Wattleworth v Goodwood Road Racing Company Ltd and Others* [2004] EWHC 140 (QB). “The Court of Appeal reconciled *Perrett* and *Tomlinson v Congleton BC* [2003] UKHL 47, [2003] 3 All ER 1122, by holding that the issue was the proximity of the claimant and defendant. In *Perrett*, there was clearly

where the harm suffered is physical and where there is no threat that the burden of liability may be disproportionate to the conduct involved. What is clear is that provided there is sufficient proximity and foreseeability of the injury, a duty to prevent/mitigate human rights abuses beyond the first-tier of supplier might be seen fair to impose on the purchaser a duty of care for the abuse resulting in the physical injury. Additionally, even the case of pure economic losses and psychiatric injuries resulting from human rights violations can be treated by the court as serious injury by examining the extent and scope of the defendant involvement, by determining the fairness of attributing liability to the human rights abuse due to the gravity of the harm.

5.12. Applying the Principle of Duty of Care and *Chandler v Cape Industries* Case to The Supply Chain Context

The neighbourhood principle established in *Donoghue v Stevenson* and *Chandler v Cape Industries*¹⁶⁴⁷ case ground a duty of care within a supply chain business operation, if it can be determined that the following criteria are met in human rights abuse case:

- The business of the purchaser and supplier are in relevant aspects the same;
- The purchaser had or ought to have had superior knowledge of some relevant aspect in a particular industry;
- Supplier's system of work was unsafe as the purchaser knew or ought to have known; and

proximity between the inspector and the passenger, even though the latter may not have even been aware of the former, let alone relied upon him. This was not the case in Tomlinson, where the claimant had dived into shallow water on the defendant's land. McCombe LJ held that the distinction was that in Tomlinson, the defendant had not engaged, nor even had any knowledge of, the claimant's activity whereas in the instant case, the defendant had taken the decision to involve himself and therefore had "assumed responsibility" with reasonably foreseeable consequences if he neglected his task. Obiter, it was held that had the cause of the accident been (one of the possibilities) the claimant's excess weight on the hatch, then that would have been outside the scope of the defendant's duty (although presumably that would have failed on causation as well)".

¹⁶⁴⁷ *Chandler v Cape plc* [2012] EWCA Civ 525. The High Court held that Cape plc owed a direct duty of care to the employees of its subsidiary because it assumed overall responsibility for the relevant matters in relation to those employees. The judge based his decision on the three-stage test established in *Caparo Industries v Dickman*² stating that Cape plc:

- had actual knowledge of the Mr Chandler's working conditions;
- should have foreseen the risk of injury to Mr Chandler;
- employed a scientific officer and a medical officer who were responsible for health and safety issues relating to all employees within the Cape group;
- dictated policy in relation to health and safety issues; and
- retained overall responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to risk of harm through exposure to asbestos.

- Purchaser/knew or ought to have foreseen that the supplier and/or supplier's employees would rely on the purchaser's using its superior knowledge for the employees' protection.

A vital precedent in examining proximity between the purchaser and employees of the supply chain corporation, and fairness/reasonableness of finding a duty of care was observed in the decision in *Chandler v Cape Industries*.¹⁶⁴⁸ In *Chandler v Cape Industries*, a parent corporation was held to have a duty of care to an employee of its subsidiary, and a duty to intervene in order to fulfil that duty, where the employee had been made ill by asbestos dust on the subsidiary's workplace. The judge examines proximity, as well as fairness/reasonableness by reference to the role the parent corporation in directing policy on health and safety issues, and thus assuming responsibility to prevent and mitigate injury from asbestos exposure to its subsidiaries' employees. Though, the judge acknowledged that the subsidiaries themselves had a part to play in maintaining safety, especially through the implementation of the policies of the parent corporation, the parent corporation retained the overall responsibility for this part of health and safety policy, establishing a sufficient degree of proximity.¹⁶⁴⁹

The Court applied the following parameter to find a duty of care in *Chandler*: 1. The business of the parent corporation and subsidiary were in relevant respect same; 2. The parent corporation had, or ought to have had, superior knowledge of relevant aspect of health and safety in specific industry; 3. The subsidiary's system of work was unsafe as the parent corporation knew, or ought to have knew; and 4. The parent corporation knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for employee' protection. The Court of Appeal found that while the parent corporation had no *de jure* power to intervene in its subsidiary's business, simply because it was the parent corporation, in that particular case, it could still be held liable for failure to intervene to correct its subsidiary's unsafe practice. This two was possible due to the *de facto* involvement of the parent in the health and safety policy of its subsidiary. In this respect, the court held that "at any stage (the parent corporation) could have intervened and Cape Products (the subsidiary) would have bowed to its intervention. On this basis, the Claimant has established a sufficient degree of proximity between the Defendant and himself".¹⁶⁵⁰ The question in this thesis is, how

¹⁶⁴⁸ *Ibid.*

¹⁶⁴⁹ *Ibid.*

¹⁶⁵⁰ *Ibid.*

can this legal rule which the Court created in *Chandler v Cape Industries* applied in supply chain corporate relationship? The fact of *Chandler* seems at first instance to be distinguishable from those in a purchaser/supplier relationship due to the fact that the purchaser does not have the power that a parent corporation has over its subsidiary. However, even though the supply chain relationship being simply one of sale and purchaser, the *Chandler* legal rule is still relevant here. Its operative principles reach beyond the context of a parent corporation's relationship with its subsidiary.

The first step in the *Chandler* legal rule is determining whether the purchaser business is in relevant parts, the same as the supplier. This point was both clear in *Chandler* and its precedent, English courts have avoided liability from parent corporation that is not operating in the same business sector, but “merely hold shares in its subsidiaries as if [they] were an investment holding corporation”.¹⁶⁵¹ Having said that, certain purchasers of goods in the supply chains of concern in this thesis will not play the passive roles of an investment holding corporation. It is more likely that they will be actively carrying out business as retailers, manufacturers. The important question for any legal counsellor is to ask whether the business of a purchaser can be viewed, in relevant parts, the “same” as the supplier's business. The *Chandler* court decision, qualified “sameness” of business with “relevant aspect”. A possible implication of this is that the business of a purchaser and a supplier need not be the same in all aspects. For example, a purchaser and retailer of garments and a supplier of garments might be considered in the same line of business in both corporate business operation. It would be more difficult to establish sameness of business in “relevant aspects” where a supplier is producing a component used in a final product, example a producer of a mineral used in an electronic product by a purchaser might have little in common.

Therefore, the vital point here is to read the first legal rule in *Chandler* judgement with the rest of the legal rule laid out in the court decision: purchaser having superior knowledge of the risk of certain types of injury in a specific industry; actual or presumed knowledge of the

¹⁶⁵¹ *Thompson v The Renwick Group plc* [2014] EWCA Civ 635. “The Court of Appeal in *Thompson* followed *Caparo v Dickman* and *Chandler v Cape* in assessing whether a parent company owes a direct duty of care to an employee of its subsidiary company. *Thompson* helps to show the circumstances in which the court will impose such a duty. Tomlinson LJ explained that the circumstances set out by Arden LJ in *Chandler* where the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees were not exhaustive. The evidence must be sufficient to show sufficient proximity between the parent and the employees of the subsidiary. *Thompson* suggests that the key elements to imposition of a duty of care will be (i) superior knowledge and (ii) evidence showing the relationship between the two companies, and which indicates the fairness and appropriateness of attaching responsibility”. *Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89.

purchaser's that the condition of work in the supplier's factory carried these risks; and the purchaser's actual or presumed awareness that the supplier or the injured individual would partially rely on the purchaser acting on that knowledge in order to avoid the injury. If the purchasing corporation has in place, for an instant, policies on workplace health and safety that it expects or requires its suppliers to follow, this could be evidence that the purchaser corporation has superior knowledge of these issues as compared with that of its suppliers. The drafters of the contract would then be seen as quasi-regulator, which either defectively formulated the rules or failed to follow them through, and thus helped to create a risk.¹⁶⁵² In certain cases, superior knowledge could also be attributed to the purchaser if it audited the standards in the supplier's factory or workplace by itself or hiring an auditing firm. In each of these situations, the courts should examine whether the purchaser was in a line of business that overlapped with that of its supplier sufficiently to make it fair that its knowledge and experience should be brought to bear on improvements sought.¹⁶⁵³

As indicated above and throughout this thesis when the courts are considering foreseeability as a component of the duty to take care, actual or presumed knowledge that there are human rights violations further down the supply chain, the court can infer a duty of care by referring to the purchaser's level of engagement with its suppliers and by looking at the gravity and prevalence of the risk involved. A purchaser with the vast experience in a particular sector could be in a position to evaluate the risk involved in producing a particular product. Therefore, the purchaser might have a good knowledge of the production using advanced method and technology, irrespective of whether its suppliers have expertise on such issues. Where a purchaser has such superior knowledge for, example labour and human rights standards, requires its suppliers to adhere to it human rights standards, and monitor compliance, this could create an environment where the supplier and the injured third parties rely on the purchaser's pressure to avoid the injury caused. The latter could then be held liable for failing to bring that pressure to bear, thereby contributing to the injury caused to the victims. What this means is that a conscious reliance by the injured third parties on the defendant is not considered necessary by the court to assign a duty of care on the actor.¹⁶⁵⁴ It is enough that "where A advises B as to action to be taken which will directly and foreseeably affect the safety or well-

¹⁶⁵² Kenneth M Amaeshi, Onyeka K Osuji and Paul Nnodim, 'Corporate Social Responsibility in Supply Chains of Global Brands: A boundaryless Responsibility? Clarifications, Exceptions and Implications' (2008) 81(1) *Journal of Business Ethics* 223, 234.

¹⁶⁵³ Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis and Jane Wright (n 1612).

¹⁶⁵⁴ *Watson v British Boxing Board of Control* [2001] QB 1134.

being of C, a situation of sufficient proximity exists to found a duty of care on the part of A toward C. whether in fact, such a duty arises will depend upon the facts of the individual case”.¹⁶⁵⁵

5.13. Finding Liability in Supply Chain Business Operation, Using the Focus Framework Approach

The theoretical focus here, is connected to the previous finding in the above section, which discuss the approach of the Determinate Framework Approach in establishing proximity and foreseeability in a supply chain business human rights abuses. In conjunction with the above evidence highlighted in the previous sections, finding liability through the concept of duty of care in supply chain business, requires the corporation possessing certain business attributes, to take steps to identify, prevent, mitigate and remediate human rights violations in the supply chain business. In this understanding, a liability for a supply chain breach of the duty of care can possibly be trigger by these factors, using the Focus Framework Approach established here:

- Outsourcing elements of the core business of the corporation;
- Special knowledge of the actor on labour and human rights standards in the supply chain, including industry-specific and country-specific knowledge; and
- Influence leverage.

The imposing duty of care on corporations using the Focus Framework Approach, is an example of looking for the initial procedures the corporation took to regulate and mentor their supply chain business partner. This procedure could establish incentives for the corporation to take a hands-off approach to their supply chain partnership, which can result in no assumption of responsibility. Thus, the question to the court is whether in certain situations a duty to act could be imposed on the supply chain corporation if there is a certain type of relationship between the parties and if the defendant carries certain characteristic, irrespective of whether the corporation had actively taken certain steps to assume responsibility. What is essentially be said is that, in the context of supply chain corporation, this route could be considered when the purchaser or the supplier does not actively set standards for and monitor compliance of its supply chain partnership but should do so.

¹⁶⁵⁵ *Ibid.*

The theoretical framework of the Focus Framework Approach is included in the UN Guiding Principle under the human rights due diligence requirement, and it applies to all business enterprises irrespective of the size.¹⁶⁵⁶ However, this thesis acknowledges that except such a due diligence obligation is made mandatory by legislation,¹⁶⁵⁷ it is hard to convince the courts that a business is under a duty to take those initial steps to identify, prevent, mitigate, and remedies abuses taking place within its supply chain business (partnership) operation, as common laws only acknowledge a duty of affirmative action in tort in exceptional situations.¹⁶⁵⁸ Nevertheless, though in the absence of statutory due diligence requirements, it might be possible to raise the parameter of existing legal doctrine so as to fix a duty on a certain corporation that carries superior knowledge and authority. However, in order to establish an affirmative duty of care, aimed at preventing harm directly inflicted by the third parties (example suppliers), the tort of negligence often see to assess “pre-tort relationship between the parties”.¹⁶⁵⁹

A possible implication of this is that a relationship recognised as fixing an affirmative duty have so far included occupiers’ liability, employers’ duty to ensure safety of their employees, the relationship between parents and their children, between a school and the children in its care, and between prisons and similar authorities and those in their charge.¹⁶⁶⁰ These examples shown here, illustrate two types of duty: the first is a duty to ensure the safety of the other person in the relationship, and the second is to prevent the other party from causing harm to the third parties.¹⁶⁶¹ In the first group of duty, the vulnerable party (example child) is in the care of the defendant (example school and in the second, the party causing harm (example a child or an inmate) is under the supervision of the parent or the custodial authority.¹⁶⁶² In the second group, the English courts have also included certain situations where the defendant creates the risk of injury.¹⁶⁶³ In this case, it could appear far-fetched to argue that the victims of human rights abuse in the supply chain are in the purchaser’s care or that the supplier is under the supervision of the purchaser where the latter has not actively assumed responsibility. Nevertheless, as specified by the Privy Council in *AG of BVI v Hartwell*:

¹⁶⁵⁶ Björn FASTERLING and Geert DEMUIJNCK, ‘Human Rights in the Void? Due Diligence in The UN Guiding Principles on Business and Human Rights’ (2013) 116 (4) *Journal of Business Ethics* 799, 814.

¹⁶⁵⁷ Vanina ECKERT, ‘The French Attempt to Legalize Human Rights Due Diligence: Is France Leading The European Union in Business and Human Rights?’ (2016).

¹⁶⁵⁸ *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

¹⁶⁵⁹ Simon F DEAKIN, Angus JOHNSTON and Basil MARKESINIS (n 1578).

¹⁶⁶⁰ *Ibid.*

¹⁶⁶¹ *Ibid.*

¹⁶⁶² *Ellis v The Home Office* [1953] 2 QB 135.

¹⁶⁶³ *Mitchell v Glasgow City Council* [2009] UKHL 11.

“the law of negligence is not an area where fixed absolutes of universal application are appropriate. In each case, the governing consideration is the underlying principle. The underlying principle is that reasonable foreseeability, as an ingredient of a duty of care, is a broad and flexible objective standard which is responsive to the infinitely variable circumstances of different cases. The nature and gravity of the damage foreseeable, the likelihood of its occurrence, and the ease or difficulty of eliminating the risk are all matters to be taken into account in court when deciding whether as a matter of legal policy a duty of care was owed by the defendant to the plaintiff in respect of the damage suffered by him”.¹⁶⁶⁴ In outsourcing the core elements of the business, a purchaser is delegating the task of complying with labour and human rights standards to others, while purchasing at the lowest cost as possible, thus absolving itself from paying for the cost of compliance.¹⁶⁶⁵

In addition, special knowledge of labour and human rights issues in the supply chain corporation need not be a labour or human rights expert. If they have drawn up human rights and labour policies or recruited human rights or corporate social responsibility expert, these can give rise to a presumption of special knowledge. If a supply chain corporation is transacting with businesses in places where risks of abuse are higher,¹⁶⁶⁶ specifically if it carries on doing business with the corporation in environments where there are obvious failings, this should be taken into account in judging its affirmative duty. Though, while, it has been held that the fact “that one has expert knowledge does not in itself create a duty to the whole worlds to apply that knowledge in solving its problems”,¹⁶⁶⁷ if combined with other factors, knowledge can be an element for triggering liability. This is particularly so where the class of potential claimants is a clearly defined group, example employee of suppliers. Furthermore, influence and leverage could be acknowledged by reference to being in control of the relationship with the supplier. It is not about being in control of the other entity, but about the decisive influence exercised by a purchaser over aspects of supplier’s business.¹⁶⁶⁸

Evidence of this would be the volume of business between the parties, the duration of their business relationship; the special nature of the product manufactured by the supplier (example whether the supplier is easily replaceable), the level of revenue generated by the

¹⁶⁶⁴ *Attorney General v Hartwell (British Virgin Islands)* [2004] 1 WLR 1273.

¹⁶⁶⁵ Yann Queinnec and William Bourdon (n 1613).

¹⁶⁶⁶ Jason Switzer, ‘Armed Conflict and Natural Resources: The Case of The Minerals Sector’ (2001) *London: International Institute for Environment and Development*.

¹⁶⁶⁷ *Sutradhar v Natural Environment Research Council* (n 1571).

¹⁶⁶⁸ Julia Hartmann and Sabine Moeller, ‘Chain Liability in Multitier Supply Chains? Responsibility Attributions for Unsustainable Supplier Behaviour’ (2014) 32 (5) *Journal of Operations Management* 281, 294.

supplier from the purchaser's orders. These are elements that feed into the purchaser's ability to exert decisive pressure by ceasing the relationship with the supplier if the latter engages in labour and human rights abuses. Another important element of influence and leverage is whether an influential purchaser is contributing to the creation of a dangerous situation for the supplier's employees by, for example, placing excessive orders with tight deadlines.¹⁶⁶⁹ In these cases, the purchaser would have constructive knowledge that this pressure would create an environment in which abuses are common-place. The influence and leverage of some influential supply chain actors could trickle down, at various strengths, beyond the first-tier relationships, which will give rise to a duty of care.

5.14. The Breach of a Duty of Care in Supply Chain Business Operation

Once it is established that a supply chain corporation owes a duty of care to the victims of labour and human rights violation in its supply chain, then it is necessary for the court to establish if the duty was breached. The most important aspect of determining whether the supply chain corporation have breached its duty of care is establishing the exact scope of the duty, however, this might differ from one case to another, but in the most general terms it would be a duty to prevent/ mitigate human rights harm, inflicted by its contractual partners, to employees, or other third parties in its supply chain. In cases of employees harmed in the factory. Such a specific duty would be to procure a healthy and safe working environment for the employees. In order to assess whether the duty was breached, English courts applies an objective standard of care, based on what is required of the reasonable person.¹⁶⁷⁰ Under the principle of a reasonable man, if the person to whom the duty attaches is skilled or an expert, the standard of care will be determined by reference to a standard that would be expected from the ordinary skilled person "exercising and professing to have that special skill".¹⁶⁷¹

Now, whether the standard was followed or not will be determined by looking at the facts of each case. However, it has been accepted by English courts that "the degree of care required varies directly with the risk involved."¹⁶⁷² The risk of harm to human rights can arguably increase the standard of care required from the defendant. In the Focus Framework Approach, where a supply chain actor assumes responsibility to prevent/mitigate labour and human rights abuses in its supply chain through codes of conduct, public statements,

¹⁶⁶⁹ ITUC Report (n 1577).

¹⁶⁷⁰ *Blyth v Birmingham Waterworks Company* [1856] 11 Ex Ch 78.

¹⁶⁷¹ *Muir v Glasgow Corporation* [1943] SC (HL) 3.

¹⁶⁷² *Barnett v Chelsea & Kensington Hospital Management Committee* [1968] 2 WLR 42.

and monitoring processes such as audit and inspection, it shall carry out the requirements of such responsibility with reasonable care expected from the ordinary skilled person. If it fails to identify, during audits, the most obvious defects giving rise to human rights abuses, fails to follow up on corrective action plans and fails to impose the sanctions envisaged in the contract, it cannot be treated as acting with reasonable care. A reasonable standard for audits, for instance, would be to conduct unannounced visits, so that a realistic assessment of the situation can be made. For the Focus Framework Approach, the expected standard of care would also be that of the ordinary skilled person. In these cases, the breach of the duty might be due to failing to exercise a positive influence on the supply chain partner, contributing to precarious working conditions by placing excessive orders with short deadlines; or due to continuing business relationships with partners that severely abuse the rights of their workers.

5.15. Causation in Supply Chain Business Operation

The final step in establishing negligence liability is to show that the defendant's breach of duty has caused the damage suffered. The first step is to establish causation in fact by applying the 'but-for' test, if the claimants would have suffered their injuries regardless of the defendants' negligence, the negligence has not caused the claimants' loss.¹⁶⁷³ The but-for causation is established on the balance of probabilities, so in assessing causation in the supply chain context, the courts would assess, on the facts of the case, whether the harm could have been prevented or mitigated had the supply chain corporation not breached its duty. Where more than one corporation contributed to the damage, they could each be found liable (jointly and severally) for their contribution to the damage if each one's negligence had materially increased the risk of harm.¹⁶⁷⁴ In these cases, the burden of proof is reversed, in that the defendant must show, on balance of probabilities, that its negligence did not cause the harm.¹⁶⁷⁵ Following this principle, a purchaser, for instance, could be jointly liable with a supplier for injuries suffered by the latter's workers due to the negligent actions/omissions of each.

The second step in establishing causation is 'causation in law' which refers to the scope of liability. The damage suffered must be a foreseeable consequence of the breach of duty, sometimes described as requiring that any damage should not be too remote as a consequence

¹⁶⁷³ *McGhee v National Coal Board* [1973] 1 WLR 1.

¹⁶⁷⁴ *Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Co., Ltd (Wagon Mound (No. 1))* [1961] A.C.388.

¹⁶⁷⁵ *Woodland v Essex County Council* [2013] UKSC 66.

of the harm.¹⁶⁷⁶ This, again, will be decided by a factual inquiry by the court. The nature of loss, for example, personal injury or pure economic loss, will play a role in deciding the foreseeability of the damage.¹⁶⁷⁷ In supply chain human rights violation cases, one might look for a substantial effect on the outcome by assessing whether the ability to intervene would likely result in an improvement of behaviour on the part of its supply chain business partner. It will become more difficult to show causation in law if the human rights violation move beyond the first tier in the supply chain.

5.16. Non-Delegable Duty of Care in Supply Chain Business Operation

In certain supply-chain corporation relationships, it might be possible to argue that a supply chain business owed the employees of its contractual partners, a non-delegable duty of care. This is because such a duty is personal to the defendant and not vicarious.¹⁶⁷⁸ A typical example of the non-delegable duty of care is the duty owed by an employer to its employees.¹⁶⁷⁹ These duties particularly require providing a safe place and system of work.¹⁶⁸⁰ The underlying goal of non-delegable duties is “to protect those who are both inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives”.¹⁶⁸¹ As they are recognised, non-delegable duties hinge on an antecedent relationship between the parties placing the defendant in a position of control over an aspect of the victim’s life; and it is owed to a limited class of claimants, in a vulnerable position, for a particular class of risks where the victim has no control over how the defendant chooses to perform its obligations.¹⁶⁸²

Non-delegable duties can be most relevant in the supply chain context where purchaser appoints a social auditor to monitor compliance with labour and human rights standards applied by its supplier. However, the key question for the court is whether a purchaser can delegate all

¹⁶⁷⁶ *Wilsons and Clyde Coal Ltd v English* [1937] UKHL 2.

¹⁶⁷⁷ *Ibid.*

¹⁶⁷⁸ Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis and Jane Wright (n 1578).

¹⁶⁷⁹ Patrick SelimAtiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967).

¹⁶⁸⁰ *Lochgelly Iron & Coal Co v McMullan HL (Bailii)* [1933] UKHL 4 and *Bartonshill Coal Co v Reid HL* [1858] 3 Macqu 265

¹⁶⁸¹ Carolijn Terwindt, Sheldon Leader, Anil Yilmaz-Vastardis and Jane Wright (n 1648).

¹⁶⁸² *Woodland v The Swimming Teachers' Association and Others QBD (Bailii)* [2011] EWHC 2631 (QB), [2012] PIQR P3, [2012] ELR 76). “The court was asked as to the vicarious or other liability of a school where a pupil suffered injury at a swimming lesson with a non-employee during school time, and in particular whether it had a non-delegable duty to ensure the welfare of children”. *Woodland v Essex County Council CA (Bailii)* [2012] EWCA Civ 239, [2013] 3 WLR 853, [2012] ELR 327, [2012] Med LR 419, [2012] PIQR P12, [2012] BLGR 879). “The claimant had been injured in a swimming pool during a lesson. The lesson was conducted by outside independent contractors. The claimant appealed against a finding that his argument that they had a non-delegable duty of care was bound to fail”.

or parts of its duty to prevent/mitigate harm to the victims in its supply chain to an auditor. If, on the facts of a case, a purchaser exercises control over the conditions of safety in its supply chain partner's workplace, example by assuming a quasi-regulator role, arguably, it has a non-delegable duty to provide a safe place and system of work to its supplier's employee. Control can be manifested through the terms of, and threatened sanctions associated with codes of conduct, and the impacts on the workplace of the volume of orders generating the hours it was necessary to work in order to meet the orders. The employee of a supplier, for instance, will have no control over how a purchaser elects to discharge its duties, either itself or via its auditors. If an auditor, it appointed carries out the monitoring negligently, liability for harm and losses arising from the auditor's negligence can be attributed to the purchaser/supplier. A supply chain corporation who has assumed responsibility for employee's safety and labour standards must not only appoint a suitable auditor but must take adequate steps to assure itself that the auditor has carried out a suitable risk assessment.¹⁶⁸³ Careful selection of the auditor with the mission of assessing risk does not absolve the party which selected the auditor from the obligation itself to monitor the adequacy of the auditor's performance.¹⁶⁸⁴

5.17. Vicarious Liability in Supply Chain Business Operation

In the supply chain business partnership context, vicarious liability might be an alternative ground for liability in cases involving the relationship between a purchaser and its certain suppliers or its auditors. In order to consider vicarious liability, there has to be a sufficiently close relationship between the tortfeasor and the party vicariously liable, and the tort committed must be sufficiently linked to that relationship. In its classic form, vicarious liability is a strict liability regime under which an employer is held liable for harm caused by the negligent conduct of its employee(s) in the course of employment.¹⁶⁸⁵ Another relationship giving rise to vicarious liability is the relationship between a principal and an agent.¹⁶⁸⁶ English courts also now accept that certain relationships that appear as one of 'independent contractor' might be classified as "akin to employment" and give rise to vicarious liability.¹⁶⁸⁷ Though, there is a shift in focus from looking at the formal appearance of the relationship to the function exercised by the contractor. A recent decision concerning the

¹⁶⁸³ *Uren v Corporate Leisure (UK) Ltd and Ministry of Defence (MOD)* [2011] EWCA Civ 66.

¹⁶⁸⁴ *Ibid.*

¹⁶⁸⁵ *Launchbury v Morgans CA* [1971] 2 QB 245.

¹⁶⁸⁶ *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

¹⁶⁸⁷ *Ibid.*

relationship between *Uber BV* and its drivers from the employment tribunal shows how courts are willing to adapt the law to the modern economic conditions and relationships.¹⁶⁸⁸ If a supplier can be classified as having a relationship akin to employment with the purchaser, or if a social auditor can be classified as an agent of the purchaser, it might be possible to hold a purchaser vicariously liable for the torts committed by the supplier or the auditor.¹⁶⁸⁹ The rationale behind vicarious liability is to reach deeper pockets of the party economically stronger than the tortfeasor, as well as to promote the improvement of behaviour on the part of the tortfeasor and the party held vicariously liable.¹⁶⁹⁰

The relationship between a purchaser and its suppliers or auditors is not one of formal employment. Among other things, the relationship is one of ‘independent contractor’, and thus the parties would not be held accountable for the human right violation caused to third parties by each other’s acts and omissions.¹⁶⁹¹ Though, it is important to observe that a formal employment relationship is not always necessary to establish vicarious liability.¹⁶⁹² In extending vicarious liability to novel relationships, English courts give consideration to whether it would be fair, just and reasonable to extend liability. In *Various Claimants v Catholic Child Welfare Society* Lord Phillips summarised these considerations as follows: “(i)The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer; iii) The employee’s activity is likely to be part of the business activity of the employer; iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; v) The employee will, to a greater or lesser degree, have been under the control of the employer”.¹⁶⁹³ What is essentially be said here is that the court can overlook policy considerations in the supply chain context and found a novel duty of care in exceptional circumstances, where it is fair, just and reasonable to impose a duty of care on the defendant.

¹⁶⁸⁸ *Aslam and Farrar and Others v Uber BV* (2202550/2015) [2016] Employment Tribunals.

¹⁶⁸⁹ Phillip Morgan, ‘Vicarious Liability for Group Companies: The Final Frontier of Vicarious Liability?’ (2015).

¹⁶⁹⁰ *Ibid.*

¹⁶⁹¹ Ewan McKendrick, ‘Vicarious Liability and Independent Contractors—A Re-Examination’(1990) *Modern Law Review* 53, 770.

¹⁶⁹² *Ibid.*

¹⁶⁹³ *Catholic Child Welfare Society and Others v Various Claimants and The Institute of the Brothers of The Christian Schools* [2012] UKSC 56 on Appeal from [2010] EWCA Civ 1106.

5.18. Relationship between a Purchaser and its Suppliers Can Create a Duty of Care

Depending on the factual circumstances of each supply case, a relationship between a purchaser and a supplier might be sufficiently like employment. In such cases, even if, on the face of it, the relationship appears as one of an independent contract, it might be possible to argue that the purchaser is vicariously liable for the labour and human rights abuses inflicted by the supplier. The success of such an argument will also depend on the willingness of courts to take into consideration the changing social and economic realities that might justify new relationships as akin to employment.¹⁶⁹⁴ One of the policy considerations identified by Lord Phillips in *Various Claimants* is having the better means to compensate the victims.¹⁶⁹⁵ While this would not be the case in every supply chain case, in some cases the purchaser might be in a better position to compensate the victims, not only because it has deeper pockets, but also there might no longer be a supplier to hold liable. This is particularly so if, like the KiK and Rana Plaza cases, the supplier's business was run to the ground.¹⁶⁹⁶

In determining the nature of the relationship between a purchaser and its supplier, the key question for the victims to answer, is whether the supplier was under the supervision and accountable to the purchaser.¹⁶⁹⁷ There are a number of elements in the relationship between a supplier and a purchaser that can indicate supervision and accountability. The first indicator is the level of control exercised over the policies and practices of the supplier. Control is understood as an "entitlement", and as such, it is not necessary to show an actual exercise of control, but can be satisfied by showing an "ability to control".¹⁶⁹⁸ Control may not be exercised on all aspects of the supplier's business; but might be exercised with respect to the labour and human rights standards that must be followed in the supplier's workplace, via assuming the role of a quasi-regulator discussed above in the duty of care context. In other words, "employment for one purpose is not necessarily employment for another purpose".¹⁶⁹⁹ Other factors contributing to the control analysis would be the economic dependency of the supplier on the purchaser, its autonomy in taking decisions on labour and human rights standards, and the supplier's integration into the purchaser's overall organisational structure.

¹⁶⁹⁴ Paula Giliker, *Vicarious Liability in Tort: a Comparative Perspective* (Vol. 69. Cambridge University Press 2010).

¹⁶⁹⁵ *Ibid.*

¹⁶⁹⁶ Carolijn Terwindt and Miriam Saage-Maass, *Liability of Social Auditors in the Textile Industry* (Diss. Friedrich-Ebert-Stiftung Global Policy and Development 2016).

¹⁶⁹⁷ *JGE v The English Province of Our Lady of Charity and The Trustees of The Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871.

¹⁶⁹⁸ *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151.

¹⁶⁹⁹ *Ibid.*

In *Aslam and Farrah v Uber BV*,¹⁷⁰⁰ the employment tribunal found an employment relationship between Uber and its drivers, even though all the contractual arrangements between the relevant parties explicitly stated that the relationship was one of independent contractors. This finding was supported by the fact that the function provided by the drivers was at the heart of Uber's business. The same could be said for some supply chain relationships where a business outsources a core function of its business to a contractor, and this way hopes to offload the labour and human rights compliance requirements onto the supplier. An examination of this consideration can help determine whether the employer has created the risk by employing the supplier. The employment tribunal in the *Uber* case also took into consideration the public statements made by *Uber* about its drivers, which gave the impression that these drivers were employed by *Uber*. Similar public statements are sometimes made by supply chain corporation about the control they exercise over the labour and human rights policies of their partners. The employment tribunal also highlighted that *Uber* does not market transportation services provided via its software application for the benefit of any individual driver, but instead to promote its own brand and sell its services. The same can be said where a supply chain corporation is outsourcing the production of branded products, and markets goods produced in violation of labour and human rights standards as its own. The marketing is not done for the benefit of its suppliers, but for its own brand name. This can arguably satisfy the condition that the activity was being carried out on behalf of the employer.

Another consideration for the *Uber* tribunal was the strict terms set by *Uber* which had to be followed by the drivers, otherwise, the drivers would face sanctions. Where a purchaser stipulates in contract the conduct that must be followed by a supplier in discharging its obligations under the contract, and the party imposing the terms is in a superior bargaining position, this, read together with the above elements of duty of care, could result in a relationship akin to employment, as opposed to an arm's length contract between two independent businesses. In these cases, while the supplier might be in a position to elect not to enter into a business relationship with the purchaser, if it does choose to enter into the relationship, it will be required to follow the labour and human rights standards and instructions provided by the contract, especially if the failure to comply is accompanied by sanctions for breach of contract or otherwise. This can show whether the employee is, to a greater or lesser degree, is under the control of the employer. All of these factors can indicate the integration of a supplier to its purchaser's organisational structure, not only in terms of what the supplier

¹⁷⁰⁰ *Aslam and Farrar and others v Uber BV* (n 1658).

produces, but also how it produces the goods.¹⁷⁰¹ The degree of economic integration of a business could assist in determining what is akin to employment. The required level of integration could be present even if the business relationship between the parties is not stable and long-term but are short-term and flexible, and the supplier is manufacturing goods for multiple purchasers, and not just one. In order to determine this, the courts should consider the existence of the above-mentioned conditions of supervision and accountability, as well as the mechanisms purchasers put in place for the regulation of their relationships with all their suppliers, particularly, the organisational steps by which the purchaser investigates, evaluates, and approves or rejects a supplier. The consideration of these issues could help determine whether the employee's activity was a part of the business activity of the employer

5.19. Creating a Duty of Care through the Relationship between a Purchaser and its Auditors

It is a widespread practice for purchasers to engage social auditors to monitor supplier compliance with the labour and human rights standards they set in their supplier contracts.¹⁷⁰² Negligently conducted audits might give rise directly to the liability of the auditing company if it can be established that the auditors owed a duty of care to the employees of the supplier. Another route for accountability could be via the application of vicarious liability principles to the relationship between the purchaser and its auditor if the latter can be classified as the 'agent' of the former. An agent has authority to represent the principal or act on principal's behalf and can legally bind the principal vis-à-vis third parties.¹⁷⁰³

An auditor might be classified as an agent if it is exercising the duty of monitoring supplier compliance on behalf of the purchaser. Acts carried out by the agent on behalf of the principal are attributed to the principal. If, in the course of exercising its authority, the agent signs a contract or commits a tort, the principal will directly be a party to these relationships with third parties. If an auditor's negligent conduct of audits acts as a cause of harm to the employees of the supplier, there might arguably be a case for the vicarious liability of the purchaser who appointed the auditor.¹⁷⁰⁴ The auditor is the "conduit pipe" between a purchaser and the supplier and its injured employees, given that it was the purchaser's obligation to monitor compliance with labour and human rights standards, which it delegated to its auditor,

¹⁷⁰¹ *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

¹⁷⁰² Carol Murray and Barbara Cleave, *Schmitthoff's Export Trade* (Sweet & Maxwell 2005).

¹⁷⁰³ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22.

¹⁷⁰⁴ Rights of Third Parties Act 1999.

either by finding faults that needed to be fixed, or by giving clearance that the standards applied were system was fit for purpose. Even where there are multiple purchasers from a supplier, and each engages their own auditor, each negligently conducted audit could give rise to a joint and several liability of the respective purchasers who have engaged the auditors, if each audit has made a material contribution to increasing the risk of damage.

5.20. Human Rights Due Diligence and Reporting in Supply Chain Business Operation

Some national laws requiring companies to conduct human rights due diligence throughout their business operations, including their supply chains have a significant potential in improving corporation behaviour and accountability.¹⁷⁰⁵ Another contribution to improving accountability can come from reporting requirements on human rights. Non-financial reporting rules on human rights impacts have been introduced in the EU for certain large companies.¹⁷⁰⁶ Under the EU Directive, covered companies are required to disclose information on human rights impacts of their activities, including those arising from subsidiary and supply chain operations and how these impacts are managed; and the due diligence processes adopted to identify, prevent and mitigate adverse impact. Reporting can be avoided where a company does not pursue policies relating to human rights, but it has to provide a “clear and reasoned” explanation of this choice.

In the UK, the Modern Slavery Act 2015 introduces a transparency obligation for business organisations that fall within the scope of the Act 100 s54¹⁷⁰⁷ requires these entities to prepare an annual slavery and human trafficking statement. Pursuant to s54 (4) of the Act the statement could either state what steps were taken by the organisation “to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business” or it could state that “the organisation has taken no such steps”.¹⁷⁰⁸ While these are very positive steps, challenges remain. There is little clarity on the content of these reports and questions over sanctions for failure to report accurately. Consequences for failing to report or misleading reporting are unclear. There is no clarity as to the substantive standards against which the reports shall be assessed and who shall conduct these assessments. Reporting has so far remained vague, with no actionable information coming out of company

¹⁷⁰⁵ Katherine Leanne Christ and Roger Leonard Burritt, ‘Current Perceptions on The Problem of Modern Slavery In Business (2018) *Business Strategy & Development*.

¹⁷⁰⁶ Directive 2014/95/EU.

¹⁷⁰⁷ Modern Slavery Act 2015.

¹⁷⁰⁸ *Ibid.*

reports. On the other hand, there is still value in reporting and due diligence requirements. They urge companies to identify risks and take preventative measures. They can also aid in demonstrating knowledge and involvement of a company in its partners' human rights performance.

Lack of information is a serious challenge for victims seeking accountability against corporate groups and supply chain actors. In order to demonstrate 'knowledge' or even 'assumption of responsibility' in tort terms for human rights issues, claimants can make use of corporation reports that convey the relationship of a business with its supply chain partners.¹⁷⁰⁹ While potential liability can be a disincentive for corporations to disclose information, there is a growing pressure on businesses to become more transparent on human rights and labour issues, as well as a trend for introducing mandatory reporting requirements. These public and legislative pressures can have an impact on corporations' attitude towards reporting. Beyond reporting, a mandatory due diligence obligation could result in a duty of care being attached to the corporation vis-a-vis the claimants.¹⁷¹⁰ If states wish to establish a level playing field for business actors respecting human rights, mandatory due diligence and reporting obligations could make an important contribution to achieving such a level playing field.

5.21. The Application of Duty of Care to Multinational Corporations

It has been observed in this study that the UK courts¹⁷¹¹ hear cases of overseas human rights violations.¹⁷¹² Most notable is in 2016, when Mr Justice Coulson, sitting as a judge in the Technology and Construction Court, allowed a legal claim against UK-based mining company Vedanta Resource PLC and its Zambian subsidiary Konkola Copper Mines to be tried in UK courts.¹⁷¹³ This trend further supports the notion of tort law as an effective mechanism for corporate human rights violations and a tool for effective remedy (a typical example is companies in the extractive industry).¹⁷¹⁴ Also, the US, human rights violations litigation, the

¹⁷⁰⁹ Yann Queinnec and William Bourdon (n 1579).

¹⁷¹⁰ Rachel Chambers and Anil Yilmaz Vastardis, 'The New EU Rules on Non-Financial Reporting: Potential Impacts on Access to Remedy?' (2015).

¹⁷¹¹ *Prest (Appellant) v Petrodel Resources Limited and others (Respondents)* [2013] UKSC 34 On appeal from: [2012] EWCA Civ 1395. "Liability could be imposed on a parent company if the corporate veil of the subsidiary can be pierced".

¹⁷¹² David P Forsythe *Encyclopedia of Human Rights* (Vol. 5. Oxford University Press 2009).

¹⁷¹³ *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2016] EWHC 975 (TCC).

¹⁷¹⁴ Liesbeth FH Enneking, *Foreign Direct Liability and Beyond-Exploring The Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (Eleven International Publishing, The Netherlands 2012)

ATCA, has increased significantly,¹⁷¹⁵ as indicated in chapter IV. Other foreign direct liability cases have been heard in a jurisdiction such as Canada, Australia, and the UK, as indicated in the previous chapters above and other European Union Countries jurisdiction.

In an examination of these cases, most of the legal suits have been based on a general doctrine of tort law and, more particularly, the tort of negligence, but these case have lacked the core three principles of establishing a duty of care, as explained in the *Caparo v Dickman* case.¹⁷¹⁶ Perhaps, this could be one of the reasons why sometimes the court has failed to establish liability of corporation subsidiary misconduct, where there is clearly a breach of the fundamental rights of humanity and environmental damages. Therefore, the question is how can the court frame and address corporate misconduct in the context of *Caparo and Dickman* test?

5.22. The Rationale behind the Corporate Neighbourhood Principle

The depth of international mechanisms for regulating corporate operations and providing a remedy for the harm they may directly or indirectly cause society is ineffective, nonetheless redundant in obtaining justice for the victims and environmental damages. The concept of foreign direct liability has been seen as an alternate method to the soft law initiative, but, however, fall short due to the jurisdiction limitations. Therefore, as explained early in the definition of tort, the concept of tort is a collection of civil wrongs, for which the law provides a remedy for the victim, where the act of an actor falls below the reasonable man standard.¹⁷¹⁷ In this idea, it can be said that tort law allows the remedy to be enforced against a wrongdoer, to the benefit of the victim who has suffered harm, which reflects on the harm committed by the wrongdoer.¹⁷¹⁸ As explained by Enneking in relation to human rights violation cases, the author stated that tort law “provides a legal framework or interference with the mutual relationship between private parties that is very flexible due to it open, standard-based structure and that may thus fairly easily accommodate shifting norms and values in a time of changes”.¹⁷¹⁹

¹⁷¹⁵ Halina Ward, ‘Governing Multinationals: The Role of Foreign Direct Liability’ (2001) 18 *Briefing Paper*.

¹⁷¹⁶ Robyn Martin, ‘Categories of Negligence and Duties of Care: Caparo in the House of Lords’ (1990) 53 (6) *Modern Law Review* 824, 828.

¹⁷¹⁷ Jenny Steele, *Tort Law: Text, Cases, and Materials* (Oxford University Press 2010).

¹⁷¹⁸ *Ibid.*

¹⁷¹⁹ Liesbeth FH Enneking (n 1684).

As a result, in a legal application, tort is seen as a specific responsive to social change because of its flexibility and workable notion,¹⁷²⁰ which has the potential to fill the gap of the corporation liability, parent corporate, supply chain and subsidiary liability. Therefore, when applying this principle to human rights violations that are generally based on the norm of a duty of care, it will allow the court to take a range of factors into consideration, such as the whole business conduct of the corporations with the supply chain, subsidiary and the government. That will effectively allow the court to pierce the corporate veil in a concept of the obligations to act reasonably in business activities, not to cause harm.¹⁷²¹ In the tort of negligence, it must be proven that the corporation owes a duty of care to the victims and the breach of this duty of care have resulted to the harm caused, (see above section on the tort of negligence for further clarification).¹⁷²² Applying this principle to corporate human rights abuse, what is clear is that accountability and remedy for the harm caused by a corporation, which can be anything from shock and inconvenience to illness or death,¹⁷²³ should give right to an effective sanction and remedy. However, this is currently not the case.¹⁷²⁴ The tort law in

¹⁷²⁰ *Ibid.*

¹⁷²¹ Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape plc.' (2013) 76 (3) *Modern Law Review* 603, 619.

High Court decision

The High Court held that Cape plc owed a direct duty of care to the employees of its subsidiary because it assumed overall responsibility for the relevant matters in relation to those employees. The judge based his decision on the three-stage test established in *Caparo Industries v Dickman*² stating that Cape plc:

- had actual knowledge of the Mr Chandler's working conditions;
- should have foreseen the risk of injury to Mr Chandler;
- employed a scientific officer and a medical officer who were responsible for health and safety issues relating to all employees within the Cape group;
- dictated policy in relation to health and safety issues; and
- retained overall responsibility for ensuring that its own employees and those of its subsidiaries were not exposed to risk of harm through exposure to asbestos.

Court of Appeal decision

The Court of Appeal confirmed the decision of the High Court holding that responsibility of a parent company for the health and safety of its subsidiary's employees may be imposed where:

1. the businesses of the parent and subsidiary are in a relevant respect the same;
2. the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
3. the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
4. the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

These points reflect the findings of the High Court. However, the decision of Arden LJ seems to be broader than the High Court decision. She states that, for the purposes of element (4), it is not necessary to show that the parent is "in the practice of intervening" in the subsidiary's health and safety policies. Rather, courts will look at the group structure more widely and may find element (4) established "where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues".

¹⁷²² Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United State' (2011) 3 *City UHKL Review* 1.

¹⁷²³ *Bodo Community and Others v Shell Petroleum Development Company of Nigeria* [2014] EWHC 958 (TCC).

¹⁷²⁴ Gregory T Euteneier, 'Towards a Corporate Law of Nations: Multinational Enterprises Contributions to Customary International Law' (2007) 82 *Tulane Law Review* 757.

the notion of a duty of care can also accommodate different elements of harm caused by corporations, such as damage to the environment, damage to livelihood, toxic waste,¹⁷²⁵ oil spills,¹⁷²⁶ water pollutions,¹⁷²⁷ or even alleged corporate complicity in the kidnapping and torture of trade union leaders.¹⁷²⁸ Accordingly, the duty of care will provide victims with the different means that the harm done to them does not have to fall into a standardised group, but can be acknowledged as an individual element of the tort of negligence, which requires effective sanction and remedy.

As well as the flexibility that the tort of negligence offered, the concept of a duty of care provides a legal instrument for a greater accountability through the court system, it has a potential for universal applications.¹⁷²⁹ It will provide the opportunity for the discovery and disclosure of the truth about corporate human rights abuses, which is a crucial factor in effective sanction and remedies for human rights violations.¹⁷³⁰ And it is also a method of providing truth-seeking role for the victims in court, which place greater emphasis on transparency and development of case law. Unlike the many voluntary mechanisms, whose investigations rely on the willing of the corporations, human rights violation cases brought before international court provide a strong forum in which the truth can be revealed due to the independent of the court from the host and home state, the basis of the court and its rigorous fact-finding process.¹⁷³¹

Nonetheless, it can be acknowledged that procedural rules may vary between national states judicial systems, however, following a close analysis of the US, civil law, religious law and other common law jurisdiction, the broad scope and extent of finding liability and revealing the truth about corporation misconducts will allow the victims a comprehensive access to the

¹⁷²⁵ Frances Gibb, 'Trafigura's £30 Million Payout Approved After Slopes Dumped in Ivory Coast (2009) *The Times*. <<http://www.thetimes.co.uk/tto/law/article22149990.ece>> accessed 21 December 2016

¹⁷²⁶ *Bodo Community and Others v Shell Petroleum Development Company of Nigeria* (n 1659).

¹⁷²⁷ Norbert Fenzl and Armin Mathis, 'Pollution of Natural Water Resources in Amazonia: Sources, Risks and Consequences' (2004) *Issues of Local and Global use of Water from The Amazon: Montevideo, UNESCO* 57, 76.

¹⁷²⁸ Mary Carson, Adrian Gatton, Rodrigo Vázquez and Maggie O'Kane, 'Colombian Takes BP to Court in UK Over Alleged Complicity in Kidnap and Torture' (2015) *The Guardian*. <<https://www.theguardian.com/environment/2015/may/22/colombian-takes-bp-to-court-in-uk-alleged-complicity-kidnap-and-torture>> accessed 21 December 2016.

¹⁷²⁹ Chapter 4.

¹⁷³⁰ Jaime E Malamud-Goti, Lucas Sebastian Grosman and P. De Greiff, 'Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies' in Pablo de Greiff (ed) *The Handbook of Reparations* (OUP New York 2006).

¹⁷³¹ *Ibid.*

corporate files,¹⁷³² of which thorough investigation can lead to an “airing of salient facts”.¹⁷³³ This can be achieved in practice by applying the general principle of law.¹⁷³⁴ This evidence can, therefore, be presented and relied on in court, to establish a novel duty of care for a particular misconduct, that is in close relationship with the defendant (corporation) and the plaintiff. The duty of care here will ensure appropriate balance is struck between the need to discourage a “claims culture” and “fishing expeditions” on the one hand, and the need of victims of corporate abuse to access the corporate information and evidence they need to pursue legitimate claims on the other. What is essentially being said here is that, the evidence rules must better consider the inherent inequality in access and control of information that exists between claimants and corporate defendants in human rights cases. Eventually, this will engage the state’s own duty of care to guarantee access to justice, fair trial, equality of arms and knowledge of the truth. This duty of care rules and the way in which they are interpreted by courts will redress the difficulties in accessing critical information by establishing broad and permissive discovery regimes. This view is partly supported with the development of the African Commission on Human and Peoples’ Rights, which prepared a model access to information law that permits unqualified requests from private bodies where the information is necessary for the protection of human rights.¹⁷³⁵ South Africa is one of the only countries that appears not to qualify access to information from private bodies on the basis of a relationship with the state.¹⁷³⁶

Human right abuses litigation brought under the principle of duty of care in both national and international court will facilitate the exposure of corporate conduct on the ground and its perception in the public sphere. The difference is in what corporations advocate as its human rights duty to respect business operation.¹⁷³⁷ Of course, it is perfect to acknowledge that the media and NGOs play a significant role in publicising corporate human rights abuses,

¹⁷³² Beth Stephens, ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002).

¹⁷³³ Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart-Publishing Oregon 2004).

¹⁷³⁴ Chapter 8.

¹⁷³⁵ Section 12, Model Law for African States on Access to Information.

<<http://www.achpr.org/instruments/access-information/>> accessed 10 December 2017. See also Toby Mendel ‘Freedom of Information: A Comparative Legal Survey’ UNESCO at 15 <<http://unesdoc.unesco.org/images/0015/001584/158450e.pdf>> accessed 9 December 2017.

¹⁷³⁶ 7 Section 32 of the Constitution of the Republic of South Africa, 1996 provides that:

“(1) Everyone has the right of access to (a) any information held by the state
(b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state

¹⁷³⁷ Halina Ward, ‘Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options’ (2000) 24 *Hastings International and Comparative Law Review* 451.

however, this can only go as far as the social campaign element of corporate accountability is concerned. Therefore, tort element enhances the gravity and detriment for the corporation that engages in human rights abuse,¹⁷³⁸ by imposing a duty of care on its business activities.

This can be supported by the current development of the publicities surrounding foreign direct liability in countries, such as the UK¹⁷³⁹ and US,¹⁷⁴⁰ comparing this to the voluntary mechanism. It can be observed that pressure from the court judgment and the media attention have a damaging result for corporations, in relation to the corporate reputation and finance, because any threat of civil litigation cause the corporate share prices to fall.¹⁷⁴¹ This is further supported by Ward, the author noted that after the House of Lord's judgment in *Lubbe v Cape plc*,¹⁷⁴² Cape's share dropped sharply.¹⁷⁴³ This suggestion follows similar patterns of Kappel, which found that the UK and US corporations experience "significant negative abnormal returns when human rights abuses become publicly known".¹⁷⁴⁴ Nonetheless, this is only a detriment to the corporations and does not provide justice and remedy for the victim. Therefore, it is imperative to stress that the concept of corporate accountability is about justice and remedy for the victims not the corporation or business activities. Thus, anything below this does not meet the minimum requirement of accountability.¹⁷⁴⁵

5.23. The Opportunity for Victims under a Duty of Care

While the growing bodies of voluntary mechanisms and corporate social responsibility has focused on soft law approach to regulating corporate conduct that is linked to their business operations. There has been little done to directly address the environmental damages and abuses of victims' rights caused by corporations. While on the other hand, the emphasis placed on tort law has portrayed tort law as a remedy mechanism, instead of as an effective sanction and remedy mechanism for corporate human rights abuses. There is an element of truth in this

¹⁷³⁸ *Ibid.*

¹⁷³⁹ Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 (01) *Business Ethics Quarterly* 145,177.

¹⁷⁴⁰ Gregory GA Tzeutschler, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad' (1998) 30 *Columbia Human Rights Law Review* 359.

¹⁷⁴¹ Marisa McVey, 'A Powerful Retort: Foreign Direct Liability as an Essential Mechanism of Redress for Victims of Human Rights Violations by Multinational Extractive Corporations' (2015) *Human Rights Commission 2015 Working Paper* 1.

¹⁷⁴² *Lubbe v Cape Plc* [2000] UKHL 41.

¹⁷⁴³ Halina Ward (n 1685).

¹⁷⁴⁴ Vivien Kappel, Peter Schmidt and Andreas Ziegler, 'Human Rights Abuse and Corporate Stock Performance— an Event Study Analysis' (2009) 21 *Whitepaper December*.

¹⁷⁴⁵ Which is sanction and remedy, See Chapters Two and Three.

view, due to the current doctrine of tort law in Western Society. Contrastingly this study argues that tort law is an ever-evolving concept and plays a significant role in the different social-legal challenges facing the modern society. Therefore, tort law provides victims of human rights abuses a possible avenue for effective accountability, reparation, and deterrence for future corporate misconduct.

Adding to the little development in the field of tort law perspectives, this thesis expands on this concept by building on the idea of the duty of care in the framework set out in the neighbourhood principle, to analyse the options available for foreign nationals wishing to hold multinational corporations to account within home country jurisdiction, such as the US, UK or the European Union. This will provide possible international standards that are directly related to victims' rights to truth, justice, and reparations, which can be used as the metric for evaluating the effectiveness of accountability, whether at a host state, a home state in the concept of foreign liability,¹⁷⁴⁶ or international forum, such as a court. Furthermore, the remedy for victims has been only addressed through the US ATCA after *Kiobel case*, and no jurisdiction has yet to address and identify the extent and scope of the application of tort of negligence across the globe.¹⁷⁴⁷ Lest one not forget, there has already been a significant development of foreign liability in the UK and the Netherlands against Shell for the environment damage and human rights abuses caused by the oil leak in Nigeria.¹⁷⁴⁸ Therefore, this is not to move away from this development but to argue that perhaps focusing on the duty of care element of human rights violations and environment damages, will establish the element need for accountability and effective remedy for the victims. In this opinion, the duty of care creates a paradigm shift, which paves the way for legal solutions to improve access to remedy for corporate human rights abuse and environmental damages, as demonstrated in the Focus and Determinate Framework Approach.

5.24. Summary of the Purpose of Tort Law

Following the discussion in this chapter so far, the study establishes that the tort law (tort of negligence) will seek to fill the current gap created by the lack of effective corporate

¹⁷⁴⁶ Gregory GA Tzeuschler, 'Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad' (1998) 30 *Columbia Human Rights Law Review* 359.

¹⁷⁴⁷ Beth Stephens, 'Corporate Liability: Enforcing Human Rights through Domestic Litigation' (2000) 24 *Hastings International and Comparative Law Review* 401.

¹⁷⁴⁸ Liesbeth Enneking, 'Future of Foreign Direct Liability: Exploring the International Relevance of the Dutch Shell Nigeria Case' (2014) 10 *Utrecht Law Review* 44.

accountability system. Furthermore, it is argued that tort law covers all human rights abuses by corporation in a socio-legal context. When used in a human rights context, the duty of care, can be used to realise victims' rights to truth, justice, and reparations, specifically in bringing litigation against corporate extraction parent companies.

It has also been observed that the current human rights mechanism cannot provide an effective remedy for victims of corporate human rights violations, this is because human rights obligation is primarily for states to abide by, and therefore, the tort law could step in to fill the needs of the victims. Also, where a claimant has suffered harm and a mechanism already exists through which some form of redress may be sought, it can be argue that this makes it unnecessary for a civil law remedy in tort to be additionally created. This argument, of course, may only be deployed where court felt that the existing means of redress offer an effective remedy. The next section of this chapter shall apply the concept of duty of care to corporate human rights violation cases in Canada and UK, to illustrate how effective this mechanism will be effective in combating corporate human rights abuses.

5.25. The Application of Duty of Care to Multinational Corporations

The current development of corporate liability for human rights violation committed by its subsidiary is observed in Canadian courts, where Toronto-based Hudbay Minerals has assumed responsibility to protect the plaintiff from injured cause by a third party, and the plaintiff has depended on the defendant's action.¹⁷⁴⁹ It was, therefore, upheld that the defendant may owe the plaintiff a duty of care.¹⁷⁵⁰ In this understanding, it is observed that a Canadian corporation who has offered itself as a corporate that adhered to human rights duties in its global operation shall owe a duty to the victim of human rights abuse, which is linked directly or indirectly to the business of the parent corporate. Nonetheless, this is a novel duty and must be established using the two-step test in *Ann v London Borough Council*¹⁷⁵¹ and *Caparo v*

¹⁷⁴⁹ *Choc v Hudbay Minerals Inc.* [2013] ONSC 1414.

Angelica Choc v HudBay Minerals Inc. regarding the brutal killing of Adolfo Ich, a respected community leader and school teacher who was hacked with machetes and shot in the head by mine company security personnel on Sept. 27, 2009. Learn more.

German Chub Choc v HudBay Minerals Inc. regarding the shooting and paralysing of German Chub by mine company security personnel on Sept. 27, 2009.

Margarita Caal Caal v HudBay Minerals Inc. regarding the gang-rape of 11 women from Lote Ocho by mining company security personnel, police and military during the forced eviction of their village and families from their ancestral lands on Jan. 17, 2007.

¹⁷⁵⁰ *Fallowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 SCR 132.

¹⁷⁵¹ *Anns v Merton London Borough Council* [1978] AC. 728.

Dickman.¹⁷⁵² Likewise, a recent case in the Canadian Supreme Court, elaborate on the concept of duty of care in *Hill v Hamilton-Wentworth Regional Police Service Board*.¹⁷⁵³ These two cases show the principal example of where a corporation's duty of care arises from, and also indicates how *Anns* and *Caparo* test can be applied effectively in court, to impose liability.

Following this brief illustration, the study shall move on to address the steps that victims need to pass before bringing human rights violation cases against the corporation under the concept of duty of care, as it have been shown in the duty of care in a supply chain business operation. It also examines whether the relationship between the plaintiff and the corporation discloses "sufficient foreseeability and proximity to establish a *prima facie* case for corporate human rights violations".¹⁷⁵⁴ Thus, given the inadequacy of case law¹⁷⁵⁵ addressing corporate human rights duty of care for its operation in the foreign country,¹⁷⁵⁶ the thesis shall only focus on the case law from Canada, the United Kingdom, and the United States because these jurisdictions have applied the concept of duty of care in their domestic courts.¹⁷⁵⁷ It will then move on to address the second element of duty of care inquiry; observing whether there are "any national policy consideration which are out to repudiate or restrict the duty of care".¹⁷⁵⁸

For the purposes of this thesis, the analysis follows the theoretical claim of the tort of negligence, in a notion of duty of care. Where the defendant corporation indicated that it requires its subsidiary to adhere to the basic minimum human right standards (i.e. respect to health and safety, and hours of work), observing compliance with those standards and its

¹⁷⁵² *Caparo* (n 1617).

¹⁷⁵³ *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 SCR 129. "Supreme Court of Canada Torts Negligence Duty of care Police investigation.

¹⁷⁵⁴ *Ibid*

¹⁷⁵⁵ Peter Muchlinski, 'Implementing The New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' 2012) 22 (1) *Business Ethics Quarterly* 145,177.

¹⁷⁵⁶ *Abu Ghraib lawsuits against CACI, Titan* (now L-3).

On 9 June 2004, a group of 256 Iraqis sued CACI International and Titan Corporation (now L-3 Services, part of L-3 Communications) in US federal court. The plaintiffs, former prisoners, allege that the companies directed and participated in torture, war crimes, crimes against humanity, sexual assault, as well as cruel, inhuman and degrading treatment at Abu Ghraib prison. While the plaintiffs were detained at Abu Ghraib they allege that they were raped, repeatedly beaten, detained in isolation, urinated on, prevented from praying and forced to watch family members being tortured. They further allege that the defendants were negligent in the hiring and supervision of their employees in Iraq. The US Government had hired CACI and Titan to provide interrogation and translation services at military prisons in Iraq. *Adidas lawsuit (re University of Wisconsin)* and *AngloGold Ashanti silicosis lawsuit (So. Africa)*

¹⁷⁵⁷ Shin Imai, Bernadette Maheandiran and Valerie Crystal, 'Access to Justice and Corporate Accountability: a Legal Case Study of HudBay in Guatemala' (2014) 35 (2) *Canadian Journal of Development Studies/Revue canadienne d'études du développement* 285, 303, Robert McCorquodale, 'Waving Not Drowning: Kiobel Outside The United States' (2013) 107 (4) *American Journal of International Law* 846-851 and Julian Fulbrook, 'Chandler v Cape Plc: Personal Injury: Liability: Negligence' (2012) *Journal of Personal Injury Law* 135, 139.

¹⁷⁵⁸ *Ibid*.

response to acknowledged breaches of that standard by either asking the subsidiary to comply, improve, or terminate the business relationship if it need be. It is possible, therefore, that if corporation A failed to observe or respond to human rights impact in its business operation or if a corporate subsidiary did not monitor or respond to human rights impact, if the plaintiff alleges that it did so negligently. The corporation's conduct should give rise to a duty of care and liability for human rights abuse. The question for the court is what the corporation knew or ought to have known at the time of the existence of real and immediate risk of human rights violations to the victim's life or individual from the misconduct of a third party such as the subsidiary and that the corporation failed to take measures within its scope of power which, judged reasonably, might have been expected to avoid? Also, it is for the court to find the immediate question asked, as to whether a prior relationship between the victims and the corporation should be necessary at all in order to find negligence.

5.26. Third Party Liability: Corporation Foreseeability

The first leg of the *Anns* test is to ask whether there is a sufficient relationship between the plaintiff and the defendant to disclose sufficient foreseeability and proximity to establish a *prima facie* case of duty of care.¹⁷⁵⁹ This is a straightforward test for the plaintiff to establish foreseeability, whether as between the alleged defendant and the victims, in the contemplation of the former breach of the duty of care, it was likely for the defendant act to cause the harm (the first requirement). Applying this to the Canadian case *Hill v Hamilton-Wentworth Regional Police Service Board*, if a Canadian corporation has undertaken to protect human rights in its business operations (corporate duty to respect human rights, through due diligence) and has done so negligently, then there is a rebuttable presumption that it is reasonably foreseeable that the corporate subsidiary conduct could violate the human rights in the society where it conducts its business operation.

An illustration of this is a scenario where a conduct of corporation such as Shell expressly recognises that “there is the potential unethical social and environmental practice” in its business operations and its subsidiary social responsibility program in response to the concern over human rights violations, but did nothing to address it.¹⁷⁶⁰ In addition, it is argued

¹⁷⁵⁹ Hazel McLean, ‘Negligent Regulatory Authorities and the Duty of Care’ (1988) 8 (3) *Oxford Journal of Legal Studies* 442, 456.

¹⁷⁶⁰ Douglass Cassel, ‘Corporate Initiatives: A Second Human Rights Revolution’ (1995) 19 *Fordham International Law Journal* 1963, also see, Ken Saro-Wiwa, *Genocide in Nigeria: The Ogoni Tragedy* (Vol. 18. Saros International Pub, 1992).

that a corporation that has carried out a degree of human rights assessment, as well as a degree of monitoring human rights and environment impact of their business operation, and the local community is aware of the specific risks attached to its business operation in such an environment. The corporation has the requisite knowledge of the human rights abuse undertaken by its subsidiary, thus, it can be said in court that this knowledge satisfies the first element of foreseeability in an *Anns* test. Therefore, the question for the court should be whether, and if so when, the event gained momentum to the extent that the harm that was reasonably foreseeable changed from the harm of general human rights abuse and environment damage defined the nature to the harm resulting from subsidiary human rights violations on that particular segment of society.

Consequently, if the court found that the reasonably foreseeable harm is present in the corporation's operations the duty of care exists and any violations in this respect are only justifiable, if at all, within the international human rights law obligations and not only by way of action for breaches of duty of care. This view followed the House of Lords judgment in *Reeves v Commissioner of Police of the Metropolis* (2000).¹⁷⁶¹ A duty of care was established in respect of attempts of a prisoner known to be mentally ill, but a doctor had found Mr Lynch to be of sound mind. The police, who clearly owed him a duty of not physically harming him by their own actions, argued that they owed him no duty of care in respect of his suicide because he was not mentally ill and had deliberately taken his own life, even though the opportunity for him to do so had only arisen from their carelessness. The House of Lords (now Supreme Court) disagreed, holding that the police's duty to prisoners in its custody extends to a positive duty to take reasonable steps to assess the suicide risk of all prisoners. This was justified by the degree of control exercised over prisoners in custody and the known (high) risk of suicide among prisoners, even those without a known mental illness. In a legal observation what is clear from the duty of care is that the liability of corporate human rights and subsidiary act do not need to touch, and concern homes state as advocated by the US Supreme Court's judgment in *Kiobel*,¹⁷⁶² because the duty of care is an action or conduct that violates the rights of people and the environment. Either through the corporations exercising of control and influence in the subsidiary business operations. In general, therefore, it seems that corporation foreseeability will negate the state jurisdiction in regard to imposing liability.

¹⁷⁶¹ *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360.

¹⁷⁶² David L Sloss, 'Kiobel and Extraterritoriality: A Rule without a Rationale' (2013) *Maryland Journal of International Law, Forthcoming* 11, 13.

The position this study took is that the US Supreme Court got the application of tort law wrong in the case of *Kiobel*.¹⁷⁶³ There is no general duty for the parent corporation to prevent other people from violating the human rights of others, but there are exceptions to this rule, many which relate to and overlap with some of the concept foreseeability and stem from either a special (business operations) or pre-tort relations. Example, it often because someone has not done something (an omission) that a third party is allowed the chance to lead to the harm suffered. Therefore, the question to the court in parent corporation's scenario should be foreseeability, did the parent corporation foresaw it conduct will result in human rights abuses? In what circumstance should the general duty of care apply in the case or the general rule that people should not be liable for actions of the third party? If the US Supreme Court sought to address this issue at the initial stage of *Kiobel*, the presumption will be that a duty of care exists and Shell Petroleum will be found liable for human rights violation by its subsidiary. Hence, the concept of touch and concern is irrelevant to tort liability, and the tort law does impose liability for the acts of the third party (subsidiary) in the exception circumstances. Having said that, the logical question for the court is if the liability for the third party¹⁷⁶⁴ act is broadly met

¹⁷⁶³ *Kiobel v Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

¹⁷⁶⁴ Sean W Martin, Reed Bates and Michael McMyne 'Are You as Guilty as The Criminal? Liability for Criminal Acts of Third Parties and Employees' (2015) 64 (2) *FDCC Quarterly* 131.

Courts throughout the country uniformly hold that a business owner is not liable for injuries to others resulting from the criminal acts of third parties unless (1) the criminal act is foreseeable and (2) reasonable efforts can be made to prevent the criminal conduct from injuring customers. However, despite the overwhelming acceptance of these legal principles, there remains considerable debate over what actions or events give rise to a business owner's duty of care and what reasonable steps must be taken to deter criminals from victimising those who may be on the premises. There is generally no duty to protect customers from criminal activities of third persons of care toward its customers; indeed, "[t]he touchstone for the creation of a duty is foreseeability".

The owner's duty to intervene may not stop at the front door. Ejecting a patron or calling 911 may not always be enough to meet a business owner's duty. This is especially the case when alcohol is involved, or when there is an altercation between guests. The key question is whether the conduct puts the business on notice that an incident may occur beyond its. However, when a criminal act is "reasonably foreseeable", the business owner owes a duty". *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999). See also *Sturbridge Partners, Ltd. v Walker*, 482 S.E.2d 339 (Ga. 1997)

C. Breach of Duty;

After establishing foreseeability, and thus a duty on the part of the business owner, the plaintiff must prove that the business owner breached that duty. This will almost always be a jury question. To prove breach, a plaintiff should have expert testimony on the reasonable standard of care required, as well as how the defendant's conduct fell below that standard. In general, to succeed, the plaintiff must proffer evidence showing that reasonable security measures would have prevented the criminal conduct that caused plaintiff's injuries. *Lau's Corp, Inc. v Haskins*, 405 S.E.2d 474 (Ga. 199); *Ritz Carlton Hotel Co. v Revel*, 454 S.E.2d 183 (Ga. Ct. App. 1995); *Grandma's Biscuits, Inc. v Baisden*, 386 S.E.2d 415 (Ga. Ct. App.

D. Causation;

Even assuming the defendant owed and breached a duty of care to the plaintiff, the plaintiff cannot prevail without also proving the breach was the proximate cause of his or her injuries. As is true generally, the plaintiff's evidence of causation, including testimony of causation experts, cannot be based upon speculation and conjecture. Some courts have noted that proximate cause requires proof of two elements: foreseeability and cause-in-fact. As to the latter element, "if it is shown that the injury would have

by the conduct of the duty being a duty to control the third party or a duty to safeguard a dangerous thing. As noted by, Lord Goff in *Smith v Littlewood* (1987).¹⁷⁶⁵

- Where there is a special relationship between the defendant and the claimant;
- where there is a special relationship between the defendant and the third party such as control or supervision;
- where someone creates a source of danger that may be sparked by a third party; and
- where there is a failure to take a step to abate a known danger created by a third party.¹⁷⁶⁶

Applying these rules to corporate human rights violations, the principle in *Smith v Littlewood* established that corporate liability for a misconduct should not be restricted because parent corporate accountability for its subsidiary may have political implications that are a detriment to international relations. This is because the finding of liability in this circumstance is based on the relationship, control, the creation of the danger, and the steps taken to mitigate the danger. Thus, foreseeability and duty of care are about rule of law, remedy, deterrence, and protecting society from corporate conducts that are a detriment to the enjoying of the fundamental human rights of humanity.

5.27. Corporation Proximity

During the time of this research, the UK court, and the Canadian courts have not yet established whether the relationship between the UK or Canadian corporation and its subsidiary in the conducting of its business operation could be sufficiently proximate to give rise to a duty of care. However, it is acknowledged in this study that there are existing authorities that have considered the imposition a duty of care to the corporation, for the misconduct of its subsidiary. Furthermore, this authority on the corporate duty of care has outlined the key tort of negligence principles for assuming a responsibility to protect human rights and the potential ground for holding corporations accountable for a third-party misconduct.

Therefore, liability for the breach of the duty of care could arise where the corporations controls the business operations, either directly or indirectly, where the corporation has assumed responsibility and where the corporation conduct has contributed or created the

resulted even though the defendant did that which the plaintiff contends should have been done, then the purported negligence is not a cause-in-fact of the injury”.

¹⁷⁶⁵ *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18.

¹⁷⁶⁶ *Ibid.*

violations of the basic human rights.¹⁷⁶⁷ An important point to note in the concept of liability and duty of care is that liability simply means having legal responsibility for one action and only attaches once all the elements of a tort are made out by the plaintiff. So, for example, while corporations who operate in an environment that has a very high record of human rights violations may owe a duty not to make the situation worse, their actions would be judged against the reasonable corporation in that circumstance. Hence, one way or another, these principles increase the degree of proximity between the corporation and the victims, creating a relationship between them in which the foreseeability of violation become greater. Therefore, justifying the corporation's potential liability to that specific victim for either involving directly or indirectly in human rights violations. Observing this development, this research will now move on to examine the accountability of a corporation and subsidiary before moving on to address the final leg of *Caparo* test, the fair, just, and reasonable principle.

5.28. Accountability for the Violation Inflicted by Third Party

The core question for the court in the proximity inquiry is whether the relationship was “sufficiently close and direct to give rise to a legal duty of care, considering such a factor as expectation representation, trust, and the property or the interest involved”.¹⁷⁶⁸ *Saelzler v Advanced Group 400*,¹⁷⁶⁹(affirming summary judgment based on plaintiff's failure to adequately demonstrate defendant's negligence was the proximate cause of her injuries in a case where plaintiff was beaten and sexually assaulted while attempting to deliver a package to an apartment owned by defendant); *Nola M. v Univ. of S*¹⁷⁷⁰ (reversing jury verdict in favour of the plaintiff because the plaintiff's security expert established defendant's “abstract

¹⁷⁶⁷ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

¹⁷⁶⁸ *Fallowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132.

¹⁷⁶⁹ *Saelzler v Advanced Group 400*, 107 Cal. Rptr. 2d 617, 623-24 (2001).

The plaintiff was an employee of Federal Express and attempting to deliver a package to a resident in a 28-building apartment complex owned by defendants when she was assaulted and severely beaten by three unidentified men. The complex was located in a high crime area and there had been frequent recurring criminal activity on the premises. At the time of the attack, a security gate at the complex was broken, but plaintiff presented no evidence establishing whether the gate was malfunctioning or was broken by the attackers themselves, or whether her assailants entered the property through this gate or by some other means, whether the attackers were tenants of the building with access to the property. The defendant obtained summary judgment on the basis that the plaintiff could not establish a causal link between her injury and the defendant's failure to maintain the premises in a safe condition. The Court of Appeal reversed, but the California Supreme Court reversed the Court of Appeal. (*Saelzler*, supra, 25 Cal.4th at pp. 769-771.)

Assuming for purposes of discussion that the defendants breached a duty to keep all entrance gates locked and to provide additional daytime security guards, the court concluded that the evidence nevertheless failed to show that the breach contributed to the plaintiff's injuries. (*Id.* at p. 775.)

¹⁷⁷⁰ *Nola M. v Univ. of S. Cal.*, 20 Cal. Rptr. 2d 97 (Ct. App. 1993).

negligence” but did not establish a causal link between the negligence and plaintiff’s injuries). It can therefore be assumed that the act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct should have realised the likelihood that such a situation might be created thereby and that a third person might avail himself of the opportunity to commit such a tort or crime liability may exit.¹⁷⁷¹ A vexing question in cases involving criminal acts of third parties is the apportionment of fault among the co-defendants. A threshold question in analysing this issue, of course, is whether a particular jurisdiction applies the doctrine of vicarious liability or respondent superior and allows for apportionment of damages among joint tortfeasors/co-defendants.

Determining comparative fault and apportionment in cases of this type presents difficult issues, since it involves comparing the fault of an allegedly negligent actor with a party who acted intentionally. While courts in some states have held that fact finders may compare the fault of such parties¹⁷⁷² other states do not allow for the apportionment of fault between negligent and intentional tortfeasors.¹⁷⁷³ In *Riley v Maison Orleans II*,¹⁷⁷⁴ for example, relatives of a deceased nursing home resident alleged that the resident suffered injuries and ultimately died after being attacked with a steel pipe by another of the facility’s residents. The trial court ruled that the deceased resident’s injuries resulted from the conduct of another resident and from the absence of adequate supervision by the facility, and rendered a substantial damages award against the defendant nursing facility. The United States Court of Appeals for the Ninth Circuit addressed this issue in *Avitia v United States*.¹⁷⁷⁵ In that case, a patient was sexually assaulted by her doctor at a clinic receiving federal funds and sued the United States under the Federal Tort Claims Act. Applying California law, the trial court held the United States liable because the clinic and its employees failed to provide a chaperone for the patient during the

¹⁷⁷¹ *Liberty Nat’l Life Ins. Co. v Weldon*, 100 So. 2d 696, 710 (Ala. 1957) (quoting Restatement (Second) of Torts § 448 (1977)).

¹⁷⁷² *Hutcherson v City of Phoenix*, 961 P.2d 449 (Ariz. 1998); *Field v Boyer Co. L.C.*, 952 P.2d 1078 (Utah 1998).

¹⁷⁷³ *Whitehead v Food Max*, 163 F.3d 265 (5th Cir. 1998); *Merrill Crossings Assocs. v McDonald*, 705 So. 2d 560 (Fla. 1997).

¹⁷⁷⁴ *Riley v Maison Orleans II, Inc.* 2002 WL 31256411 (La. Ct. App. Sept. 25, 2002).

¹⁷⁷⁵ *Avitia v United States*, No. 00-55240 (9th Cir. Dec. 14, 2001).

On appeal, the Ninth Circuit examined the government’s argument that the trial court should have apportioned damages between the United States and the physician. Under California law, a defendant’s liability for noneconomic damages in personal injury cases is limited to “that defendant’s percentage of fault”. Thus, according to the court, because the physician’s “intentional misconduct” was an “important cause of [plaintiff’s] injury”, the district court clearly erred when it “disregarded [this] conduct as a contributing factor”.

gynaecological exam at which the alleged sexual assault occurred. The court found the clinic liable for its own negligence and, under respondent superior, for the negligence of the physician. The trial court awarded plaintiff \$210,000 in noneconomic damages.

The Supreme Court in *Childs Desormeaux*,¹⁷⁷⁶ it is uncommon for the court to find liability to protect other, without the essential element being present in the principle of proximity. “Generally the mere fact that a person face danger does not impose any kind of duty on those in a position to become involve”.¹⁷⁷⁷ Nonetheless, the Supreme Court concluded that liability for duty of care arises when these three factors are identified, which, however, indicate a positive duty to protect, control, provide self-sufficiency, and trust. The factors developed by the court follow the principle of *Anns and Caparo* test.

The factors in *Childs* have also confirmed in the Supreme Court later judgment in *Fullowka v Pinkerton's of Canada Ltd.*¹⁷⁷⁸ *Fullowka* arose from the 1992 bombing at the Giant Mine near Yellowknife by striking miner who has been dismissed by the corporation.¹⁷⁷⁹ The family of the miner killed in the bombing brought a negligence claim against Pinkerton’s, the security company hired to protect the mine during the strike, as well as against the trade union involved in the strike and the Government of the Northwest Territories.¹⁷⁸⁰ The Canadian Supreme Court rejected all the three tort claims, thus, accepting that Pinkerton’s owed a *prima facie* duty of care as a result of having assumed the responsibility of protecting the workers from the dangerous act of the miners during the strike.¹⁷⁸¹

To understand the concept of proximity, *Fullowka* is crucial for a successful duty of care claim against the conduct of a third party (subsidiary) because it addressed the same broad proposition of imposing a duty of care. Most importantly, however, it addresses the circumstance where a person (corporate) could be found directly liable for failing to protect another person from harm caused by a third party. Therefore, this test is concerned with whether there existed, prior to the corporation misconduct or the misconduct of the subsidiary failure to take care, sufficient factual link between the plaintiffs as to establish proximity (in the sense of neighbourhood or closeness) such as would support the imposition of a duty of

¹⁷⁷⁶ *Childs v Desormeaux*, [2006] 1 S.C.R. 643, Reasoning “Using the Anns test, harm to Childs was not foreseeable. Unless reliance is induced by the host, there will be no liability for the actions of guests”

¹⁷⁷⁷ *Ibid.*

¹⁷⁷⁸ *Ibid.* “Child concerned the liability of social host, so the ultimate finding of the Court (rejecting a duty of care) is not directly applicable to the theoretical concept of duty of care liability”.

¹⁷⁷⁹ *Fullowka v Pinkerton's of Canada Ltd* 2010 SCC 5, [2010] 1 SCR 132.

¹⁷⁸⁰ *Ibid.*

¹⁷⁸¹ *Ibid.*

care. The proximity in this context indicates the presence pathways to harm, the existence of such pathways providing a reason for imposing a legal obligation upon the corporation and the subsidiary to take care.

Prior studies that have noted the importance of superior responsibility also have highlighted that one of the most important question that arises before a defendant can be charge (criminal or civil) is whether the law or customary international law doctrine existed in preceding to an alleged violation of human rights.¹⁷⁸² This study also observed that is broadly acknowledged that it is unfair to hold someone accountable for something that was not a legal violation before they committed the act.¹⁷⁸³ The notion of responsibility for the actions of a person under the command of another has a long and deep history in domestic and international law.¹⁷⁸⁴ Researcher have study the roots of the notion of command responsibility to the Roman Empire¹⁷⁸⁵ and as well as Sun Tzu in the sixth century.¹⁷⁸⁶ Early responsibilities were connected to the state (the crown) or military officials.¹⁷⁸⁷

In 1439, a proclamation from Charles VII of France, Ordinance at Orleans, stated: “each captain or lieutenant [is] held responsible for the abuses, ills and offences committed by members of his company” and must punish offenses.¹⁷⁸⁸ This suggests that if there is a failure to punish or the officer “covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been”.¹⁷⁸⁹ Similarly, in 1621, the Articles of War

¹⁷⁸² Allison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) *California Law Review* 75, 169.

¹⁷⁸³ Ronald Slye and Beth Van Schaack, *International Criminal Law: Essentials* (Wolters Kluwer Law & Business 2009).

¹⁷⁸⁴ Hans Kelsen, ‘Collective and Individual Responsibility in International Law with Particular Regard to The Punishment of War Criminals’ (1942) 31 *California Law Review* 530.

¹⁷⁸⁵ Arthur Thomas O'Reilly, ‘Command Responsibility: A Call to Realign Doctrine with Principles’ (2004) 20 *American University International Law Review* 71.

“The origins of command responsibility are ancient, with a long history of development and practice in the laws of various nations”

¹⁷⁸⁶ William H Parks, ‘Command Responsibility for War Crimes’ (1973) 63 *Military Law Review* 1, also see; Victor H Mair, *The Art of War: Sun zi's Military Methods* (Columbia University Press 2008).

¹⁷⁸⁷ Sidney G Buchanan, ‘A Conceptual History of The State Action Doctrine: The Search for Governmental Responsibility (Part II of II)’ (1997) 34 *Houston Law Review* 665.

¹⁷⁸⁸ Leslie C Green, ‘Command Responsibility in International Humanitarian Law’ (1995) 5 *Transnational Law & Contemporary Problems* 319, also see: Zita Rohr, ‘Playing the Catalan: The Rise of The Chess Queen; Queenship and Political Motherhood in Late Medieval Aragon and France’ *Virtuous or Villainess? The Image of The Royal Mother from The Early Medieval to The Early Modern Era* (Palgrave Macmillan US 2016) 173-197 and Ralph Griffiths, ‘Theodor Meron, Henry’s Wars and Shakespeare’s Laws’ (1996) *Nottingham Medieval Studies* 198, 200.

¹⁷⁸⁹ *Ibid.*

delivered by Adolphus of Sweden stated that a commander could give no unlawful orders.¹⁷⁹⁰ Author such as Grotius also contributed to the debate in 1625, the author observed that “the State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so”.¹⁷⁹¹ Therefore, the notion of superior responsibility was not just stated as a superlative but was a principle enforced in domestic law. In one early example, in 1474, the Archduke of Austria ordered the trial of Peter von Hagenbach who was charged with responsibility for atrocities committed by his subordinates while carrying out orders from his master.¹⁷⁹²

Another central development in the evolution of the command responsibility doctrine was restitution for victims.¹⁷⁹³ Throughout the early 20th century, many states ratified The Hague Conventions and the Geneva Convention of 1929.¹⁷⁹⁴ The most generally mention inception of a positive duty of the state to prevent war crimes in a treaty is the Hague Conventions.¹⁷⁹⁵ The Hague Convention of 1907 also identified the duties for restitution to private parties: a belligerent party violating provisions “shall if the case demands, be liable to pay compensation. What this means is that the defendant shall be responsible for all acts committed by persons forming part of its armed forces”.¹⁷⁹⁶ In addition, the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field reinforced duties of military “commanders in chief” to comply with the duties in the Convention.¹⁷⁹⁷ This observation may support the hypothesis that the concept is the codification of the responsibility of civilian superiors, and in particular private superiors, began to be more systematically implemented over the course of the twentieth century.

¹⁷⁹⁰ Norman G Cooper, ‘Gustavus Adolphus and Military Justice’ (1981) 92 *Military Law Review* 129.

¹⁷⁹¹ Hugo Grotius, *Hugo Grotius on the Law of War and Peace* (Cambridge University Press 2012).

¹⁷⁹² Leslie C Green (n 1758).

¹⁷⁹³ James C O’Brien, ‘The international Tribunal for Violations of International Humanitarian Law in The Former Yugoslavia’ (1993) 867 (4) *American Journal of International Law* 639, 659.

¹⁷⁹⁴ International Conferences (The Hague), *Hague Convention (IV) Respecting The Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907. <<http://www.refworld.org/docid/4374cae64.html>> accessed 5 September 2017 and International Committee of the Red Cross (ICRC), *Geneva Convention Relative to The Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287. <<http://www.refworld.org/docid/3ae6b36d2.html>> accessed 5 September 2017

¹⁷⁹⁵ *Ibid.*

¹⁷⁹⁶ *Ibid.*

¹⁷⁹⁷ Convention for The Amelioration of The Condition of The Wounded and Sick in Armies in The Field, 118 L.N.T.S. 303, at art. 26 (June 19, 1931). Art 26. The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Furthermore, international treaties vary in the degree to which they mention corporate superior responsibility.¹⁷⁹⁸ Some highlight them in groups such as defendants, this incorporate both state and non-state actors (corporations), however, do not differentiate types of liability for all the different actors.¹⁷⁹⁹ Other treaties discussion both potential liability of non-state actors as well as superior responsibility.¹⁸⁰⁰ In addition to the Nuremberg¹⁸⁰¹ trial that provide for the prosecution of superior officers, major international mechanisms offer further, longstanding support for the principle that private actors can be held accountable for their role in violations of international law.¹⁸⁰² This observation also including when a private actor is in a position of superior responsibility.¹⁸⁰³

This view is equivalent to parent corporation and subsidiary relationship (proximity), where the parent corporation have significant control over the subsidiary business operation.¹⁸⁰⁴ The principle from Nuremberg and the body of law, includes international treaties and other sources focused on human rights and environmental law, as well as sources that deal with other substantive issues, such as maritime law¹⁸⁰⁵ have shown that it is possible for corporate superior to be held accountable for human rights violation, where it exercise control over the subordinate.¹⁸⁰⁶ Even though the vast majority of these sources of case law, law and treaties do not make specific reference to superior responsibility, they contain a comprehensive legal language that has been widely interpreted to include this form of liability.¹⁸⁰⁷ A possible explanation for this might be that this body of law complements and strengthens the law codified by the founding documents of the international tribunals,

¹⁷⁹⁸ Guénaél Mettraux, *The Law of Command Responsibility* (Oxford University Press USA 2009).

¹⁷⁹⁹ Jordan J Paust, 'Non-State Actor Participation in International Law and the Pretense of Exclusion' (2010).

¹⁸⁰⁰ William A Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 *Fordham International Law Journal* 907.

¹⁸⁰¹ Gary Komarow, 'Individual Responsibility under International Law: The Nuremberg Principles in Domestic Legal Systems' (1980) *International and Comparative Law Quarterly* 21, 37.

¹⁸⁰² Jennifer M Green, 'Corporate Torts: International Human Rights and Superior Officers' (2016) 17 *Chicago Journal of International Law* 447.

¹⁸⁰³ Steven R Ratner, 'Corporations and Human Rights: a Theory of Legal Responsibility' (2001) 111 (3) *Yale Law Journal* 443, 545.

¹⁸⁰⁴ Phillip I Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of The Corporate Juridical Entity' (2000) 24 *Hastings International and Comparative Law Review* 297.

¹⁸⁰⁵ Michael A De Gennaro, 'Oil Pollution Liability and Control under International Maritime Law: Market Incentives as an Alternative to Government Regulation' (2004) 37 *Vanderbilt Journal of Transnational Law* 265.

¹⁸⁰⁶ Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press 1993).

¹⁸⁰⁷ Brian Seth Parker, 'Applying The Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations' (2012) 35 *Hastings International and Comparative Law Review* 1.

international courts and domestic courts decisions, which is further strengthened by the cases that have interpreted these laws in international and domestic tribunals.¹⁸⁰⁸

Similarly, one of the treaties that addresses both superior responsibility and culpability for private actors is the Convention on Enforced Disappearances,¹⁸⁰⁹ which provides that, States Parties “shall take the necessary measures to hold criminally responsible [superiors] who (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution”.¹⁸¹⁰ The Convention on Disappearances also noted that these provisions were “without prejudice to the higher standards of responsibility applicable under international law to a military commander or to a person effectively acting as a military commander”.¹⁸¹¹

¹⁸⁰⁸ Statute of the Special Court for Sierra Leone, S.C. Res. 1315, art. 6 3 (Aug. 16, 2000). “[hereinafter Sierra Leone Statute]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with the inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29 (Oct. 27, 2004). Since 2000, other “hybrid” tribunals combining international and national aspects have been created to hold violators accountable for war crimes and human rights violations including in Sierra Leone, East Timor, Bosnia, Kosovo, and Cambodia. The founding documents for these tribunals include provisions for superior responsibility parallel to those of the ICTY and the ICTR, adopting the “effective control” and “knew or had reason to know” standards”.

¹⁸⁰⁹ UN General Assembly, *International Convention for The Protection of All Persons from Enforced Disappearance*, 20 December 2006. <<http://www.refworld.org/docid/47fdfaeb0.html> >accessed 6 September 2017. Article 2. For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Article 3

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorisation, support or acquiescence of the State and to bring those responsible to justice.

Article 4

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law

¹⁸¹⁰ *Ibid.*

¹⁸¹¹ Article 6.

1. Each State Party shall take the necessary measures to hold criminally responsible at least:

- (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
- (b) A superior who:

It can thus be suggested that there is no requirement of state action in the definition of the norm, thus, both governmental and non-state actors may be liable for false disappearance. Also, the area of law that requires that a superior may be liable is maritime law.¹⁸¹² For instance, the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea,¹⁸¹³ provides that a carrier is liable for damage resulting from death or personal injury due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.¹⁸¹⁴

Further to these sources of law that are explicit about the application of superior responsibility to private actors, there is a body of law that includes the legal duties of private parties, and which courts have construed to be related to superior commander.¹⁸¹⁵ Thus, these sources extend back almost two centuries. Particularly courts have established the ruling on the slave trade during the nineteenth century are an overlooked source of international law that addressed violations by private parties.¹⁸¹⁶ This development is also noted in the between 1817 and 1871, in the US, UK, Netherlands, and Portugal, when these countries entered into treaties that established international courts to quash the slave trade.¹⁸¹⁷ The courts were given

(i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;

(ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

(iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

¹⁸¹² International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS. <<http://www.refworld.org/docid/469224c82.html>> accessed 6 September 2017. Patricia Jimenez Kwast, 'Maritime Law Enforcement and The use of Force: Reflections on The Categorisation of Forcible Action at Sea in The Light of The Guyana/Suriname Award' (2008) 13(1) *Journal of Conflict and Security Law* 49, 91.

¹⁸¹³ International Maritime Organization (IMO), *International Convention for the Safety of Life At Sea*, 1. November 1974, 1184 UNTS 3. <<http://www.refworld.org/docid/46920bf32.html>> accessed 6 September 2017.

: Baris Soyer, 'Sundry Considerations on the Draft Protocol to The Athens Convention Relating to The Carriage of Passengers and Their Luggage by Sea 1974' (2002) 33 *Journal of Air Law and Commerce* 519.

¹⁸¹⁴ *Ibid.*

¹⁸¹⁵ Jenny S Martinez, 'Antislavery Courts and The Dawn of International Human Rights Law' (2008) *Yale Law Journal* 550, 641. Though all but forgotten today, these antislavery courts were the first international human rights courts.

¹⁸¹⁶ *Ibid.*

¹⁸¹⁷ Jenny S Martinez, *The Slave Trade and The Origins of International Human Rights Law* (Oxford University Press 2011).

authority to seize a ships that engage in slave trade and divided the assets as a punishment for violating international law.¹⁸¹⁸ In this understanding, this research argues that in the 20th century, most human rights treaties have a provisions that specified that they applied to private actors.¹⁸¹⁹ Similarly, Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide provides, “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.¹⁸²⁰ Convention on the Prevention and Punishment of the Crime of Genocide in the US and international courts have held that genocide violates international law when it is committed by state or non-state actors¹⁸²¹ and this also consist of those in positions of superior responsibility.¹⁸²²

In addition, the Convention against Torture (CAT) forbids torture “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.¹⁸²³ The convention stipulate that public and private persons can be held accountable; the language is “any person”.¹⁸²⁴ Though there must be some state action by one

¹⁸¹⁸ Eugene Kontorovich, ‘The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals’ (2009) *University of Pennsylvania Law Review* 39, 115.

¹⁸¹⁹ Convention on the Prevention and Punishment of The Crime of Genocide, art. 4, *Opened for Signature* Dec. 9, 1948, 78 UNT.S. 277 (entered into force Jan. 12, 1951).
Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

¹⁸²⁰ *Ibid.*

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

¹⁸²¹ *Sosa v Alvarez-Machain*, 542 US 692, 732 & n. 20 (2004).

“sufficient consensus that genocide by private actors violate international law” *Kadic v Karadzic* 70 F.3d 232, 239 41 (2d Cir. 1995)); Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v Serb. & Montenegro*), Judgment, 2007 I.C.J. 398 (Feb. 26).

¹⁸²² Caroline Fournet, ‘The Universality of The Prohibition of The Crime of Genocide, 1948-2008’ (2009) 19 (2) *International Criminal Justice Review* 132,149 and Tahlia Petrosian, ‘Secondary Forms of Genocide and Command Responsibility under the Statutes of the ICTY, ICTR and ICC’ (2010) 17 *Australian International Law Journal* 29.

¹⁸²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *Opened for Signature* Dec. 10, 1984, 1465 UNT.S. 85 (entered into force June 26, 1985).

¹⁸²⁴ Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

of the participants in the torture. The Committee against Torture, internationally distinguished that the Convention recognised its enforcement against private actors, arguing that “acts of torture committed by non-state officials or private actors” is addressed by the convention.¹⁸²⁵ Likewise, CAT General Comment 3, on the Convention’s Article 14, explain the state responsibility for a right to redress, effective remedy, and reparations in situations in which “state authorities knew or have reasonable grounds to believe that acts of torture or ill-treatment had been committed by non-state officials or private actors and failed to exercise due diligence to prevent, investigate and punish, the state bears responsibility to provide redress to the victims”.¹⁸²⁶

Following these developments, a variety of treaties stipulate that all groups of “persons” (natural and legal) are projected to be incorporated by their provisions. These treaties comprise the racial discrimination,¹⁸²⁷ apartheid,¹⁸²⁸ environmental hazards,¹⁸²⁹ and organised crime.¹⁸³⁰ Other treaties by the same token have generally incorporated the International Covenant on Civil and Political Rights (ICCPR),¹⁸³¹ which advocates that each state party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant”¹⁸³² the Convention for the Elimination of Racial Discrimination (CERD), which states that governments must “prohibit and bring to an end, by all appropriate means including legislation racial discrimination by any persons, group or

¹⁸²⁵ Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties* 18, UN Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007).

¹⁸²⁶ Committee against Torture, *General Comment No. 3: Implementation of Article 14 by States Parties*, 7, UN Doc. CAT/C/GC/3 (Dec. 13, 2012).

¹⁸²⁷ International Convention on The Elimination of All Forms of Racial Discrimination, *Opened for Signature* Dec. 21, 1965, 660 UNT.S. 195, 212; (entered into force Jan. 6, 1969) [hereinafter CERD]; Committee on The Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of The Convention: Concluding Observations of The Committee on The Elimination of Racial Discrimination: United States of America, 30, UN Doc. CERD/C/USA/CO/6 (Mar. 5, 2008)

¹⁸²⁸ International Convention on The Suppression and Punishment of The Crime of Apartheid art. I (2), 2, *Opened for Signature* Nov. 30, 1973, 1015 UNT.S. 243 (entered into force July 18, 1976) (declaring apartheid criminal).

¹⁸²⁹ International Convention on Civil Liability for Oil Pollution Damage, *Opened for Signature* Nov. 29, 1969, 973 UNT.S. 3 (entered into force June 19, 1975); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *Opened for Signature* Mar. 22, 1989, 1673 UNT.S. 57 (entered into force May 5, 1992); Convention on Third Party Liability in The Field of Nuclear Energy, *Opened for Signature* July 29, 1960, 956 UNT.S. 251. (entered into force Apr. 1, 1968).

¹⁸³⁰ United Nations Convention against Transnational Organized Crime, art. 10 1, *Opened for Signature* Nov. 15, 2000, 2225 UNT.S. 209 (entered into force Sept. 29, 2003)
“Each State Party shall adopt such measures as may be necessary consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organised criminal group for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention”.

¹⁸³¹ Convention on The Elimination of All Forms of Discrimination Against Women art. 2(e), *Opened for Signature* Dec. 18, 1979, 1249 UNT.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

¹⁸³² *Ibid.*

organisation”¹⁸³³ and the Convention for the Elimination of Discrimination Against Women (CEDAW), which states as its goal to “eliminate discrimination against women by any person, organisation or enterprise”.¹⁸³⁴ The present treaties raises the possibility that these sources of law, which provide for private liability, have been interpreted to cover superior officers (proximity) and thus, strengthen the international legal basis for corporate superior officer liability in business operations.

Furthermore, the concept of due diligence in soft law¹⁸³⁵ in the core human rights documents has also been an important characteristic of the recent development of business and human rights standards in the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,¹⁸³⁶ the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,¹⁸³⁷ the UN Guiding Principles on Business and Human Rights, and the Voluntary Principles on Security and Human Rights.¹⁸³⁸ The due diligence principle in the UN Guiding Principles have supported the notion of the application of “human rights” due diligence to identify, prevent, mitigate, and account for how to address business impacts on human rights.¹⁸³⁹ Also, the guiding principles include the identification of key risks related to the type of business and the geographical area of operation, and the existence of a plan of action to prevent or mitigate risks.¹⁸⁴⁰ The latter are based on both technical data and consultations with potentially affected people and other relevant stakeholders, specific actions triggered once abuses are reported, and disclosure of specific policies and processes undertaken to identify and address key risks.¹⁸⁴¹ This implied that the standards for business have also drawn increasing attention in regional bodies and within nation states.¹⁸⁴² The Working Group on

¹⁸³³ *Ibid.*

¹⁸³⁴ UN Committee on The Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992. <<http://www.refworld.org/docid/52d920c54.html>> accessed 8 September 2017.

¹⁸³⁵ Ramona Elisabeta Cirlig, ‘Business and Human Rights: from Soft Law to Hard Law’ (2016) 6 *Juridical Tribune* 228 and *Lantz v Coleman* 2010 Conn. Super. Lexis 621 (Conn. Super. Ct. Mar. 9, 2010).

¹⁸³⁶ Richard Woodward, *The Organisation for Economic Co-Operation and Development (OECD)* (Routledge 2009).

¹⁸³⁷ Janelle M Diller, ‘ILO Tripartite Declaration of Principles Concerning Multinational Enterprises And Social Policy’ (2002) 41 (1) *International Legal Materials* 184, 201.

¹⁸³⁸ Björn FASTERLING and Geert DEMUIJNCK, ‘Human Rights in the Void? Due Diligence in The UN Guiding Principles on Business and Human Rights’ (2013) 116 (4) *Journal of Business Ethics* 799, 814.

¹⁸³⁹ Tanja BÖRZEL and Jana HOENKE, ‘From Compliance to Practice: Mining Companies and The Voluntary Principles on Security and Human rights in The Democratic Republic of Congo’ (2010).

¹⁸⁴⁰ United Nations, *Guiding Principles on Business and Human Rights: Implementing The United Nations “Protect, Respect and Remedy” Framework* (UN 2011).

¹⁸⁴¹ Radu Mares, ed. *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2011.)

¹⁸⁴² *Ibid.*

Human Rights and Business have made important progress in seeking mutuality among sectors, encouraging businesses to move toward respect for human rights.¹⁸⁴³ Additionally, some sources of “soft,” or non-binding, law such as UN declarations, have also supported the principles of private liability and superior responsibility for human rights violations.¹⁸⁴⁴

For example, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law “provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation”.¹⁸⁴⁵ These various sources of soft international law, particularly have detailed guidelines on business and human rights, which established the obligations and procedure for due diligence standards to protect, respect and remedy human rights violations.¹⁸⁴⁶ What this means is that the accountability for superior liability is established in both soft and hard law,¹⁸⁴⁷ as well as case law in the past decades. This evidence arguably establishes the possible ground for corporate superior responsibility for human rights abuses and environmental damages.

As well, the Nuremberg trials and the continuation of the Allied Zone cases,¹⁸⁴⁸ and the Tokyo (“Far East”)¹⁸⁴⁹ tribunals all included “industrialists” as defendants, endorsing the early tribunals application of international law irrespective of the status of the defendant (military, civilian governmental leader or private citizen);¹⁸⁵⁰ the judgement in the tribunals recognised in the case law is that conduct focused on whether superiors demonstrated a culpable failure to

¹⁸⁴³ Human Rights Council Res. 17/4, UN Doc. A/HRC/RES/17/4, at 2 (July 6, 2011).

¹⁸⁴⁴ General Assembly Res. 60/147, 3(c) (Dec. 16, 2005).

¹⁸⁴⁵ Theo Van Boven, ‘The United Nations Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (2010) *United Nations Audiovisual Library of International Law*. New York, United Nations.

¹⁸⁴⁶ John Ruggie, ‘Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework’ (2009) *Report to The Human Rights Council, A/HRC/11/13*

¹⁸⁴⁷ Jon Birger Skjærseth, Olav Schram Stokke and Jørgen Wettestad, ‘Soft law, Hard Law, and Effective Implementation of International Environmental Norms’ (2006) 6 (3) *Global Environmental Politics* 104, 120.

¹⁸⁴⁸ Ann Tusa and John Tusa, *The Nuremberg Trial* (Skyhorse Publishing Inc 2010).

The “Nuremberg Trials” include the Major War Criminals tried at the International Military Tribunal at Nuremberg (IMT) from 1945 to 1946 and the subsequent Nuremberg Military Tribunals (NMT) trials of lower ranking Nazis conducted by the Americans in Nuremberg and by France, the United Kingdom and the Soviet Union in their respective zones of occupied Germany.

¹⁸⁴⁹ John R Pritchard, R. ‘The International Military Tribunal for The Far East and its Contemporary Resonances’ (1995) 149 *Military Law Review* 25.

¹⁸⁵⁰ Bernard Victor Aloysius Röling and Christiaan F. Rüter, eds. *The Tokyo Judgment: The International Military Tribunal for the Far East (IMTFE), 29 April 1946-12 November 1948* (Vol. 2. APA University Press Amsterdam 1977).

take reasonable steps to prevent or punish international crimes of those under their control.¹⁸⁵¹ Also, the Nuremberg tribunals provided a new ground for holding individuals responsible for violating international law and human rights.¹⁸⁵² Throughout World War II, the UN delivered a number of statements signifying its intention to bring to trial those enemy personnel who were guilty of war crimes and these individuals included corporate defendants, or “industrialists”.¹⁸⁵³ The suggestion behind this principle is that corporate structure did not provide a defence for prosecution.¹⁸⁵⁴ This was acknowledged by Justice Robert Jackson: “While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity”.¹⁸⁵⁵

Superior responsibility principle was applied in the military tribunals set up by the four Allied Powers under Allied Control Council Law No. 10.¹⁸⁵⁶ The cases that are most cited for the development of the doctrine are *US v List and others (The Hostages Cases)*¹⁸⁵⁷ and *The High Command Case*.¹⁸⁵⁸ What is clear from both of these cases is that, German military officers were held accountable because they were found to possess knowledge of their subordinates’ abuses and had power to stop the abuses but they have failed to exercise the power that they had.¹⁸⁵⁹ The *Hostages Cases* observed that the duties of the supervisor “for maintaining peace and order, and the prevention of crime” and the “should have known” standard: knowledge

¹⁸⁵¹ Allison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) *California Law Review* 75, 169.

¹⁸⁵² Michael R Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (Macmillan 1997).

¹⁸⁵³ Quincy Wright, ‘The Law of The Nuremberg Trial’ (1947) 41 (1) *American Journal of International Law* 38, 72.

¹⁸⁵⁴ Francesca Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (University of Ottawa Press 1998).

¹⁸⁵⁵ Michael Bazylar and Jennifer Green, ‘Nuremberg-era Jurisprudence Redux: The Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* and the Legal Legacy of Nuremberg’ (2012) 7 *Charleston Law Review* 23.

¹⁸⁵⁶ Deutschland Gebiet unter Alliiertes Besatzung Kontrollrat, *Enactments and Approved Papers of The Control Council and Coordinating Committee* (1947).

¹⁸⁵⁷ *United States v List (Wilhelm) and others*, Trial Judgment, Case No 7, (1948) 11 TWC 757, (1950) 11 TWC 1230, (1948) 8 LRTWC 34, ICL 491 (US 1948), (1948) 15 ILR 632, 19th February 1948, International Military Tribunal [IMT]; Nuremberg Military Tribunal [NMT]. Whether international law permitted an occupying force to take hostages from the civilian population as a guarantee against attacks by unlawful resistance forces, and whether they had the right to execute these hostages in the event that a unilateral guarantee was violated. Whether guerrilla forces were considered lawful belligerents under the Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land.

¹⁸⁵⁸ War Criminals, ‘Law Report’ (1949). <http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf> accessed 11 September 2017. *United States V Wilhelm von Leeb et al*, 12 LRTWC 1 at 59 (1948).

¹⁸⁵⁹ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (Vol. 13. United Nations War Crimes Commission 1949).

could be attributed to the commander because he ignored reports of “terrorism and intimidation being carried out by units of the field”.¹⁸⁶⁰ The implication of the judgment in the case is that it is the commander’s duty to know: “any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf.”¹⁸⁶¹ Furthermore, the tribunal also observed that there was a duty to condemn and punish and a “practical coercive deterrent”¹⁸⁶² to high-ranking commanders ordering or complying with human rights violations.¹⁸⁶³ In respect to action upon which the commander was on notice (in this case, the killings of innocent people): “not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence, constitutes a serious breach of duty and imposes criminal responsibility” on him.¹⁸⁶⁴

The *Nuremberg* Military Tribunals (NMT) also held the defendants accountable where they did not have authoritative control over the state or military apparatus.¹⁸⁶⁵ The exemplary case, known as “*The Medical Trial*,” sixteen medical doctors and officials were charged with responsibility for medical experiments including subjecting people held in concentration camps to extreme temperatures and infecting them with diseases including typhus.¹⁸⁶⁶ What was clear is that the defendants included Siegfried Handloser, Chief of the Wehrmacht Medical Service and Handloser were convicted of responsibility for war crimes and crimes against humanity committed by subordinates because they knew of the abuses, including those that resulted in the deaths of prisoners, and that the abuses were likely to continue, and yet they failed to investigate, prevent, or punish the offenses or “exercise any proper degree of control over those conducting experiments within their *field of authority and competence*”.¹⁸⁶⁷ One interesting finding is that the awareness was not sufficient for conviction; other defendants who were aware of the experiments were cleared because they did not have supervisory authority.¹⁸⁶⁸

¹⁸⁶⁰ *Ibid.*

¹⁸⁶¹ *Ibid.*

¹⁸⁶² *Ibid.*

¹⁸⁶³ Allison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) *California Law Review* 75,169.

¹⁸⁶⁴ John A Appleman, *Military Tribunals and International Crimes* (Westport Conn: Greenwood Press 1971).

¹⁸⁶⁵ Kevin Jon Heller, *The Nuremberg Military Tribunals and The Origins of International Criminal Law* (Oxford University Press on Demand 2011).

¹⁸⁶⁶ Acquaviva G A Cassese, Fan M and A Whiting, *International Criminal Law: Cases and Commentary* (Oxford University Press 2011).

¹⁸⁶⁷ *Ibid.*

¹⁸⁶⁸ Matthew Lippman, ‘Fifty Years after Auschwitz: Prosecutions of Nazi Death Camp Defendants’ (1995) 11

Thus, this awareness and the exercise of control and authority on the conduct of the subordinate is what this thesis referred to as the legal proximity. Examining this conviction and the acquittals together gives an additional proof that the factors in culpability were knowledge and control (proximity) over subordinates (subsidiary) for a finding of corporate accountability.¹⁸⁶⁹

Analysing the tribunal, Nuremberg prosecutors were unequivocal about their ability to try civilian economic leaders.¹⁸⁷⁰ Drachsler, pronounced Control Council Law No. 10 as expanding superior responsibility to “industrialists in their representative capacity, as officers of the leading German economic institutions, as corporate officials of their own organisations, and as individuals”.¹⁸⁷¹ This evidence suggested that the tribunals were clear that industrialists could be held liable for acts undertaken as supervisors.¹⁸⁷² In one particular case, such as, *Government Commissioner v Roechling*, the tribunal found senior officials in the Roechling firm responsible for abuse of labourers, who included prisoners of war, in spite of the fact that it was Gestapo soldiers who physically abused the labourers.¹⁸⁷³ The Tribunal held that “Hermann Roechling and the other accused members of the Directorate of the Voelklingen works are not accused of having ordered this horrible treatment, but of having permitted it; and indeed supported it, and in addition, of not having done their utmost to put an end to these abuses”.¹⁸⁷⁴ Roechling’s son-in-law was found to possess the authority “to obtain an alleviation in the treatment of these workers,” but, despite this authority, he did not address the violations”.¹⁸⁷⁵ Thus, the tribunal found his son-in-law responsible because he has the authority to address the violations, however, did not exercise his authority to halt the abuses. In examining the tribunal view, the standard applied to find these officials culpable had three elements defined in the statutes of the modern tribunals, the first is effective control, second is knowledge of the abuse, and the third is the ability to stop the abuse but failed to do so.¹⁸⁷⁶ In

Connecticut Journal of International Law 199.

¹⁸⁶⁹ Chantal Meloni, *Command Responsibility in International Criminal Law* (TMC Asser press 2010).

¹⁸⁷⁰ Greg R Vetter, ‘Command Responsibility of Non-Military Superiors in The International Criminal Court (ICC)’ (2000) 25 *Yale Journal of International Law* 89 and Kai Ambos, ‘General Principles of Criminal Law in the Rome Statute’ (Vol. 10. No. 1. Springer Netherlands, 1999) *Criminal Law Forum*.

¹⁸⁷¹ Jonathan A Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’ (2009) *Columbia Law Review* 1094, 1262.

¹⁸⁷² Kim Christian Priemel, ‘A Story of Betrayal’: Conceptualizing Variants of Capitalism in The Nuremberg War Crimes Trials’ (2013) 85 (1) *Journal of Modern History* 69, 108.

¹⁸⁷³ Rehan Abeyratne, ‘Superior Responsibility and the Principle of Legality at the ECCC’ (2012).

Gov’t Comm’r of the Gen. Trib. of The Military Gov’t for the French Zone of Occupation in *Germany v Roechling*, Indictment, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 1061 Appendix B (1950).

¹⁸⁷⁴ *Ibid.*

¹⁸⁷⁵ *Ibid.*

¹⁸⁷⁶ Jennifer M Green (n 1475).

relations to the argument presented in this thesis so far, these three elements are what referred in tort law as, the harm was reasonably foreseeable, the relationship of proximity and whether it is fair, just and reasonable to impose a duty of care on the defendant.¹⁸⁷⁷

Also, in the *Pohl* case,¹⁸⁷⁸ the defendants before the Nuremberg Military Tribunal included Karl Mummertthey, a Waffen SS officer¹⁸⁷⁹ who managed mining companies, factories, and quarries in the Nazi concentration camp. Mummertthey supervised labourers who were enslaved and presided over the administration of concentration camps.¹⁸⁸⁰ He attempted to escape liability by arguing that he was merely a “private businessman in no way associated with the sternness and rigor of SS discipline and entirely detached from concentration camp routine”.¹⁸⁸¹ The Nuremberg Military Tribunal did not accept this defence, however, found that “[i]f excesses occurred in the industries under his control he was in a position not only to know about them, but to do something”.¹⁸⁸² The Tribunal also rejected Mummertthey’s claims of ignorance, stating that his “assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know”.¹⁸⁸³

During the period of August 1947 and July 1948, the Nuremberg Military Tribunal in *United States v Krauch*, put on trial twenty-four directors of I.G. Farben.¹⁸⁸⁴ In the case Farben supplied Zyklon B poison gas used in the German concentration camps to murder millions. As

¹⁸⁷⁷ Martin Petrin, ‘Assumption of Responsibility in Corporate Groups: Chandler v Cape plc’ (2013) 76 (3) *Modern Law Review* 603, 619.

¹⁸⁷⁸ *POHL et al.* US Military Tribunal Nuremberg, Judgment of 3 November 1947.

All the defendants were indicted under the first three counts, and all but one under the fourth count. The trial lasted from April 8 until September 22 and the Tribunal delivered its judgment and sentences on November 3. The first count of the indictment (conspiracy) was disregarded and judgments were delivered only on the last three counts. Three of the defendants were acquitted, but the rest were found guilty: two under only the second and third counts and thirteen under the second, third, and fourth counts. The Tribunal sentenced four of the guilty defendants to death, three to life in prison, and eight to prison terms of 10, 20, or 25 years. Seven months later, however, the Military Governor, General Lucius D. Clay, reconvened Military Tribunal II, at the request of the judges, so the defendants could file additional briefs.

¹⁸⁷⁹ Bruce Campbell, *The SA Generals and The Rise of Nazism* (University Press of Kentucky 2015).

¹⁸⁸⁰ US Gov’t Printing Off., 5 Trial of War Criminals before The Nuremberg Military Tribunals Under Control Council Law No. 10 1052 (1950).

¹⁸⁸¹ *Ibid.*

¹⁸⁸² *Ibid.*

¹⁸⁸³ *Ibid.*

¹⁸⁸⁴ *The United States of America v Carl Krauch et al* (1950) Case No 6.

US Gov’t Printing Off., 5 Trial of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 1052 (1950). The Farben case (Case 6), the trial of 23 officials of the I.G. Farben concern, was the third largest of all the Nuernberg trials, the record being surpassed in length only by the IMT case and the Ministries case. The Farben case was the second of the so-called industrialist cases, (Flick and Krupp cases).

well as conducting a notorious medical experiments upon unwilling prisoners at Auschwitz, and operated a massive industrial complex next to Auschwitz that subjected prisoners to forced labour, most of whom died from hunger, disease, or exhaustion.¹⁸⁸⁵ It is evident in this case that ten of the corporate officers were acquitted, with the remainder found guilty and receiving prison terms ranging from eight years to time already served (one and a half years).¹⁸⁸⁶ Thus, the court was clear about the accountability of these corporate officers: in the case: “[W]here private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified, is in violation of international law. Similarly, where a private individual or a juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [international law]”.¹⁸⁸⁷

Furthermore, other noticeable trials of industrialists such as Alfried Krupp, as the sole owner of Krupp, was sentenced to twelve years imprisonment and ordered to forfeit all his property under Control Council Law No. 10.¹⁸⁸⁸ In addition to the Nuremberg cases, another significant development of jurisprudence on superior responsibility was the legal system created to try war criminals in the Pacific region after the Second World War.¹⁸⁸⁹ The principle of superior accountability was termed in the founding documents for the tribunals, in one of the most cited cases (against General Yamashita)¹⁸⁹⁰ began here, and the Pacific Region tribunals also put industrialists on trial for war crimes.¹⁸⁹¹ Similarly, the Chinese Law Governing the Trial of War Criminals (1946)¹⁸⁹² explicitly held superiors responsible for

¹⁸⁸⁵ Records of the *United States Nuremberg War Crimes Trials, United States v Krauch* (Case IV) (Aug. 14, 1947–July 30, 1948). <<https://perma.cc/PAZ2-VWSV>> accessed 12 September 2017.

¹⁸⁸⁶ *Ibid.*

¹⁸⁸⁷ *Ibid.*

¹⁸⁸⁸ *United States v Krupp* (The Krupp Case). 9 Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law NO. 10, 1449–50. (1950). <<https://perma.cc/L9Q7-DHBU>> accessed 12 September 2017. On November 12, 1947, the US Military Government for Germany created Military Tribunal III-A in order to try the Krupp Case. The 12 defendants in this case, all officials of the Krupp industrial concern, had been indicted on August 16. The lead defendant, Alfried Krupp, and eight other defendants, had been members or deputy members of Krupp's Managing Board, while the three others had held similar high-ranking positions.

¹⁸⁸⁹ Ann Marie Prevost, ‘Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita’ (1992) 14 *Human Rights Quarterly* 303.

¹⁸⁹⁰ Bruce D Landrum, ‘The Yamashita War Crimes Trial: Command Responsibility Then and Now’ (1995) 149 *Military Law Review* 29, 3

¹⁸⁹¹ Arthur K Kuhn, ‘International Law and National Legislation in The Trial of War Criminals The Yamashita Case’ (1950) 44 (3) *American Journal of International Law* 559, 562.

¹⁸⁹² William H Parks, ‘Command Responsibility for War Crimes’ (1973) 1 *Military Law Review* 62.

failing to prevent crimes of their subordinates and was stated in broad terms, applying to “persons” and including omissions: “Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals”.¹⁸⁹³

Pursuant to the Tokyo Charter,¹⁸⁹⁴ which created the tribunals to try war crimes in the Pacific region, the Japanese General Tomoyuki Yamashita was tried for atrocities committed by troops under his command in the Philippines in the closing days of the war.¹⁸⁹⁵ The military commission found that “there was a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province and to devastate and destroy more than 25,000 men, women, children, all unarmed non-combatant civilians were brutally mistreated and killed”.¹⁸⁹⁶ The Tribunal decided that “the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused”.¹⁸⁹⁷ Thus, it was held that Yamashita could be held responsible for the conduct of those under his command because a commander has a “duty to take such appropriate measures as are within his power to control the troops under his command,” rather than those within his formal mandate or authority.¹⁸⁹⁸ The judgement was a contentious one, also some scholars argued that “in many ways, the evolution of command responsibility doctrine has consisted of reactions and counter-reactions to Yamashita”.¹⁸⁹⁹ The criticisms included dissenting US Supreme Court justices.¹⁹⁰⁰

Yamashita case is not only addressing command responsibility for war crimes in the Pacific region during World War II, and the Far East tribunals included at least one case against

¹⁸⁹³ *Prosecutor v Mucić et al.*, Case No. IT-96-21-T, Judgment, 337 (Int’l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998). <<https://perma.cc/BT86-GBWV>> accessed September 2017, (citing Art. IX of the Chinese Law of 24th October, 1946, Governing The Trial of War Criminals.

¹⁸⁹⁴ Robert Cryer and Neil Boister, eds. *Documents on The Tokyo International Military Tribunal: Charter, Indictment, and Judgments* (Vol. 1. Oxford University Press 2008).

¹⁸⁹⁵ United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*. (Vol. 13. United Nations War Crimes Commission 1949).

¹⁸⁹⁶ *In re Yamashita*, 327 US 1, 14 (1946).

¹⁸⁹⁷ *re Yamashita*, 327 US at 15.

¹⁸⁹⁸ *Ibid.*

¹⁸⁹⁹ Allison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) *California Law Review* 75, 169.

¹⁹⁰⁰ Jenny S Martinez, ‘Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond’ (2007) 5 (3) *Journal of International Criminal Justice* 638, 664.

officers of a corporation,¹⁹⁰¹ the Kinkaseki Mine, operating in Taiwan from 1942–1945.¹⁹⁰² Nine civilian Nippon employees were tried before the British War Crimes Court in Hong Kong in 1947¹⁹⁰³ and charged with mistreating prisoners of war forced to work in the mines.¹⁹⁰⁴ The perpetrators included the general manager, two production managers, a production supervisor and five foremen. Toda Mitsuga, the General Manager, was included in those who were found guilty.¹⁹⁰⁵ The tribunal rejected Toda’s arguments that the military was responsible for the treatment of Prisoners of War (POWs) at the mine. The rejection was founded on Toda’s testimony that POWs were paid by the company and that he received weekly or monthly reports from subordinate corporation officials about “the amount of work done, the amount of ore extracted, purchases of stones and expenditures”.¹⁹⁰⁶ Toda was found guilty, but what is surprising is that the court provided no reasoning for its sentence.

The description of methods of responsibility in the Royal Warrant Regulation 8 (ii)¹⁹⁰⁷ took a procedural approach that “where there was evidence that a war crime had been the result of concerted action on the part of a unit or a group of men,” it is “*prima facie* evidence of the responsibility of each member of that unit or group for that crime”.¹⁹⁰⁸ “[T]he Hong Kong indictments” have been interpreted “to include a nascent version of the doctrine of command responsibility”.¹⁹⁰⁹ The tribunal decided that the private mining company was liable for the conditions and mistreatment, together with forced labour, at the mine for prisoners of war who had been transferred to them by the Japanese Army.¹⁹¹⁰ The tribunals established at the conclusion of the World War II have been one of the most often cited bases in human rights law, thus, the prosecution of corporate officers in the “industrialist trials” in both Europe and the Pacific.¹⁹¹¹ The precedent of the court provides a critical legal basis for applying superior

¹⁹⁰¹ Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in The Wake of World War II* (Vol. 299. Harvard Univ Council on East Asian 2009).

¹⁹⁰² Gary K Reynolds, *US Prisoners of War and Civilian American Citizens Captured and Interned by Japan in World War II: The Issue of Compensation by Japan* (Congressional Research Service Library of Congress 2002).

¹⁹⁰³ Sybilla Jane Flower, *British Prisoners of War of the Japanese, 1941–45’ The History of Anglo-Japanese Relations, 1600–2000* (Palgrave Macmillan UK 2000)

¹⁹⁰⁴ Suzannah Linton, ‘Rediscovering The War Crimes Trials in Hong Kong, 1946–48’ (2012) 13 *Melbourne Journal of International Law* 284.

¹⁹⁰⁵ Yuma Totani, ‘*The Prisoner of War Camp Trials’ Hong Kong’s War Crimes Trials* (2013) 71, 94.

¹⁹⁰⁶ *Ibid.*

¹⁹⁰⁷ Anthony PV Rogers, ‘War Crimes Trials under The Royal Warrant: British Practice 1945–1949’ (1990) *International and Comparative Law Quarterly* 780, 800.

¹⁹⁰⁸ Suzannah Linton, ed. *Hong Kong’s War Crimes Trials* (Oxford University Press 2013).

¹⁹⁰⁹ *Ibid* at 207.

¹⁹¹⁰ Anita Ramasastry, ‘Corporate Complicity: From Nuremberg to Rangoon–An Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations’ (2002) 20 *Berkeley Journal of International Law* 91.

¹⁹¹¹ Paul Taucher, *Command Responsibility at The Sandakan-Ranau War Crimes Trial* (Diss. Murdoch University

responsibility to corporate officers committing war crimes and crimes against humanity.¹⁹¹² Furthermore, in the last two decades, a supplementary source of legal standards on superior responsibility has been the jurisprudence of international tribunals that were created to address genocide, war crimes, and crimes against humanity in particular countries or regions;¹⁹¹³ the most common jurisprudence to be created so far has come out of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁹¹⁴ and the International Criminal Tribunal for Rwanda.¹⁹¹⁵

In applying these legal standards, the tribunals have further developed the law on superior responsibility, which including when it is applicable to private corporate officials.¹⁹¹⁶ In this development, it can be seen that the tribunals focus on the conduct itself rather than the status of the individual responsible for the violation, therefore, the elements of the test are whether a superior (1) has “effective control” over subordinates, (2) knew or had reason to know about the alleged violation, and (3) failed to take measures to prevent the abuse or punish the perpetrator.¹⁹¹⁷ Applying these elements in the context of tort law, this research found that the test set down in ICTY, is equivalent to the House of Lords test in *Caparo* (tort of negligence).

In 1998, the ICTY addressed the first contemporary judgement on the elements of superior responsibility.¹⁹¹⁸ In the former Yugoslavia, a number of the defendants were non-state actors and in *Prosecutor v Delalic, et al (Celebici)*,¹⁹¹⁹ the ICTY ruled that “the applicability of the principle of superior responsibility in Article 7 (3) extends not only to

2016).

¹⁹¹² Timothy Wu and Yong-Sung Kang, ‘Criminal Liability for The Actions of Subordinates-The Doctrine of Command Responsibility and Its Analogues in United States Law’ (1997) 38 *Harvard International Law Journal* 272.

¹⁹¹³ Guénaél Mettraux, *International Crimes and The Ad hoc Tribunals* (Oxford University Press on Demand 2005)

¹⁹¹⁴ George H Aldrich, ‘Jurisdiction of The International Criminal Tribunal for The former Yugoslavia’ (1996) 90 (1) *American Journal of International Law* 64, 69.

¹⁹¹⁵ Cecile Aptel, ‘The International Criminal Tribunal for Rwanda’ (1997) 37 (321) *International Review of The Red Cross Archive* 675, 683.

¹⁹¹⁶ William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006).

¹⁹¹⁷ Ann B Ching, ‘Evolution of The Command Responsibility Doctrine in Light of The Celebici Decision of The International Criminal Tribunal for The former Yugoslavia’ (1999) 25 *North Carolina Journal of International Law and Commercial Regulations* 167

¹⁹¹⁸ Kelly D Askin, ‘Reflections on Some of The Most Significant Achievements of The ICTY’ (2002) 37 *New England Law Review* 903.

¹⁹¹⁹ *Prosecutor v Zdravko Mucic aka “Pavo”, Hazim Delic, Esad Landzo aka “Zenga”, Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998. <<http://www.refworld.org/cases/ICTY.41482bde4.html>> accessed 12 September 2017.

military commanders but also to individuals in non-military positions of superior authority”.¹⁹²⁰ In this study the applicability of superior responsibility to civilian as well as military officials, it is noted that the tribunal clarified that the superior responsibility could apply whether or not there was a *de jure* hierarchical structure.¹⁹²¹ The *Celebici* Appeals Chamber established that the essential relationship between superior and subordinate was one of “effective control”.¹⁹²² The ICTY observed the Nuremberg’s *Pohl* case as a relevant precedent on superior responsibility and distinguished that the information was available to put on notice for the need for further investigation.¹⁹²³ The tribunal’s thinking shows that command responsibility is not a form of strict liability. Thus, although not strict liability, the standard for superior liability was greater than ordinary negligence and recklessness in this case.¹⁹²⁴

In *Prosecutor v Blaskic*, the ICTY clarified that the “indicators of effective control are more a matter of evidence than of substantive law”.¹⁹²⁵ Hence, what is clear in the court judgement is that the elements of effective control recognised in this decision were the power to prevent international crimes, punish perpetrators, to refer the offenders to appropriate authorities.¹⁹²⁶ The ICTY acknowledged the sources of customary international law with relation to superior responsibility and its application to cases involving both international and internal armed conflict, and to both military and civilian superiors.¹⁹²⁷ Its decisions repeated the elements of effective control between a superior and subordinate, whether the superior “knew or had reason to know about a forthcoming or past violation, and the failure to prevent a predicted violation or punish violations within the superior’s knowledge”.¹⁹²⁸

Also, the ICTR, was formed to address genocide, war crimes, and crimes against humanity for the atrocities in Rwanda in 1994.¹⁹²⁹ The tribunal clearly specified that superior

¹⁹²⁰ *Celebici* Trial Judgment, at 376.

¹⁹²¹ *Ibid* at 354.

¹⁹²² *Ibid* at 376.

¹⁹²³ *Prosecutor v Blaškić*, Case No. IT-95-14-A, Appeal Judgment, 192–93, 262–63 (Int’l Crim. Trib. For the Former Yugoslavia, July 29, 2004). <<https://perma.cc/Z8DM-MX56>> accessed 12 September 2017 (citing the *Pohl* decision for the fact that liability was based on *de facto* rather than *de jure* authority)

¹⁹²⁴ Allison Marston Danner and Jenny S Martinez (n 1545).

¹⁹²⁵ *Prosecutor v Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgement, 69 (Int’l Crim. Trib. For the Former Yugoslavia July 29, 2004). <<https://perma.cc/L9VN-LWP6>> accessed 12 September 2017 hereinafter *Blaskic* Appeal Judgment.

¹⁹²⁶ *Ibid* at 69.

¹⁹²⁷ Greg R Vetter, ‘Command Responsibility of Non-Military Superiors in The International Criminal Court (ICC)’ (2000) 25 *Yale Journal of International Law* 89, James D Levine, ‘The Doctrine of Command Responsibility and Its Application to Superior Civilian Leadership: Does The International Criminal Court Have The Correct Standard’ (2007) 52 *Military Law Review* 193.

¹⁹²⁸ *Celebici* Trial Judgment, at 379–93.

¹⁹²⁹ Timothy Gallimore, ‘The Legacy of The International Criminal Tribunal for Rwanda (ICTR) and Its

responsibility applied to civilian as well as military officials.¹⁹³⁰ In one crucial case, the *Bagilishema*¹⁹³¹ panel indicated that, “[T]here can be no doubt, therefore, that the doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority”.¹⁹³² Thus, what is most relevant to this research is that, the ICTR has found business leaders culpable under charges of superior responsibility where they had effective control over those committing the violations. Similarly, where superior knew or had reason to know about the crimes and the superior officer could have taken action to prevent or punish the violation, but failed to do so.¹⁹³³

In the case against the director of the Gisovo Tea Factory, the ICTR Trial Chamber found Alfred Musema liable as a superior officer because he “exercised *de jure* authority over [tea factory] employees” and because he “was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute”.¹⁹³⁴ In another extensively discussed case, *The Media Case*,¹⁹³⁵ an ICTR Appeals Chamber examine the legal standards for superiors in a private company running a Rwanda radio station and newspapers. The court held that superiors could be culpable for violations committed by their subordinates.¹⁹³⁶ The Chamber held that corporate officials with effective control over their subordinates who “knew or had reason to know” subordinates were about to commit crimes and failed to prevent or punish acts inciting genocide, could be held criminally responsible for these violations.¹⁹³⁷ The Chamber upheld the conviction of Ferdinand Nahimana, the radio station’s founder and manager, for his subordinates’ acts of

Contributions to Reconciliation in Rwanda’ (2007) 14 *New England Journal of International and Comparative Law* 239.

¹⁹³⁰ Gideon Boas, James L Bischoff and Natalie L. Reid, *Forms of Responsibility in International Criminal Law* (Cambridge University Press 2007).

¹⁹³¹ *The Prosecutor v Ignace Bagilishema (Trial Judgement)*, ICTR-95-1A-T, International Criminal Tribunal for Rwanda (ICTR), 7 June 2001. <http://www.refworld.org/cases ICTR_48abd5170.html> accessed 12 September 2017. During the events from April until July 1994 in Rwanda, Ignace Bagilishema held the position of *Bourgmestre* (Mayor) of Mabanza commune. Bagilishema was charged under an Amended Indictment with genocide, complicity in genocide, violations of the Geneva Conventions, as well as murder, extermination and other inhumane acts as crimes against humanity.

¹⁹³² *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 42 (Int’l Crim. Trib. for Rwanda June 7, 2001).

¹⁹³³ Catharine A MacKinnon, ‘*Prosecutor v Nahimana, Barayagwiza, & Ngeze*. Case No. ICTR 99-52-T’ (2004) *American Journal of International Law* 325,330.

¹⁹³⁴ *Prosecutor v Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 880, 894 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000). <<https://perma.cc/S2CL-BAUM>> accessed 13 September 2017.

¹⁹³⁵ Gabriele Della Morte, ‘De-Mediatizing The Media Case: Elements of a Critical Approach’ (2005) 3 (4) *Journal of International Criminal Justice* 1019-1033.

¹⁹³⁶ *Nahimana v Prosecutor*, Case No. ICTR 99-52-A, Appeals Judgment (Int’l Crim Trib.for Rwanda Nov. 28, 2007). <[https://perma.cc/VKG9-XKTB \[hereinafter Media Case\]](https://perma.cc/VKG9-XKTB [hereinafter Media Case])> accessed September 2017.

¹⁹³⁷ *Ibid* at 589, 776, 822, 834, 840, 856, 942.

inciting genocide.¹⁹³⁸ A vital characteristic of the Chamber judgement is its discrepancy between superior responsibility and direct instigation of genocide. Similarly, the Appeals Chamber dismissed charges of direct instigation due to lack of evidence against Nahimana, in spite of its finding of his responsibility as a superior.¹⁹³⁹ The Appeals Chamber also highlighted that that this was not a case in which the defendant was a *de facto* military commander and that the army was not even in control.¹⁹⁴⁰ *The Media Case* permits “double-derivative liability,”¹⁹⁴¹ concluding that superior accountability applies even when the subordinate is merely an accomplice to a third-party perpetrator (that is, failing to prevent or punish a subordinate who aids and abets or incites another in the commission of a crime).¹⁹⁴²

In distinction, on the responsibilities of superior accountability inciting genocide, the Appeals Chamber found insufficient evidence against Jean-Bosco Barayagwiza, the radio station’s co-founder, and Hassan Ngeze, who was alleged to be criminally liable for personally inciting genocide in the newspaper he controlled.¹⁹⁴³ The Chamber established that Barayagwiza had effective control over his subordinate merely at a time that was too distant from the genocide to hold him criminally responsible. Likewise, during the period of genocidal incitement at the radio station, he did not have effective control over his subordinates.¹⁹⁴⁴ Even though Hassan Ngeze published “criminal statements”¹⁹⁴⁵ in his newspaper and the Appeals Chamber endorsed his conviction for personally inciting genocide, the Chamber decided that it could not uphold the conviction for superior responsibility because he did not have effective control over his subordinates.¹⁹⁴⁶ The nuanced method adopted by the ICTR illustrates the careful application of the multi-pronged test of superior responsibility. Thus, if there is proof

¹⁹³⁸ *Ibid* at at 849–50, 853.

¹⁹³⁹ *Ibid*.

¹⁹⁴⁰ *Ibid*.

¹⁹⁴¹ William H Painter, ‘Double Derivative Suits and Other Remedies with Regard to Damaged Subsidiaries’ (1960) 36 *Indian Law Journal* 143. The expression ‘multiple derivative action’ refers to an action brought on behalf of a company against its directors not by a shareholder of the company itself, but by a shareholder of a company further up the corporate chain. Thus, where A owns a minority stake in B Ltd, which has a wholly owned subsidiary, C Ltd, a claim by A on behalf of C Ltd against the directors of C Ltd for breach of duty is described as a multiple derivative action. *Hamilton Partners LP England* [2010] C.A. 4476-VCL.

¹⁹⁴² Diane F Orentlicher, ‘Criminalizing Hate Speech in The Crucible of Trial: Prosecutor v. Nahimana’ (2005) 21 *American University International Law Review* 557.

¹⁹⁴³ Catharine A MacKinnon, ‘Prosecutor V. Nahimana, Barayagwiza, and Ngeze. Case No. ICTR 99-52-A’ (2009) 103 (1) *American Journal of International Law* 97,103.

¹⁹⁴⁴ Nahimana Prosecutor vBarayagwiza, & Ngeze (Media Case), Case No. ICTR-99-52-T (Dec. 3, 2003)’ (2004) 117 *Harvard Law Review* 2769, 2773.

¹⁹⁴⁵ Stephen Porter and John C Yuille, ‘Credibility Assessment of Criminal Suspects Through Statement Analysis’ (1994) 1 (4) *Psychology, Crime and Law* 319, 331.

¹⁹⁴⁶ Alexander Zahar, ‘The ICTR’s “Media” judgment and The Reinvention of Direct and Public Incitement to Commit Genocide’ (Vol. 16. No. 1. Springer Netherlands 2005).

of effective control of subordinates, private actors, including corporate officers, will be held accountable for human rights violations that they were found to have known about and failed to attempt to prevent or punish.¹⁹⁴⁷

As mentioned above, in addition to the international tribunals created to address genocide and other violations in the former Yugoslavia and Rwanda, tribunals combining international and national laws and procedural aspects were created to address other patterns of atrocities across the world. As these tribunals move forward, they are adopting theories of superior responsibility for corporate officials. One case that has been heard by the Special Tribunal for Lebanon has addressed corporate individuals. In the first such Hybrid Tribunal case to address corporate officers, the Lebanon Tribunal proceeded against a private corporate official, Ms. Karma Mohamed Tahsin Al Khayat, for publishing the names of “purported confidential witnesses”.¹⁹⁴⁸ In that case on contempt charges, the court convicted Ms. Khayat, who authorised the broadcasts on Al Jadeed TV and then authorised the transfer of the broadcasts onto Al Jadeed’s website and Youtube page.¹⁹⁴⁹ She further had the authority to remove these broadcasts. In exercising her authority, she acted on behalf of Al Jadeed TV.

In addition to all the evidence presented above, the current tribunals, ICTY, ICTR and Hybrid Tribunals, have provided a careful attention to legal standards superior responsibility and its application to specific cases of private actors.¹⁹⁵⁰ The tribunals’ conclusion was that business officials as well as military and civilian government officials can be found liable for human rights violations.¹⁹⁵¹ What is clear is that these tribunals have applied the multiple points of the test of superior responsibility to limit the application to those officials who had effective control over the subordinates who physically committed the violations.¹⁹⁵² The indication presented in these cases so far is that corporate superior can be held liable for human rights

¹⁹⁴⁷ Gregory S Gordon, ‘A War of Media, Words, Newspapers, and Radio Stations: The ICTR Media Trial Verdict and a New Chapter in The International Law of Hate Speech’ (2004) 45 *Virginia Journal of International Law* 139.

¹⁹⁴⁸ David Akerson and Nandish Wuetilleke, ‘Contempt of Court a Digest of The Case Law of Contempt of Court at International Criminal Tribunals and The International Criminal Court’ (2015) 44 *Denver Journal of International Law and Policy* 87.

¹⁹⁴⁹ Matthew Gillett, ‘Testing The Limits of The Law against Those Who Test The Tribunal’s Limits: Contempt Proceedings at the Special Tribunal for Lebanon’ (2017) *Journal of International Criminal Justice* 27.

¹⁹⁵⁰ Ron H Davidson, ‘The International Criminal Tribunal for Rwanda’s Decision in *The Prosecutor v. Ferdinand Nahimana et al.*: The Past, Present, and Future of International Incitement Law’ (2004) 17 (3) *Leiden Journal of International Law* 505, 519.

¹⁹⁵¹ William A Schabas, ‘International Criminal Tribunals: A Review of 2007’ (2007) 6 *Northwestern Journal of Human Rights* 382.

¹⁹⁵² Yael Ronen, ‘Superior Responsibility of Civilians for International Crimes Committed in civilian Settings’. (2010) 43 *Vanderbilt Journal of Transnational Law* 313.

violations by their subordinate. What this means is that, in a legal context a reputable presumption may exist that parent corporations or corporate officials could be accountable for the act of its subsidiaries.¹⁹⁵³

Adding to these development, the doctrine of superior responsibility cases in international human rights cases in US and other national courts ran an equivalent course to the developments in the international tribunals.¹⁹⁵⁴ This is evidence in the first cases that focused on military superiority, and then expanded to civilian leaders and corporate officials.¹⁹⁵⁵ This is due to the fact that the principle of superior responsibility is central role in human rights cases in US courts.¹⁹⁵⁶ Thus, the US Courts expression of General Yamashita trial for war crimes in Asia during World War II, is commonly example for the test of the superior-subordinate relationship as one of “effective control” and for the “knew or should have known” and “failed to take action” standards.¹⁹⁵⁷

The Yamashita military commission decision was appealed to the US Supreme Court.¹⁹⁵⁸ While controversial, the Supreme Court’s ruling confirmed the important doctrine of superior responsibility that have been repeatedly cited by later courts and tribunals in human rights and humanitarian law cases.¹⁹⁵⁹ Importantly, one central point was the use of the “effective control” test in the *Yamashita* case.¹⁹⁶⁰ This test of superior responsibility still remains the core for the examination of superior and subordinate that international tribunals and national courts rely on to this day.¹⁹⁶¹ However, the vast majority also focused much of its judgement on the deterrence purpose of holding commanders responsible, by affirming that the goal of protecting the civilian population “would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their

¹⁹⁵³ Gideon Boas, James L Bischoff and Natalie L Reid, *Forms of Responsibility in International Criminal Law* (Cambridge University Press 2007).

¹⁹⁵⁴ Naomi Roht-Arriaza, ed. *Impunity and Human Rights in International Law and Practice* (Oxford University Press on Demand 1995).

¹⁹⁵⁵ John Haberstroh, ‘In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in US Courts’ (2003) 10 *Asia Law Journal* 253.

¹⁹⁵⁶ Michael L Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’ (2000) 164 *Military Law Review* 155.

¹⁹⁵⁷ Bruce D Landrum, ‘The Yamashita War Crimes Trial: Command Responsibility Then and Now’ (1995) 149 *Military Law Review* 293.

¹⁹⁵⁸ *In re Yamashita* 327 US 1 (1946)

¹⁹⁵⁹ *Ibid.*

¹⁹⁶⁰ Charles Fairman, ‘The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and The Yamashita Case’ (1946) 59 (6) *Harvard Law Review* 833, 882.

¹⁹⁶¹ Michael L Smidt, ‘Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations’ (2000) 164 *Military Law Review* 155.

protection”.¹⁹⁶² This is an illustration that the principle of superior responsibility is a legal doctrine that exist to protect the civil rights of society, as well as preventing impunity where the superior have effective control over the subordinate. What is important in regards to superior responsibility and tort law is that, tort liability arises where there is a personal duty owed by the director or officer.¹⁹⁶³ Thus, the traditional doctrine provides that an officer is liable where he or she directs actions, participates or cooperates in an act, or has particular responsibilities.¹⁹⁶⁴ In the context of duties by officers to third parties, courts have acknowledged that such a duty might arise where there is direct or foreseeable contact with the third party, including where the corporation has delegated this duty to the officer.¹⁹⁶⁵ What this means is that the omissions and commissions may create tort liability, however, corporate officers are not generally liable merely because of their position in the corporation.¹⁹⁶⁶

The indication here is that the corporate officers can be personally liable to non-stakeholder third parties based on inadequate management or failure to supervise subordinates, including “failure to stop misconduct they ought to know about”.¹⁹⁶⁷ Cases against directors and officers have been brought for decades for mass torts and products liability.¹⁹⁶⁸ Hence, for supervision and management torts committed against third parties, the majority of courts operate under a simple negligence standard,¹⁹⁶⁹ as argued so far in this research. The Restatement (Second) on Torts (1965),¹⁹⁷⁰ section 402A defines the manufacturer’s duty to

¹⁹⁶² *In re Yamashita* 327 at 15.

¹⁹⁶³ Martin Petrin, ‘Curious Case of Directors’ and Officers’ Liability for Supervision and Management: Exploring The Intersection of Corporate and Tort Law’ (2009) 59 *American University Law Review* 1661.

¹⁹⁶⁴ 3A Fletcher Cyc. Corp. § 1137 2016.

¹⁹⁶⁵ Restatement (Third) of Agency § 7.01 (2006) (individual personally liable for torts, including where acted as agent or under direction of another).

¹⁹⁶⁶ William E Knepper and Dan A. Bailey, *Liability of Corporate Officers and Directors* (LexisNexis 2004).

¹⁹⁶⁷ Martin Petrin, ‘Curious Case of Directors’ and Officers’ Liability for Supervision and Management: Exploring The Intersection of Corporate and Tort Law’ (2009) 59 *American University Law Review* 1661 (Defining officer as a corporation’s president, financial officer, chief accounting officers, vice presidents of principal business units and any person with significant “policy-making functions”; roughly tracking definition in Rules and Regulation Under Securities Exchange Act of 1934, 17 C.F.R. § 240.16a-1).

¹⁹⁶⁸ Robert B Thompson, ‘Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise’ (1994) 47 *Vanderbilt Law Review* 1.

¹⁹⁶⁹ Richard A Posner, ‘A Theory of Negligence’ (1972) 1 (1) *Journal of Legal Studies* 29’96.

¹⁹⁷⁰ XXII. Restatement (Second) of Torts § 402A

1. H3.

2. § 402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer

3(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

encompass when “he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge of possible harm through the use of the product.”¹⁹⁷¹ Also, the duty to supervise is common in medical liability jurisprudence.¹⁹⁷² In comparable to the international law concept of “effective control,” US supervisory responsibility is limited to when an individual is legally obliged to exercise control over a subordinate.¹⁹⁷³

In this view, this study argued that the theories of responsibility include a focus on a superior officer’s participation in a tort, whether there was a breach of a duty, or a court exercising its discretion power to pierce the corporate veil.¹⁹⁷⁴ This research further contended that corporate superior liability is divided into groups, the first group includes cases in which a superior officer has “constructive knowledge of a tort”¹⁹⁷⁵ or “reasonably should have known that some hazardous condition or activity under their control could injure [a third party, but] they negligently failed to take or order appropriate action to avoid the harm”.¹⁹⁷⁶ A duty can be delegated by a corporation to a director or officer and then breached by officer conduct which causes injury to a third party; this liability can result from omissions such as failure to stop conduct that the officer ought to know about.¹⁹⁷⁷ Such duties to third parties, or “external” duties is derive from the part of “moral hazard” consideration of the risk of personal liability deters misconduct.¹⁹⁷⁸

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- (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

¹⁹⁷¹ *Ibid.*

¹⁹⁷² Dan B Dobbs, Robert E Keeton, Page W Keeton and David G Owen, *Prosser and Keeton on The Law of Torts* (West Publishing Company 1984).

¹⁹⁷³ *Ibid.*

¹⁹⁷⁴ Robert B Thompson, ‘Piercing the Corporate Veil: An Empirical Study’ (1990) 76 *Cornell Law Review* 1036.

¹⁹⁷⁵ John A Turcotte, ‘When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV’ (2000) 52 *Maine Law Review* 261.

I constructively know something if it is something that I could reasonably be expected to know of. If a contractor that is hired dug that hole in a defendant driveway then he will be deemed to have constructive knowledge of the hole even though he may not have actual knowledge of it. The defendant obligation in regards to that hole may be the same as if he actually knew of its existence. If a puddle of water remains on the shopping center floor for hours the proprietor may have constructive awareness of that. If there is no evidence as to how long the puddle had been on the floor then there is no evidence of the owner constructively knowing that. Therefore there is no constructive knowledge in that instance. The issue of whether there is constructive knowing is frequently an issue that is submitted to the jury for determination. If a manufacturer has reason to believe that young children are going to have access to their potentially dangerous product then they have a duty to warn of such danger. That is they have constructive knowledge of the danger. Based on that understanding they may also have a duty to modify their product to make it safe for all users.

¹⁹⁷⁶ *Frances T v Vill. Green Owners Ass’n*, 723 P.2d 573, 584 (Cal. 1986).

¹⁹⁷⁷ William E Knepper and Dan A. Bailey (n 1612)

¹⁹⁷⁸ Kenneth J Arrow, ‘*Essays in the Theory of Risk-Bearing*’ (1970) No. 04; HB615, A7.

Also, common law tort of negligent supervision (as already explained above) has some alteration across state jurisdictions.¹⁹⁷⁹ Courts have differences in their focuses on input in the tortious conduct, breach of a personal duty, or whether they treat supervision claims as separate from other tort liability.¹⁹⁸⁰ In conjunction with the above statement, what this study found is that tort of negligent supervision is most used where there is a pattern and the officer “had the opportunity to discover the wrongful acts,”¹⁹⁸¹ or where they are “negligent in failing to learn of and prevent torts by employees”.¹⁹⁸² Similarly, courts have held that officers were potentially liable for lack of reasonable diligence in the control and supervision of a business which resulted in a death caused by a warehouse explosion¹⁹⁸³ or a death resulting from failure to properly train a machine operator or company officers who decreased security measures to increase profits could be personally liable to a customer shot at a shopping mall.¹⁹⁸⁴

It can, therefore, be assumed that the corporate officer has a common law duty not to injure third parties.¹⁹⁸⁵ ‘[A] director could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible.’¹⁹⁸⁶ Thus, as indicated in the previous argument in this study, in one ATCA case, the court referenced US domestic standards.¹⁹⁸⁷ In *Bano v Union Carbide*, the Second Circuit stated, “under New York law,” “a corporate officer who commits or participates in a tort, even if it is in the course of his duties on behalf of the corporation may be held individually liable”.¹⁹⁸⁸ What is clear from all these cases is that the general standards of tort liability for corporate superior officers under US law, which include negligence, would, in fact, allow a greater range of tort claims than the criminal international law standards.¹⁹⁸⁹

¹⁹⁷⁹ James D Barnett, ‘The Foundations of The Distinction between Public and Private Functions in Respect to The Common-Law Tort Liability of Municipal Corporations’ (1936) 16 *Oregon Law Review* 250.

¹⁹⁸⁰ Martin Petrin (n 1613).

¹⁹⁸¹ *Lowell Hoit & Co. v Detig*, 50 N.E.2d 602, 603 (Ill. App. Ct. 1943) and *Air Traffic Conference of Am. v Marina Travel, Inc.*, 316 S.E.2d 642, 645 (N.C. Ct. App. 1984).

¹⁹⁸² *Avery v Solargizer Int’l, Inc.* 427 N.W.2d 675, 681 (Minn. Ct. App. 1988) and *Preston-Thomas Const., Inc. v Cent. Leasing Corp.* 518 P.2d 1125, 1127 (Okla. Ct. App. 1973)

¹⁹⁸³ *Cameron v Kenyon-Connel Commercial Co.*, 56 P. 358, 361 (Mont. 1899); see *Moak v Link- Belt Co.*, 242 So. 2d 515 (La. 1970) (no negligence so no liability).

¹⁹⁸⁴ *Haire v Bonelli*, 870 N.Y.S.2d 591, 593 (N.Y. App. Div. 3d Dept. 2008).

¹⁹⁸⁵ *Frances T.*, 723 P.2d at 581–82 (intentional conduct will result in personal liability; joint liability when corporate officer participates with corporation).

¹⁹⁸⁶ *Ibid.*

¹⁹⁸⁷ *Bano v Union Carbide*, 273 F.3d 120, 133 (2d Cir. 2001).

¹⁹⁸⁸ *Ibid.* citing *Lopresti v Terwilliger*, 126 F.3d 34, 42 (2d Cir. 1997).

¹⁹⁸⁹ Stuart M Speiser, Charles F Krause and Alfred W Gans, *The American Law of Torts* (Vol. 1. Lawyers Co-Operative Pub. Co 2003).

5.29. The Responsible Corporate Officer (RCO) Principle

The Responsible Corporate Officer (RCO) principle provides accountability for an officer as well as a corporation if the officer participates in wrongful conduct or knowingly approves that conduct.¹⁹⁹⁰ Hence, if there are joint participants in the corporate officer conduct then they can each be held accountable. RCO liability involves the following elements to hold an officer liable: (1) the officer's position must allow influence on corporate policies or activities, (2) there must have been a nexus between the officer and the violation, and (3) the defendant's actions or inactions facilitated the violations.¹⁹⁹¹ The RCO was originally developed for "public welfare" statutes, and now includes statutes such as the Clean Air Act,¹⁹⁹² the Clean Water Act,¹⁹⁹³ the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),¹⁹⁹⁴ the Resource Conservation and Recovery Act, the Food, Drug and Cosmetic Act,¹⁹⁹⁵ and the Sherman Anti-Trust Act.¹⁹⁹⁶ Among all these acts, the common

¹⁹⁹⁰ 3A Fletcher Cyc. Corp. § 1135.

¹⁹⁹¹ Tom McMahon and Katie Moertl, 'The Erosion of Traditional Corporate Law Doctrines in Environmental Cases' (1988) 3 (3) *Natural Resources & Environment* 29, 56, Lynda J Oswald and Cindy A Schipani, 'CERCLA and The Erosion of Traditional Corporate Law Doctrine' (1991) 86 *Northwestern University Law Review* 259. (General principles of corporate law doctrine for CERCLA violations), Marco Quazzo, 'Officers and Directors Face Personal Liability under The Responsible Corporate Officer Doctrine' (2013) 11 *Corporation Accountability Report (BNA)* 841 (RCO doctrine applied in civil cases).

¹⁹⁹² Clean Air Act 1993.

¹⁹⁹³ Clean Water Act 33 USC. §1251 et seq. (1972).

The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganised and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1972.

¹⁹⁹⁴ Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) 42 USC. §9601 et seq. (1980).

The Comprehensive Environmental Response, Compensation, and Liability Act, otherwise known as CERCLA or Superfund provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, EPA was given power to seek out those parties responsible for any release and assure their cooperation in the cleanup.

EPA cleans up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act. Through various enforcement tools, EPA obtains private party cleanup through orders, consent decrees, and other small party settlements. EPA also recovers costs from financially viable individuals and companies once a response action has been completed.

EPA is authorised to implement the Act in all 50 states and US territories. Superfund site identification, monitoring, and response activities in states are coordinated through the state environmental protection or waste management agencies.

The Superfund Amendments and Reauthorization Act (SARA) of 1986 reauthorised CERCLA to continue cleanup activities around the country. Several site-specific amendments, definitions clarifications, and technical requirements were added to the legislation, including additional enforcement authorities. Also, Title III of SARA authorized the Emergency Planning and Community Right-to-Know Act (EPCRA).

¹⁹⁹⁵ Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795 (Codified as Amended in Scattered sections of 42 USC.).

¹⁹⁹⁶ Sherman Anti-Trust Act, 15 USC §§ 1-7 (2011).

understanding is that these are “public welfare statutes” enacted to prevent harm to the general public.¹⁹⁹⁷ In examining the concept of maximise deterrence, these statutes have turned to individual corporate officer liability.¹⁹⁹⁸ The evaluation of both the types of actions, and the shared goal of deterrence, points to these statutes as important element of comparison with human rights cases.¹⁹⁹⁹

What this research found is that RCO principle is never new, but it is developed in the 1920s, based on English cases from the nineteenth century.²⁰⁰⁰ Also, in *United States v Dotterweich*,²⁰⁰¹ the president of a pharmaceutical company was criminally convicted for shipping misbranded and adulterated drugs in interstate commerce.²⁰⁰² The court held that all those who had a “responsible share” in the conduct could be held liable for corporate violations of the law.²⁰⁰³ The essential element required by the court to established liability is “foresight” and “vigilance” that “individuals who executed the corporate mission” would implement measures to prevent violations.²⁰⁰⁴ Justice Frankfurter’s opinion quantified that the Food, Drug and Cosmetic Act “dispenses with the conventional requirement for criminal conduct awareness of some wrongdoing”. Therefore, in the interest of larger good it puts the burden of acting hazard upon a person otherwise innocent but standing in responsible relation to a public danger.²⁰⁰⁵

¹⁹⁹⁷ Noel Wise, ‘Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases’ (2002) 21 *Stanford Environmental Law Journal* 283.

¹⁹⁹⁸ *Ibid.*

¹⁹⁹⁹ *Celentano v Rocque*, 923 A.2d 709, 282 Conn. 645 (2007).

²⁰⁰⁰ Noel Wise (n 1933).

²⁰⁰¹ *US v Dotterweich*, 320 US 277 283–84 (1943).

Mr. Justice Frankfurter delivered the opinion of the Court.

“This was a prosecution begun by two informations, consolidated for trial, charging Buffalo Pharmacal Company, Inc., and Dotterweich, its president and general manager, with violations of the Act of Congress of June 25, 1938, c. 675, 52 Stat. 1040, 21 USC. 301-392, 21 USC.A. §§ 301-392, known as the Federal Food, Drug, and Cosmetic Act. The Company, a jobber in drugs, purchased them from their manufacturers and shipped them, repacked under its own label, in interstate commerce. (No question is raised in this case regarding the implications that may properly arise when, although the manufacturer gives the jobber a guaranty, the latter through his own label makes representations.) The informations were based on § 301 of that Act, 21 USC. 331, 21 USC.A. § 331, paragraph (a) of which prohibits “The introduction or delivery for introduction into interstate commerce of any drug that is adulterated or misbranded”. 2Any person” violating this provision is, by paragraph (a) of § 303, 21 USC. 333, 21 USC.A. § 333, made “guilty of a misdemeanor”.

This Court so held in *United States v Morgan*, 222 US 274, 32 S.Ct. 81, 56 L.Ed. 198, in construing the Food and Drugs Act of 1906, 34 Stat. 768, 21 USC.A. § 1 et seq. and the legislative history to which the court below called attention abundantly proves that Congress, in the changed phraseology of 1938, did not intend to introduce a change of substance. 83 Cong.Rec. 7792-94.

²⁰⁰² *Ibid.*

²⁰⁰³ *Ibid.*

²⁰⁰⁴ *US v Park*, 421 US 658, 672 (1975).

²⁰⁰⁵ *Dotterweich*, 320 US at 281 (citing *United States v Balint*, 258 US 250, 252 (1922)).

In 1975, the case *United States v Park*,²⁰⁰⁶ a chief executive officer was held liable for a national grocery chain's food storage conditions that violated federal law. The court held that an "individuals who execute the corporate mission" have a "positive duty to seek out and remedy violations of [the Federal Food, Drug and Cosmetic Act] when they occur" and "a duty to implement measures that will insure that violations will not occur".²⁰⁰⁷ The view of the court establish that public has a "right to expect [foresight and vigilance] of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them".²⁰⁰⁸ The court approach can be connected to what has been labelled a "resurgence" of the RCO doctrine, in 2007, the Department of Justice brought charges against three officers for the misbranding and fraudulent marketing of OxyContin.²⁰⁰⁹ The executives pled guilty to misdemeanours and agreed to pay \$634,525,475 in fines.²⁰¹⁰ Similarly, in another important deterrent, the Office of the Inspector General (OIG) debarred the three executives from participation in federal healthcare programs for 12 years,²⁰¹¹ and the exclusion was upheld by the US Court of Appeals for the District of Columbia.²⁰¹² Furthermore, in 2009, a case against four executives of a medical device manufacturer resulted in prison terms and \$100,000 in fines.²⁰¹³

The RCO principle was first applied in a civil case in 1985, in *United States v Hodges X-Ray*,²⁰¹⁴ defendants attempted to distinguish prior decisions on criminal liability, but the court rejected those arguments, saying that "the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved."²⁰¹⁵ Also, in the 1990s, the RCO was used for civil penalties in cases on a wide-range of environmental statutes, including CERCLA, the Clean Air Act, and the Federal Hazardous Substances Act.²⁰¹⁶ The RCO doctrine has been

²⁰⁰⁶ *Park*, 421 US at 658.

²⁰⁰⁷ *Ibid* at 672.

²⁰⁰⁸ *Ibid*.

²⁰⁰⁹ Thomas J Mortell and Michelle Gustavson, 'The Resurgence of The Corporate Officer Doctrine' (2012) 32 (55) *Advocate*. <<http://www.hawleytroxell.com/2012/06/the-resurgence-of-the-responsible-corporate-officer-doctrine/>> accessed 14 September 2017. (Citing *United States v Purdue Frederick Co., Inc.*, 495 F. Supp. 2d 569, 573 (W.D. Va. 2007).

²⁰¹⁰ Barry Meier, 'In Guilty Plea, OxyContin Maker to Pay \$600 Million' (May 10, 2007) *New York Times*.<<http://www.nytimes.com/2007/05/10/business/11drug-web.html>> accessed 14 September 2017

²⁰¹¹ Thomas J Mortell and Michelle Gustavson (n 1696).

²⁰¹² *Friedman v Sebelius*, 686 F.3d 813 (D.C. Cir. 2012) (remanded for reconsideration of length of exclusion).

²⁰¹³ *United States v Norian Corp.*, No. 09-cr-403-LDD (E.D. Pa. 2009), Sentencing Nov. 21, 2011.

²⁰¹⁴ *United States v Hodges X-Ray, Inc.*, 759 F.2d 557, 561 (6th Cir. 1985).

²⁰¹⁵ *Ibid*.

²⁰¹⁶ Noel Wise (n 1933).

labelled as a strict liability standard.²⁰¹⁷ This is because “the primary unique feature of the responsible corporate officer doctrine is that it does not matter that such officer did not participate in or have knowledge of the alleged violation”.²⁰¹⁸

Analysing the RCO, one of the significant bases of the doctrine is that personal liability promotes responsible conduct.²⁰¹⁹ Nonetheless, what this study found is that the arguments against applying the RCO strict liability standard include that holding a superior responsible for genocide, war crimes, crimes against humanity, torture, or other serious human rights violations leads to more severe punishment than RCO cases, reputational harm, and for acts of genocide, include elements such as specific intent.²⁰²⁰ However, this study argue in favour of applying such a standard to human rights violations is that a strict liability standard, because it will demonstrate a zero-tolerance policy, and that human rights violations should be treated as violations of the same level of severity as the conduct regulated by US public welfare statutes,²⁰²¹ which follow the principle of the duty not harm thus neighbour.

There is also an argument that the criticism of unfair responsibilities is less applicable in the corporate context than it is for those in government service.²⁰²² Thus, where a corporate officer has power and responsibility and when the end objectives are the creation of profits, the situation is arguably different from the assumption of power in a military position or to serve a civilian government.²⁰²³ Another central discrepancy is the difference between the consequences of a criminal conviction and a tort verdict against a corporate superior officer.²⁰²⁴ In addition, liability is limited by what is feasible, notably by the “objective impossibility defense” a defendant may claim that he or she was “powerless to prevent or correct a

²⁰¹⁷ Timothy Wu and Yong-Sung Kang, ‘Criminal liability for The Actions of Subordinates-The Doctrine of Command Responsibility and Its Analogues in United States Law’ (1997) 38 *Harvard International Law Journal* 272.

²⁰¹⁸ Kai Peters, Kai Peters, *The Corporate Responsibility Doctrine: Handling Matters When Corporate Executives Are Involved in Criminal or Civil Matters*, in *Protecting Corporation Against Management Liability Claims: Leading Lawyers on Analysing Development in Employment Regulation, Investigating and Responding to Allegation, and Creating Effective Compliance Strategies* (2013). <<https://www.gordonrees.com/Templates/media/files/pdf/The%20Corporate%20Responsibility%20Doctrine.pdf>> accessed 15 September 2017, See *Dotterweich*, 320 US at 284; *Park*, 421 US at 670–72 (all those who had a “responsible share” in conduct could be held liable for corporate violations of the law).

²⁰¹⁹ Noel Wise (n 1933).

²⁰²⁰ Timothy Wu and Yong-Sung Kang (n 1848).

²⁰²¹ Jennifer M Green, ‘Corporate Torts: International Human Rights and Superior Officers’ (2016) 17 *Chicago Journal of International Law* 447

²⁰²² *Ibid.*

²⁰²³ *Ibid.* also see O'Brien Methven Claire and Sumithra Dhanarajan, ‘The Corporate Responsibility to Respect Human Rights: a Status Review’ (2016) 29 (4) *Accounting, Auditing & Accountability Journal* 542, 567

²⁰²⁴ *Ibid.*

violation”.²⁰²⁵ The defendant’s duty “does not require that which is objectively impossible,” though it does need the highest standard of foresight and vigilance.²⁰²⁶ What have been clear in this research so far is that the standards in US tort law for superior officer liability track with the standards under international law.²⁰²⁷ One of the essential comparable doctrine, the RCO and the duty of care, may, in fact, have a higher standard of liability than has been imposed by any of the international tribunals to date, therefore, could serve as a model for corporate human rights accountability for subsidiary misconduct, in conjunction with the tort of negligence.

5.30. RCO from Other National Jurisdictions

In further analysis, this study found that the development of the doctrine of superior responsibility is not limited to US law. Legal systems around the world have recognised superior responsibility liability and a duty of care for corporate officers, although, similar to the US, these legal provisions have rarely been apply to human rights allegations against corporate officers. The developments in the international criminal tribunals is an important starting point in the assessment of national legal systems for RCO. This was highlighted in the key study by the International Committee of the Red Cross (ICRC), which is considered as one of the authoritative interpretive agencies of humanitarian law.²⁰²⁸ The ICRC considered the legal systems around the world as they addressed violations in the context of armed conflicts.²⁰²⁹ This comprehensive study made it clear that superior responsibility is applicable to both civilian and military leaders who fail to take “necessary and reasonable measures in their power” to prevent or punish subordinates.²⁰³⁰ An implication of this is that, there is no requirement that the source of their authority be military or governmental.²⁰³¹

²⁰²⁵ Jennifer M Green (n 1991).

(“[T]here is a sense in which the superior has not assumed the risks in the same way that a corporate officer has, because he is not involved in an intrinsically profit-making enterprise. The *raison d’être* of organisations such as the army, the civil service and the government is not primarily financial gain, although agents of these organisations do receive compensation for their work. Therefore, if the moral force of the assumption of risk argument is that agents must bear responsibility for activities that they initiate for personal gain, then it is attenuated with respect to command responsibility”.)

²⁰²⁶ *Ibid.*

²⁰²⁷ Sean D Murphy, ‘Contemporary Practice of the United States Relating to International law’ (2001) 95 (2) *American Journal of International Law* 387, 421.

²⁰²⁸ Leah M Nicholls, ‘The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law’ (2006) 17 *Duke Journal of Comparative & International Law* 223.

²⁰²⁹ Customary Law, ‘The Red Cross 211’ (2005) 87 *International Law review*

²⁰³⁰ *Ibid.*

²⁰³¹ *Ibid.*

However, the tort law system do differ, reflecting “the different ideas, attitudes, trust, and beliefs that people in society hold with regard to litigation, institutions and social relationships in general”.²⁰³² Fletcher establishes that all western industrialised systems break down tort systems into intentional torts, negligence, and strict liability.²⁰³³ It is possible, therefore, that the “traditional view” of duty-creating provisions for corporate officers “inflicts liability on directors and senior officers if the corporation acted wrongfully and / or inflicted harm on their watch”.²⁰³⁴ Thus, the argument in this research is that all jurisdictions include remedial mechanisms for violations of “life, liberty, dignity, and physical and mental integrity”.²⁰³⁵ Furthermore, all legal systems include some form of undisputable tort law (or delicts), therefore, none excuses corporate conduct as a category from superior liability.²⁰³⁶ Similarly, in some countries around the world, corporate officers can be criminally prosecuted and victims are provided compensation for wrongs by corporate officers.²⁰³⁷ These legal actions also permit the tendering of evidence of customary international law. In addition, in some jurisdictions, it is less common to impose liability on a corporate officer, instead holding the entity itself liable.²⁰³⁸

As mention before, the means of incorporation varies, but there remains a core of commonality across jurisdictions.²⁰³⁹ Hence, the common types of implementation are direct provision in law; for instance Belgian law, which allows tort remedies for Belgian residents.²⁰⁴⁰ Also, some states incorporate international law through constitutional torts.²⁰⁴¹ Additionally,

²⁰³² Mauro Bussani and Marta Infantino, ‘Tort Law and Legal Cultures’ (2015) 63 (1) *American Journal of Comparative Law* 77,108.

²⁰³³ George P Fletcher, *Tort liability for Human Rights Abuses* (Bloomsbury Publishing 2008)

²⁰³⁴ Harry Glasbeek, ‘Looking for Responsibility in The Corporate World or The Corporation’s Multiple Personality Disorder’ in *Directors’ Personal liability for Corporate Fault—a Comparative Analysis. Austin/Boston/Chicago/New York/The Netherlands: Wolters Kluwer* (2008) 1, 43.

(Noting that some countries are now imposing a “more wide-sweeping” duty independent of the corporation requiring that the officer or director “take steps to ensure that wrongfully inflicted harm by the corporation does not materialize”).

²⁰³⁵ International Commission of Jurists, Report of the Expert Legal Panel on Corporate Complicity in International Crimes: Volume 3 (Civil Remedies) 4 (2008). <<https://perma.cc/Q94M-FPZY>> [hereinafter ICJ Report] accessed 15 September 2017.

²⁰³⁶ Jennifer Zerk, ‘Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies’ (2013) *Report prepared for the Office of the UN High Commissioner for Human Rights* 29.

²⁰³⁷ Ronald C Slye, ‘Corporations Veils and International Criminal Liability’ (2007) 33 *Brooklyn Journal of International Law* 955.

²⁰³⁸ William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press 2008).

²⁰³⁹ Jennifer M Green (n 1991).

²⁰⁴⁰ International Commission of Red Cross, ‘Customary International Humanitarian Law, *Belgium: Practice Relating to Rule 157: Jurisdiction over War Crimes*. <<https://perma.cc/6UYU-5LMR>> accessed 15 September 2017

²⁰⁴¹ Sathya Narayan, ‘Christian von Bar, *The Common European Law of Torts*, Volume 1, Oxford University

in many European countries, bringing human rights principles into private law is described as the “indirect third party effect.”²⁰⁴² The public laws have indirect persuasive authority, create the general framework, and are intended to be enforceable by private persons against other private persons.²⁰⁴³ Another common model superior responsibility is for the law of tort and non-contractual responsibilities to be the primary bases for civil claims.²⁰⁴⁴ In addition, another model for liability for superior responsibility is the compensation and other remedies for victims which is linked to criminal codes, such as in Spain,²⁰⁴⁵ France (action civile),²⁰⁴⁶ and the People’s Republic of China.²⁰⁴⁷

Recent study found that “[i]n the majority of jurisdictions, despite differences in terminology, for the purposes of civil liability an actor will often be considered to have acted intentionally if it voluntarily undertook a course of conduct knowing that it was more than likely to result in harm”.²⁰⁴⁸ What is also observed in this study is that the common elements leading to liability are that a defendant knew or had reason to know about risk²⁰⁴⁹ and that the defendant failed to prevent the harm from occurring.²⁰⁵⁰ This observation also include omissions, remaining silent, or failure to take precautionary measures.²⁰⁵¹ Similar to the US, other common law countries have an RCO principle.²⁰⁵² As indicated in the previous sections, the initial RCO cases in the US followed English law. Thus, under the laws of England, it is well-established that a person may be liable for authorising or inducing a tort committed by another.²⁰⁵³ English common law roots of the RCO principle go back to the nineteenth century.²⁰⁵⁴ In 1846, in *The Queen v Woodrow*, a tobacco dealer was charged with possession

Press, Oxford/New York, 1983’ (2000) 5 (2) *Uniform Law Review-Revue de Droit Uniforme* 396, 399

²⁰⁴² Benedetto Conforti and Francesco Francioni, eds. *Enforcing International Human Rights in Domestic Courts*. (Vol. 49. Martinus Nijhoff Publishers 1970).

²⁰⁴³ Mauro Bussani and Anthony J. Sebok, eds. *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing 2015).

²⁰⁴⁴ Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (Vol. 1. Oxford University Press on Demand 2010).

²⁰⁴⁵ Stephen Schafer, ‘Victim Compensation and Responsibility’ (1970) 43 *Southern California Law Review* 55.

²⁰⁴⁶ Code de Procedure Penale [C. PR. PÉN.], art. 2 (French victim of an international tort can obtain remedy in France).

²⁰⁴⁷ Zhonghua Renmin Gongheguo Xingfa [Criminal Law of the People’s Republic of China] (promulgated by Order No. 83 of the President of the People's Republic of China, Mar. 14, 1997, effective Oct. 1, 1997), art. 36, P.R.C. LAWS. <<https://perma.cc/ZT5U-2QLY>> accessed 15 September 2017 (creating private claim for damages linked to criminal cause of action).

²⁰⁴⁸ René David, ed. *International Encyclopedia of Comparative Law* (Vol. 2. Brill Archive 1986).

²⁰⁴⁹ *Ibid.*

²⁰⁵⁰ *Ibid.*

²⁰⁵¹ Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Vol. 48. Cambridge University Press 2006).

²⁰⁵² *Ibid.*

²⁰⁵³ *Ibid.*

²⁰⁵⁴ *Regina v Woodrow*, 15 M. & W. 404 (Exch. 1846 and *Queen v Stephens* (1884) 14 QBD 273.

of adulterated tobacco. The court determined that with regard to “any matter that affected public health, persons could be required to act prudently in order to guard against injury to the public”.²⁰⁵⁵ Australia applies RCO liability to environmental and health and safety legislation.²⁰⁵⁶

The UK also has civil nationality jurisdiction for genocide, crimes against humanity, torture, war crimes, residence of offender and territorial jurisdiction.²⁰⁵⁷ In the UK *Chandler v Cape PLC*²⁰⁵⁸ and *Guerrero v Monterrico Metals PLC*,²⁰⁵⁹ the English high court ruled that a parent company’s Chief Executive Officer was in frequent contact with a local mine manager, so the parent company had the duty to take reasonable care to avoid foreseeable harm to the protestors.²⁰⁶⁰ In English law, for offenses requiring criminal intent, corporate liability attributes through the identification principle, which requires that the natural person committing the offense is a director or otherwise entrusted with powers of company.²⁰⁶¹

Moving on, this research observed that some countries have stepped into the void of confronting violations committed during their own past. For example, in Argentina, business executives were sued for their responsibility for abduction, detention, and murder during the country’s “Dirty War” against dissidents between 1976 and 1983.²⁰⁶² In Argentina’s Civil Code, Articles 43 and 1113 together provide for liability of persons for damage caused by their dependents; dependents has been interpreted to include a company’s employees, agents, and other representatives who act under the instructions or direction of the company.²⁰⁶³ What this mean is that the corporate veil is not a defence when corporate shares are used to breach the law, public order or good faith, or rights of third parties. In a case in Colombia against the Urapalma palm oil company, Colombian corporate officers were ordered to pay compensation

Held: The defendants were convicted of murder. The defence of necessity was not allowed. They were sentenced to death but then granted a pardon by the Crown and served 6 months imprisonment.

²⁰⁵⁵ *Queen v Woodrow*, (1846) 153 Eng. Rep. 907, 912.

²⁰⁵⁶ Karen Wheelwright, ‘Corporate Liability for Workplace Deaths and Injuries-Reflecting on Victoria’s Laws in The Light of The Esso Longford Explosion’ (2002) 7 *Deakin Law Review* 323, also see Occupational Health and Safety Act 2004 (Vic) § 144. <<https://perma.cc/7LCM-559R>> accessed 15 September 2017.

²⁰⁵⁷ Michael P Scharf, ‘Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States.’ (2000) 35 *New England Law Review* 363.

²⁰⁵⁸ *Chandler v Cape plc* [2012] EWCA Civ 525.

²⁰⁵⁹ *Guerrero & Ors v Monterrico Metals Plc & Anor* (Rev 1) [2009] EWHC 2475 (QB) (16 October 2009).

²⁰⁶⁰ *Ibid.*

²⁰⁶¹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013).

²⁰⁶² Leigh A Payne and Gabriel Pereira, ‘Corporate Complicity in International Human Rights Violations’ (2016) 12 *Annual Review of Law and Social Science* 63, 84.

²⁰⁶³ Cod. Rev. art. 43, 1113 (Arg.).

to each victim of dislocation caused by their actions (the compensation accompanied prison sentences).²⁰⁶⁴

Other important examples of corporate superior responsibility can be noted in German law, which provides criminal and civil jurisdiction for individual officers and executives.²⁰⁶⁵ This in evidence in the recent two cases, the manager of a Danzer Group subsidiary was alleged to have used security forces in the Congo when he should have foreseen violence due to his role as a member of the governing board of the subsidiary and head of the African Management Team for the Danzer Group.²⁰⁶⁶ Under German law, senior managers may have criminal responsibility arising from a duty of care toward those affected by the actions of their employees.²⁰⁶⁷ In the Danzer case, the European Center for Constitutional and Human Rights eventually filed a criminal complaint with the public prosecutor's office that charged the Danzer Group senior manager with failure to issue clear directions. The complaint charged that the manager should have directed employees of the Siforco Company (a Danzersubsidiary) that security forces must not be called in to deal with conflicts with the local population. The complaint specified that the call for security forces must be suspended until the results of any outgoing negotiations are clear; furthermore, the prerequisite to the use of security forces is that those forces must agree that no human rights violations will be committed. The complaint further charged that security forces must only receive payments if they commit no human rights violations.²⁰⁶⁸

²⁰⁶⁴ Leigh A Payne and Gabriel Pereira (n 2032).

²⁰⁶⁵ Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, § 831, 1, *Translation at* <<https://perma.cc/P24U-FSY8>> accessed 15 September 2017

(“A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed or if the damage would have occurred even if this care had been exercised”).

²⁰⁶⁶ No Investigations Against Danzer Manager Over Human Rights Abuses Against Community in DRC, ‘European Centre for Constitutional and human Rights’. <<https://perma.cc/P33M-X97N>> accessed 20 September 2017.

²⁰⁶⁷ German Jurisprudence Provides for The Liability of Leading Employees of a Company (*Geschäftsherrenhaftung*) and Gerhard Dannecker and Christoph Dannecker, ‘The ‘Distribution’ of The Company's Criminal Liability in Business: The Criminal Responsibility of The Compliance Officer and (manager) Employee in The Take-Over of Company-Related Tasks, at The Same Time Review by BGH, Judgment of 17.7.2009-5 StR 394/08’ (2010) *Jurist Newspaper* 981, 992.

²⁰⁶⁸ Peter Muchlinski and Virginie Rouas, *Foreign Direct Liability Litigation: Toward The Transnationalisation of Corporate Legal Liability* (American Bar Association 2014), Newsletter: Criminal Complaint against Senior Manager of Danzer: Accountability for Human Rights Violations in the Democratic Republic of Congo, European Centre for Constitutional and Human Rights (Apr. 25, 2013). <<https://perma.cc/26CW-57UV>> accessed 16 September 2017.

Also, the Japanese law can provide individual liability for gross human rights violations.²⁰⁶⁹ Article 709 of the Japanese Civil Code establishes tort liability and Article 715 provides for superior liability for a person who supervises the business or “employs others”.²⁰⁷⁰ Zerk observed in 2014 that while no international law violations had been brought as torts, these violations could satisfy the Civil Code’s requirement of “illegality”²⁰⁷¹ or “infringement of rights”.²⁰⁷² The Japanese Companies Act, Part III, Section 11 on Liability for Damages of Officers to Third Parties, provides that officers “with knowledge or grossly negligent in performing their duties’ may be liable to a third party for resulting damages”.²⁰⁷³

Also, in Korean case against Shinhan Bank directors, the court established that a chief executive officer has a duty to monitor²⁰⁷⁴ the actions of subordinates.²⁰⁷⁵ Hence, in order for corporate directors to be responsible to third parties as provided in Article 401(1) of the Commercial Code, they must have neglected to perform their duties wilfully or by gross negligence. “If directors have neglected to perform their “duty to monitor” wilfully or by gross negligence, they can be found liable for the damages incurred by a third party”.²⁰⁷⁶ Additionally, the Indonesian Civil Code is similar, providing that a person is not only responsible for the damages caused by his own deed, but also for damages “caused by the acts of the individuals for whom he is responsible, or caused by matters which are under his supervision”.²⁰⁷⁷

In the Netherlands, a corporate director is liable if he “made a sufficiently serious mistake”.²⁰⁷⁸ For instant, an attempt made to hold corporate officers accountable was in a case against the *Trafigura* company, which was domiciled in Netherlands and sued for the dumping of toxic waste off the Ivory Coast that resulted in an estimated twelve deaths and thousands

²⁰⁶⁹ Mauro Bussani and Anthony J Sebok, eds. *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing 2015).

²⁰⁷⁰ MINPŌ [MINPŌ] [CIV. C.] arts. 709 (tort liability), and 715 (superior liability). [Companies Act], Companies Act, Part II, Chapter 4, Section 11 (Liability for Damages of Officer to Third Parties).

²⁰⁷¹ Jennifer Zerk, ‘Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies’ (2013) *Report Prepared for The Office of the UN High Commissioner for Human Rights* 29.

²⁰⁷² *Ibid.*

²⁰⁷³ Kaisha-Hō [Companies Act], Act No. 86 of 2005, Part III § 11.

²⁰⁷⁴ Supreme Court [S. Ct.], 2006Da68636, Sept. 11, 2008. <<https://perma.cc/RC9M-EF7X> (S. Kor)> accessed 17 September 2017.

²⁰⁷⁵ *Shinhan Bank Corporation v Kim Woo-Jjoong and Ten Others*, 2006 Da 6838, (S. Kor.).

²⁰⁷⁶ *Ibid.*

²⁰⁷⁷ Indonesian Civil Code, art. 1367.

²⁰⁷⁸ Bastian F Assink, *Secondary Director Liability, the Defining Tension* (2009). <<https://perma.cc/E9JU-8PFF>> accessed 17 September 2017.

sickened; civil and criminal litigation was brought in the Ivory Coast²⁰⁷⁹ in Netherlands and the UK.²⁰⁸⁰ In 2012, the Amsterdam Court of Appeal ruled that Claude Dauphin, founder and director of the Dutch company Trafigura, could be prosecuted.²⁰⁸¹ Thus, in November 2012, the company publicly denied culpability but paid 1.3 million pounds in an out of court settlement in exchange for withdrawal of the charges against Dauphin.²⁰⁸²

What have been clear so far in this study is that the past several decades, a broad range of defendants have faced civil claims in human rights cases. Those defendants have included those who were complicit in, but did not physically commit, acts such as torture, war crimes, and genocide. The types of action include ordering the abuse, have not been challenged in its inclusion in the category of “direct” liability.²⁰⁸³ Other types of “indirect” involvement include those who knew or had reason to know about the abuse but failed to take action to prevent or punish the violations. The illustration here from other national jurisdictions point of view, have underlying agreement in principle that there is a potential for greater use of superior corporate officer liability for human rights violations. Lastly, the purpose of corporate superior responsibility here is to produce the elements recognised in the multiple sources of law detailed in this section so far and to determine that there is a consensus on the liability of superior corporate officers in international and US, UK, German, France domestic law as well as other national jurisdictions. Although there may be some differences in the *mens rea* element with regard to selected documents, the central question about enforcement of this standard is whether there is agreement on the duty of superior officers. Sources of law across international and national systems include duties for corporate superior officers to prevent and punish violations. Guidance from tort law further highlights the possibility of holding superior corporate officers liable. This standard is particularly relevant to human rights claims and serves an important function of providing remedies to human rights victims, punishing violators, and building a legal system that deters future violations.

²⁰⁷⁹ Liesbeth Enneking, ‘Common Denominator of The Trafigura Case, Foreign Direct Liability Cases and The Rome II Regulation - An Essay on The Consequences of Private International Law for The Feasibility of Regulating Multinational Corporations Through Tort Law’ (2008) 16 *European Review of Private Law* 283.

²⁰⁸⁰ Nicola MCP Jagers and Marie-José van der Heijden, ‘Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands’ (2007) 33 *Brooklyn Journal of International Law* 833.

²⁰⁸¹ *Trafigura Reaches Toxic Waste Settlement with Dutch*, REUTERS (Nov. 16, 2012). <<https://perma.cc/QR8-NG7J>> accessed 19 September 2017.

²⁰⁸² *Ibid*

²⁰⁸³ Michael P Healy, ‘Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach’ (1992) 42 *Case Western Reserve Law Review* 65.

These findings from the research carried out in this study suggest that international tribunals have commented on the efficacy of command responsibility on many occasions. For example, the tribunal stated that “command responsibility is the most effective method by which international criminal law can enforce responsible command”.²⁰⁸⁴ In certain contexts, this applies to tort standards as well.²⁰⁸⁵ What is also clear is that the international tribunals have also focused on due process considerations, and defence attorneys and some commenters have also addressed whether superior responsibility is a standard which is fair to the defendant; and whether corporate officers are simply being made an example for widespread corporate policy.²⁰⁸⁶ The multipronged concentrate on corporate accountability described in this study so far has incorporated references to corporate officers, though the different forms of accountability for officers and the corporations themselves have not been systematically examined together. The focus on corporate accountability has been on the actor itself. Hence, the liability of officers is sometimes assumed (the acts are carried out through the officers).²⁰⁸⁷ Also, frequently, the focus of the accountability is on the corporation because no individual officers are readily identifiable or each officer did not act alone and did not individually perform sufficient acts to render them liable.²⁰⁸⁸

What the research is recommending is that corporate officer and corporate institutional liability may serve the similar purposes of remedying the victim, punishing the responsible party, and deterring future abuses. Similarly, it is suggested in this study that both the officer and the corporation may be held liable for a tort, however, there are also differences. This difference can be seen in the action of the corporate official, which may be collective,²⁰⁸⁹ and the company itself must be the focus of liability for punitive actions to deter future violations, which is the business itself breaching its duty of care.²⁰⁹⁰ For this research, it is clear that when

²⁰⁸⁴ *Prosecutor v Hadzihasanovic*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16, Int’l Crim. Trib. For the Former Yugoslavia (July 16 2003). <<https://perma.cc/N62U-TYBZ>> accessed 15 September 2017.

²⁰⁸⁵ Marcus L Plant, ‘Comparative Negligence and Strict Tort Liability’ (1979) 40 *Louisiana Law Review* 403

²⁰⁸⁶ Grahame Thompson, *The Constitutionalization of The Global Corporate Sphere?* (Oxford University Press on Demand 2012) and James Fanto, ‘Organizational Liability’ (2010) 19 *Harvard Journal of Law & Public Policy* 45

In addition to the due process issues with such an approach, there is the danger that a few officers might be selected to “take the fall” for the organisation, and the organisation might avoid both responsibility and any change in practice.

²⁰⁸⁷ Cynthia H Finn, ‘The Responsible Corporate Officer, Criminal Liability, and Mens Rea: Limitations on The RCO Doctrine’ (1996) 46 *American University Law Review* 543.

²⁰⁸⁸ Aaron D Jones, ‘Corporate Officer Wrongdoing and The Fiduciary Duties of Corporate Officers Under Delaware La’ (2007) 44 (3) *American Business Law Journal* 475, 520.

²⁰⁸⁹ Mark Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’ (2005) *Columbia Law Review* 1751, 1862.

²⁰⁹⁰ George P Fletcher, ‘The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt’

an officer is acting as the “alter ego” of the corporation and carrying out corporate policy, it is the corporation that bears responsibility (under the traditional theory of proximity and vicarious liability²⁰⁹¹).²⁰⁹² Additionally, it is also clear that from other occasions, individual officers bear singular responsibility for abuses under their watch, and the most appropriate form of accountability and deterrence is to focus on the corporate officers.²⁰⁹³

Thus, this study argued that holding the corporation accountable has been addressed as both an international and domestic obligation. Internationally, the role of the collective arises when particular human beings have not taken sufficient action for responsibility to be allocated to any particular individual,²⁰⁹⁴ or where there is a responsibility on the corporation itself.²⁰⁹⁵ There may be tactical reasons for actions against a corporation; some research have shown that corporations are more likely to be held liable for negligent actions than are individuals.²⁰⁹⁶ Additionally, the conduct of a parent corporation and subsidiary may be closely connected so that it will make it difficult to pinpoint individual responsibilities and/or formal separation between functions and subdivisions, therefore, the separation between a parent corporation and subsidiary should be disregarded and liability imposed on a parent company.²⁰⁹⁷

(2002) 111 (7) *Yale Law Journal* 1499, 1573.

(“[C]rimes that now constitute the core of international criminal law are deeds that by their very nature are committed by groups and typically against individuals as members of groups”), Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press 2011). (Identifying conditions for agency including ability to make a normatively significant choice, judgmental capacity and control to choose between options). William S Laufer, ‘Corporate Bodies and Guilty Minds’ (1994) 43 *Emory Law Journal* 647. (four modes of corporate culpability) *MacPherson v Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). (Corporate form shields individual officers and directors and other agents).

²⁰⁹¹ Patrick Selim Atiyah, ‘Vicarious Liability in the Law of Torts’ (Butterworths 1967).

²⁰⁹² Yedidia Z Stern, ‘Corporate Criminal Personal Liability-Who Is The Corporation’ (1987) 13 *Journal of Corporation Law* 125.

²⁰⁹³ Robert C Downs, ‘Piercing The Corporate Veil-Do Corporations Provide Limited Personal Liability’ (1984) 53 *UMKC Law Review* 174.

²⁰⁹⁴ Peter A French, ‘Collective and Corporate Responsibility’ (1987) and Brent Fisse and John Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’ (1986) 11 *Sydney Law Review* 468.

²⁰⁹⁵ Harold Hongju Koh, ‘Separating Myth from Reality About Corporate Responsibility Litigation’ (2004) 7 (2) *Journal of International Economic Law* 263, 274 (“If corporations have rights under international law, by parity of reasoning, they must have duties as well”). Burt Neuborne, ‘Of Singles without Baseball: Corporations as Frozen Relational Moments’ (2011) 64 *Rutgers Law Review* 769. (“The corporate fiction does and should serve as an enforcement agent (and enforcement target) for the rights and duties of the human beings who constitute the corporation”). Sara Sun Beale, ‘Is Corporate Criminal Liability Unique’ (2007) 44 *American Criminal Law Review* 1503. (Cases against individuals may be inadequate to deal with collective action).

²⁰⁹⁶ Pamela Q Saunders, ‘Rethinking Corporate Human Rights Accountability’ (2014) 89 *Tulane Law Review* 603 and Valerie P Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (Yale University Press 2000).

²⁰⁹⁷ Henry W Ballantine, ‘Separate Entity of Parent and Subsidiary Corporations’ (1925) *California Law Review* 12, 21.

So, this study recommends that the corporate officer liability has a specific deterrent effect. Thus, in pursuing and accepting positions of director, corporate officers also assume positions of responsibility. Hence, superior officers have a central role and the authority to change business conduct throughout the organisation. This authority contains a positive duty to punish and prevent wrongs by subordinates.²⁰⁹⁸ It is possible, therefore, that these actions serve both the individual harmed and, more widely, deter future wrongs against the community.²⁰⁹⁹ Also, when a specific officer has taken action that meets the standards for liability, that officer should be recognised and his or her actions, or failure to fulfil a duty, should be held up to public scrutiny and held to account in the legal system.²¹⁰⁰ In this view, the logic is that corporate officers should be more worried about individual liability rather than the liability of the corporation itself; due to the general belief that corporate liability is just passed along to shareholders.²¹⁰¹ A legal explanation of this might be that where the decisions may negatively impact individual corporate officers, the officers are more risk averse than when a decision affects third parties.²¹⁰² So, litigation against individuals may also have heftier lawsuit costs in terms of time and potential reputational harm than suits against corporate entities.²¹⁰³

Danner and Martinez have observed that the law and economics group “least-cost avoiders” as applied to the criminal prosecution of superior officer high-level officials are better placed to form policy and implement it.²¹⁰⁴ Danner and Martinez also argued that there is a moral duties when a government or military official assumes command. The authors further contest that these leaders “are not like everyone else” and “have affirmative obligations related to the governance of society, such as monitoring persons under their control to ensure that they comply with certain standards of conduct”.²¹⁰⁵ In this analysis, the same is true for corporate officers, when one examines the psychological literature on group dynamics.²¹⁰⁶ Group

²⁰⁹⁸ Roger S Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of The International Criminal Court and the Elements of Offences’ (Vol. 12. No. 3. Springer Netherlands 2001).

²⁰⁹⁹ Brent Fisse and John Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’ (1986) 11 *Sydney Law Review* 468.

²¹⁰⁰ Cecil A Wright and Allen M Linden, *Canadian Tort law: Cases, Notes and Materials* (Butterworths 1975).

²¹⁰¹ Henry Hansmann and Reinier Kraakman, ‘Toward Unlimited Shareholder Liability for Corporate Torts’ (1991) *Yale Law Journal* 1879, 1934.

²¹⁰² Claire A Hill and Richard W Painter, *Better Bankers, Better Banks: Promoting Good Business Through Contractual Commitment* (University of Chicago Press 2015).

²¹⁰³ Robert J Rhee, ‘Tort Arbitrage’ (2008) 60 *Florida Law Review* 125.

²¹⁰⁴ Allison Marston Danner and Jenny S Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) *California Law Review* 75, 169.

²¹⁰⁵ *Ibid.*

²¹⁰⁶ Darwin Cartwright and Alvin Zander, *Group Dynamics* (Harper and Row 1960).

dynamics general reveals that individuals acting in groups are more likely to accept hazardous risks than are individuals acting for themselves.²¹⁰⁷ What this indicates is that a variable reducing risk-taking in groups is the presence of a powerful member of the group who is risk-averse.²¹⁰⁸ Thus, the indication here is that holding a superior responsible for the actions of a subordinate could enhance the ability of a group to avoid hazardous risks. This opinion here marries with the RCO doctrine developed in the UK and the U.S. and other tort regimes applying the precautionary principle.²¹⁰⁹

Also, though “a corporate officer has moral and legal duties to monitor subordinates and prevent and punish violations, a system should not be created or reinforced that allows certain individuals to be the sacrificial lambs for more widespread corporate behaviour when the corporation as a whole that must be held accountable”.²¹¹⁰ Thus, the principle of vicarious liability holds that corporations are ultimately responsible for acts taken in the course of an officer’s corporate duties and many law and economics analyses find that limited liability is a more efficient means of allocating responsibility and costs.²¹¹¹ It may be the case therefore that singling out individuals to hold them liable is not a task to be undertaken lightly. Thus, the notion is a determination must be made about the control that the officer had over subordinates and whether the officer possessed the knowledge to allow prevention or punishment of the violation.²¹¹² Hence, the question of superior officer liability must first address the duty the officer has.²¹¹³ In the context of a tort there is also the question of foreseeability²¹¹⁴ and the duty of reasonable care.²¹¹⁵ Also, include in these questions is the concept that the standard must be consistent and clear so as to give notice to any potential offenders.²¹¹⁶ As this thesis has discussed in the section above, there is such a clear standard for superior responsibility for corporate officers. The standard of superior responsibility does not undercut corporate

²¹⁰⁷ Irving L Janis and Leon Mann, *Decision Making: A Psychological Analysis of Conflict, Choice, and Commitment* (Free Press 1977).

²¹⁰⁸ James G Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’ (2012) 25 (1) *Leiden Journal of International Law* 165, 219.

²¹⁰⁹ Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Harvard University Press 2009).

²¹¹⁰ Jennifer M Green (n 1957).

²¹¹² Christopher Leck, ‘International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct’ (2009) 10 *Melbourne Journal of International Law* 346.

²¹¹³ Michael J Kelly, ‘Grafting The Command Responsibility Doctrine onto Corporate Criminal Liability for Atrocities’ (2010) 24 *Emory International Law Review* 67.

²¹¹⁴ John CP Goldberg and Benjamin C Zipursky, ‘Torts as Wrongs’ (2009) 88 *Texas Law Review* 917.

²¹¹⁵ *Ibid.*

²¹¹⁶ Emily Sherwin, ‘Interpreting Tort Law’ (2011) 39 *Florida State University Law Review* 227.

institutional liability. This thesis argued that together, these two forms of potential liability form important complementary pieces of a legal structure that can provide greater responsibility for corporate human rights violations and deter future corporations for violating human rights and the environment.

5.31. Corporation Control of Business Operations

This was the first factor established in *Childs* case, “the defendants” material implication in the creation of the risk or his or her control of a risk to which others have been invited”.²¹¹⁷ Comparing this to the previous authorities established in cases, such as *Fallowka*, and the RCO principle, it was found that the defendant have a control over the relevant risk, the defendant has both a physical presence at the site of the risk and was either liable for the operation of the mining site or contractually duty to protect the plaintiff from the risk created. Likewise, in *Fallowka*, Pinkerton’s was particularly engaged to protect the mine and had employees stationed at the mine for that purpose.²¹¹⁸

In *Crocker Sundance Northwest Resorts Ltd*,²¹¹⁹ the Canadian Supreme Court held that the operator of an inner tubing event owed a duty of care to a person who was harmed while engaging in a visibly drunk manner. It was further held that where the defendant operator’s own employees were in charge of how the event was run, a duty of care was owed.²¹²⁰ What this meant is that even though the corporation may not be blame morally, it should be held accountable in the tort of negligence. If it is found that the corporation had fallen below the objective standard of the reasonable man in relation to both the human rights violations and the control it exercises over the subsidiary.

Additionally, in some approach, the plaintiff in a duty of care claim may be able to establish that the defendant (corporation subsidiary) was responsible for upholding the human rights standards and environmental assessment. For example, as noted above, Loblaw

²¹¹⁷ *Childs v Desormeaux* (n 1746).

²¹¹⁸ *Ibid.*

²¹¹⁹ *Crocker v Sundance Northwest Resorts Ltd* [1988] 1 S.C.R. 1186.

²¹²⁰ *Crocker*, “The court found for the plaintiff in the amount of 75% liability on the part of the defendant, finding Crocker to be contributorily negligent (25%). Here, the common law has recognised special relationships where there is a positive duty to act. Sundance owed Crocker a duty because of the likely and foreseeable risk of harm resulting from its operation of a competition for profit in a dangerous sport. A reasonable organisation should have taken steps to dissuade Crocker from competing. The Learned Hand formula can be applied here to determine that Sundance failed to meet its standard of care. Where a party exercises some control or gains economic benefit in a relationship, there is a special duty on that party not to place another, and to prevent another from being in a position where it is foreseeable they will suffer injury”.

Companies Limited argues that if the parent corporation's own employee is responsible for monitoring workplace conditions such as in Bangladesh then the court should be able to impose liability on the defendant (corporation) for the conduct of the employees (subsidiary).²¹²¹ Nonetheless, often the defendant would not have a physical presence in the relevant area where the corporation's subsidiary operate, likewise, they may not have any contractual duty to protect the victims affected by the subsidiary misconduct. Similar, the Canadian corporation that determines the corporate employment policy through contractual obligations and has a substantial control over it employee (subsidiary).²¹²² This could be seen to have sufficient control over the risk of human rights violations, regardless of the corporate not having a physical presence in the business environment (although physical presence would strengthen the claim).

Therefore, the question to the court should be whether in practice the defendant (corporation) has a control over the subsidiary business conduct that has created harm to society and damages the environment, even if such a control is not derived from the physical presence, ownership, or a contractual obligation. This is particularly relevant when the question is asked whether a parent corporation should owe a duty of care to victims of a human rights violation, committed by its subsidiary. The idea is that a parent corporation is liable for a duty of care should give rise to a collective responsibility²¹²³ when it can be proven that the parent corporation exercises a high degree of contractual control and practical control over the operations of the subsidiary.²¹²⁴

A typical example examine in this thesis is that, a buyer has a significant leverage over supplier operations, and it has the contractual capacity to ask the supplier to change its human rights standard and adopt a minimum human rights standard. In this context, it shall be said

²¹²¹ Loblaw Companies Limited, 'Company Statement, Lonlaw Companies Limited Update Statement on Bangladesh' (2014). <www.loblaw.ac/English/Media-Centre/announcement/default.aspx> accessed 22 December 2016.

²¹²² *Ibid.*

²¹²³ Joel Feinberg, 'Collective Responsibility' (1968) 65 (21) *Journal of Philosophy* 674, 688. The notion of collective responsibility, like that of personal responsibility and shared responsibility, refers in most contexts to both the causal responsibility of moral agents for harm in the world and the blameworthiness that we ascribe to them for having caused such harm. Hence, it is, like its two more purely individualistic counterparts, almost always a notion of moral, rather than purely causal, responsibility. But, unlike its two more purely individualistic counterparts, it does not associate either causal responsibility or blameworthiness with discrete individuals or locate the source of moral responsibility in the free will of individual moral agents. Instead, it associates both causal responsibility and blameworthiness with groups and locates the source of moral responsibility in the collective actions taken by these groups understood as collectives.

²¹²⁴ Ian Sadler, *Logistics and Supply Chain Integration* (Sage 2007).

that duty of care exists where the defendant has a position that allows it to exercise control over the subsidiary, exercise overall control, or control the business operations because the subsidiary's action exacerbates a misconduct that is originally created by the defendant influence. Therefore, there is a very high degree of foreseeability of harm, coupled with the corporation's proximate relationship to the subsidiary and the victims, as well, what could be seen as an assumption of responsibility through the corporation control.

In this circumstance only in novel or contentious cases, will it be necessary to apply the first principle in order to determine whether a duty of care arises. In such cases, the test for duty of care comprises of three stages; reasonable foreseeability of the human rights violations and the environmental damages to the plaintiff, a sufficient relationship of proximity between the corporations and the plaintiff and an inquiry into whether it would be fair, just, and reasonable to recognise a duty of care.

5.32. Corporation Self-sufficiency

It is the second essential element in the *Childs* case, which seeks to protect the independence of person affected by imposing a positive duty of care on a defendant.²¹²⁵ The Court in this part of the judgment is concerned with protecting the right of a person "engaged in risky activities" and the fundamental rights of a bystander to choose to intervene or not too.²¹²⁶ This was also distinguished in the Canadian Supreme Court decision in *Fallowka*, where it rejected the concept that imposing a duty of care would interfere with the miner's autonomy, arguing that even though the miners had decided to continue working on the site while the risk was imminent, "they made that choice in light of the assurance given to them".²¹²⁷ Likewise, even though the plaintiff in a tort of negligence claim has knowledge about the present of the risk, thus, chosen to work there, they may have done so in light of the control being exercised by the defendant to monitor the compliance with specified minimum human rights standards and respond to the breaches.

In this case, the assurance given by the defendant indicates that the defendant has assumed responsibility for the plaintiff and has knowledge about the ongoing human rights violations, therefore, a duty of care is recognised. Additionally, a record of human rights abuses

²¹²⁵ *Childs v Desormeaux* (n 1746). Not that although *Fallowka* approved this factor as part of the *prima facie* duty inquiry, the Court went to consider it as part of the residual policy issue.

²¹²⁶ *Ibid.*

²¹²⁷ *Fallowka v Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132.

was shown that the victims may not have a choice about whether or not to work in an unsafe environment or for long labour hours and insufficient pay. Therefore, in such cases, it will be entirely inappropriate for the court to reject a duty of care out of concern for the victim's autonomy to engage in risky activities.²¹²⁸

Accordingly, the concern for the victim's autonomy, if a duty were imposed in the tort of negligence claim is somewhat more a cogent debate. Therefore, the Supreme Court in *Fulowka* held that imposing a duty on Pinkerton's would not conflict with Pinkerton's right to choose not to intervene. Observing specifically that Pinkerton's had given up much of its freedom by entering into a contract to provide security for the miners.²¹²⁹ This position is valid because the victim of the tort of negligence may not be able to point to a contractual undertaking to inspect or monitor corporate adherence to human rights duties,²¹³⁰ but can rely on the principle of duty of care to exercise their human rights.

It is also observed that a Canadian corporation that has publicly stated it will monitor and respond to human rights issues in its business operation and has benefited from this statement publicly (i.e., by improving public image) cannot be said to be innocent of the human rights abuse in its business conduct.²¹³¹ Due to the fact that the public statement means it has assumed responsibility to the claimant. This position indicates a positive duty of care, thus, it is adequate for one to infer that imposing a duty of care on the corporation in such circumstances will not be unreasonable, considering the corporation control exercised in the business operations with the subsidiary, the knowledge about the human rights abuse and the steps it claims to have taken to ensure human rights violation is negated in its business operations with the subsidiary.

5.33. Victims Reasonable Trust Test

Reliance, unlike an assumption of responsibility, is not a right generating event. The common assumption is that it flows from the fact that in most cases where there has been an assumption of responsibility²¹³² the claimant suffers loss as a result of relying on the

²¹²⁸ *Ibid.*

²¹²⁹ *Ibid.*

²¹³⁰ Paul Hoffman, and Beth Stephens, 'International Human Rights Cases Under State Law and in State Courts' (2012).

²¹³¹ *Fulowka v Pinkerton's of Canada Ltd* (n 2097).

²¹³² Russell Brown, 'Assumption of Responsibility and Loss of Bargain in Tort Law' (2006) *Dalhousie Law Journal* 29, 345. The idea of voluntary assumption of responsibility first appearance in English law in connection with claims for the compensation of economic loss and in the seminal decision of the House

undertakings. As an example, bailors rely on its employees to take care. Conscious patients rely on their doctor to be careful, as do the clients of a solicitor. Therefore, in claims for damages, it is necessary for the bailee, patient, or solicitor's client to establish reliance in the strong sense that they have acted upon the assumption of responsibility to them to their detriment. In particular, there is no necessity to show that an opportunity has forgone as a result of the assumption of responsibility. There is an entitlement to be placed in the better position which reasonable care would achieve, regardless of the availability of any alternative bailor, doctor, or lawyer who would have been careful. Establishing loss through reliance on an assumption of responsibility is sufficient to find a duty of care but not necessary. The concept of assumption of responsibility also emerged from the landmark decision of the House of Lords (now the Supreme Court) in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,²¹³³ (also discussed above), which established that there could be a liability in negligence in respect of carelessly produced statements resulting in a pure economic loss. Precisely what was entailed in this concept, along with the accompanying concepts of reasonable reliance and a special relationship, has never been entirely clear,²¹³⁴ however, up until 1994 this uncertainty was largely contained within the sphere of actions for negligent misstatements.

Though, in *Spring v Guardian Assurance plc*,²¹³⁵ Lord Goff utilised the concept in a remarkable example of judicial creativity to find that the supplier of an employment reference owed a duty of care to its subject. In doing so, his Lordship commented (at 318): “[A]lthough *Hedley Byrne* itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other

of Lords in *Hedley Byrne v Heller*, where it was decided that a Bank can be liable for a negligent information supplied without consideration to a regular client. In the more recent case of *Henderson v Merrett Syndicate Ltd*, Lord Goff, in looking for the principle which underlay the decision in *Hedley Byrne*, referred to passages in the speeches of Lord Morris and Lord Devlin in that case including a passage in the speech of Lord Devlin where he considered the sort of relationship which gave rise to a responsibility towards those who act upon information or advice, and thus created a Duty of Care towards the person so acting.

Lord Goff added in *Henderson*: “From these statements, and from their application in *Hedley Byrne*, we can derive some understanding of the breadth of the principle underlying the case. We can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other.

In *White v Jones* (see *infra*) Lord Goff stated again that the *Hedley Byrne* principle was “founded upon an assumption of responsibility”. In *Galoo Ltd (In liq) & Others v Bright Grahame Murray (a firm) and another* the Court of Appeal set out to identify the difference between the facts there and those in its previous decision in *Morgan Crucible Co Plc v Hill Samuel Bank Ltd*, that allowed the recovery of an economic loss.

²¹³³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

²¹³⁴ Kit Barker, 'Unreliable Assumptions in the modern Law of Negligence' (1993) 109 (3) *Law Quarterly Review* 461, 484.

²¹³⁵ *Spring v Guardian Assurance plc* [1995] 2 A 296.

services, as for example the professional services rendered by a solicitor to his client”. Lord Goff later developed this approach in his leading judgment in *Henderson v Merrett Syndicates Ltd*,²¹³⁶ where underwriting members (“Names”) of Lloyd’s Insurance were claiming against their underwriting agents. His Lordship explained (at 181) “[T]he concept provides its own explanation why there is no problem in cases of this kind of liability for pure economic loss; for if a person assumes responsibility to another in respect of certain services, there is no reason why he should not be liable in damages for that other in respect of economic loss which flows from the negligent performance of those services. It follows that, once the case is identified as falling within the *Hedley Byrne* principle, there should be no need to embark upon any further enquiry whether it is “fair, just and reasonable” to impose liability for economic loss.²¹³⁷

Additionally, Lord Goff clarified that “an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff”.²¹³⁸ In *Williams v Natural Life Health Foods Ltd*,²¹³⁹ this approach came to be referred to as the “extended *Hedley Byrne* principle” and was described by Lord Steyn, as the “rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services”.²¹⁴⁰ *Williams* appeared to secure the concept’s position as a bona fide means of imposing a duty of care upon defendants in economic loss cases,²¹⁴¹ and an attractive one at that, given the apparent absence of any requirement to consider whether it would be fair, just and reasonable to do so. In a further development, it is now clear that the assumption of responsibility concept is not necessarily restricted to economic loss cases.²¹⁴² What is less clear, however, is precisely when it would be more appropriate to utilise this approach towards a duty of care inquiry, and whether its application would necessarily lead to a different outcome.²¹⁴³

²¹³⁶ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

²¹³⁷ Nicholas J McBride and Andrew Hughes, ‘Hedley Byrne in The House of Lords: an Interpretation’ (1995) 15 (3) *Legal Studies* 376, 389.

²¹³⁸ *Ibid.*

²¹³⁹ *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830.

²¹⁴⁰ *Ibid.* at 834.

²¹⁴¹ The *Hedley Byrne* principle was also relied upon by a majority of their Lordships in *White v Jones* [1995] 2 AC 207, concerning the liability of a solicitor towards intended beneficiaries under a non-executed will.

²¹⁴² *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, where Lord Slynn accepted that an educational psychologist could assume responsibility towards children and their parents for failure to diagnose a congenital condition such as dyslexia, and *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR 1495; [2005] UKHL 24, where Lord Steyn acknowledged that the police could assume responsibility towards victims of crime.

²¹⁴³ In *McFarlane v Tayside Health Board* [2000] 2 AC 59, Lord Steyn commented (at 83) that “in regard to the sustainability of a claim for the cost of bringing up the child it ought not to make any difference whether the claim is based on negligence simpliciter or on the extended *Hedley Byrne* principle. After all, the latter is simply the rationalisation adop”.

For example, in *McFarlane v Tayside Health Board*,²¹⁴⁴ where the claimants were seeking compensation from hospital authorities for a combination of personal injuries and economic loss following a “wrongful birth”, their Lordships adopted a variety of differing approaches in resolving the dispute, notwithstanding that the claim had been brought under the extended *Hedley Byrne* principle. Further uncertainty has been generated by judicial observations concerning the intelligibility of the concept. Even before Lord Goff’s liberalisation of the concept in *Henderson*, several Law Lords had made such observations. For example, in *Caparo*²¹⁴⁵ Lord Roskill spoke of finding: “considerable difficulty in phrases such as “voluntary assumption of responsibility” unless they are to be explained as meaning no more than the existence of circumstances in which the law will impose a liability upon a person making the allegedly negligent statement to the person to whom that statement is made; in which case the phrase does not help to determine in what circumstances the law will impose that liability or indeed, its scope”.²¹⁴⁶

In *Williams*, Lord Steyn noted that the concept had been subjected to such criticisms, and appeared to concede these arguments with the rejoinder that “coherence must sometimes yield to practical justice”.²¹⁴⁷ Regardless of the development of the assumption of responsibility concept as a basis upon which to impose a duty of care, the nature and scope of the concept and the circumstances in which it may be applied are still a mystery. Barker has described the concept as a “conceptual veil” which shrouds the true face of tort law.²¹⁴⁸ This may have been acknowledged by their Lordships in the *Customs and Excise Commissioners case*.²¹⁴⁹ The treatment of this concept by the House of Lords since 1994 represents merely one of several cautionary tales that warn that the desire to achieve practical justice may culminate in a legal landscape which is unintelligible to those lawyers who must work with it.

Nonetheless, foreseeable possibility of detriment, whether by the reliance of the claimant or a third party, is relevant and will commonly be decided in determining whether, as a matter of construction, the defendant has by his or her action implicitly assumed responsibility towards the claimant. Where the undertaking of a task means that it will not be undertaken by anyone else, this supports a finding that there is an implied assumption of

²¹⁴⁴ *McFarlane v Tayside Health Board* [2000] 2 AC 59.

²¹⁴⁵ *Ibid.* at 628.

²¹⁴⁶ Lord Griffiths in *Smith v Eric S Bush* [1990] 1 AC 831 at 862.

²¹⁴⁷ *Ibid.* at 837.

²¹⁴⁸ Kit Barker (n 2104).

²¹⁴⁹ *Customs and Excise v Barclays Bank Plc* [2006] UKHL 28.

responsibility in carrying it out. A finder who takes a lost car into his custody, or a surgeon who operates on the unconscious man, exclude the possibility of someone else undertaking this task. By contrast, in a case such as *Sutradhar v Natural Environment Research Council*,²¹⁵⁰ no one else was excluded from conferring the relevant benefit or was discouraged from doing so by the defendant's actions.²¹⁵¹ Reliance is relevant to the true construction of what can legitimately be inferred from the defendant's conduct at the moment in time. The proof of actual reliance subsequent to the undertakings is unnecessary and is indeed irrelevant to the construction to be placed upon the defendant's prior actions.

Furthermore, it is unnecessary to show that expectation has been created by the assumption of responsibility. For example, where lost goods are found, goods are sub-baled, or an unconscious patient is admitted to the hospital, no expectations of reasonable care generated in the mind of the owner of the good or the patient. Not only is reliance unnecessary, it is insufficient alone. The claimant must rely upon something. Someone who relies upon a promise made to someone else, for example, acquires no right by so doing. Further, reliance may cause another right to be infringed, but it does not generate a new right in itself. So, if someone calls an emergency hotline, and negligently assured that firefighters are on their way to the burning house, if the person has put out the fire themselves, if the person has not been given the assurance and the house burns down as a result, this is actionable. It is the property right in the house that has been infringed. The reliance causes the person's right not to have their property carelessly destroyed to be infringed; but it did not generate a new right in itself, this was the third factor in *Childs* case.

The factor recognised in *Childs* case is reasonable trust,²¹⁵² which falls under the principle of reasonable foreseeability. This factor entails the plaintiffs to establish that they have relied on the corporation's undertaking and that the corporation would reasonably expect such a trust.²¹⁵³ However, it is argued that the requirement for a plaintiff to establish dependence in a case will prove problematic. Especially, where the employees in Canadian

²¹⁵⁰ *Natural Environment Research Council* [2006] UKHL 33.

²¹⁵¹ *Stovin v Wise* [1996] UKHL 15.

²¹⁵² *Childs v Desormeaux* (n 1746), also see, Peter Bowal and Preet Saini, 'Whatever Happened to Childs v. Desormeaux: Killer Hospitality' (2014), Kelsey Drozdowski, 'Liability for Impaired Driving: Expanding the Scope' (2004) 29 *Law Now* 62.

²¹⁵³ *Fallowka v Pinkerton's of Canada Ltd* (n 2097). ("whether the plaintiff reasonably relied on the defendant to avoid and minimise risk and whether the defendant, in turn, would reasonably expect such reliance" at para 27); *Childs*, ("there is no evidence that anyone relied on the host in this case" para 46). Note, the plaintiff could alternatively establish that their position has been otherwise aggravated because the third parties that would have protected the plaintiff did not do so in reliance on the Canadian corporation's undertaking.

corporation's business operation are placed in a similar position (reasonable trust) as the miner in *Fallowka*. Where both employees are exposed to risks in their place of work, and the defendant has represented that it will protect them. Discerning from the Supreme Court decision in *Fallowka*, there is an assumption that perhaps the miners had a choice about whether or not to continue to participate in work related activities.

However, the Court held that the miners continue to attend work with the assurance that the defendant security contractors taking a reasonable care will reduce the risk associated with working in such condition.²¹⁵⁴ Thus, the employees in the tort of negligence claim may not have a real choice about working for an employer that violate human rights in its business operation (example, violation of labour condition and poor working condition) and may not have sufficient negotiating power to seek for a better working condition. Hence, the Court approach to imposing a duty of care on the defendant is perfectly adequate. Likewise, the plaintiff would have reasonably required the corporate to act according to its publicised code of conduct on human rights,²¹⁵⁵ as it can be argue that the corporation assumed responsibility by publishing the code of conduct.

However, this could be difficult to apply in practice because the defendant needs to establish that he/she relied on the parent company conduct. Therefore, some workers may be able to establish reasonable trust than others. The conclusion here is that in an empirical analysis, this study has addressed three specific challenges for a potential plaintiff in establishing reasonable foreseeability in a future claim. These are a lack of knowledge of human rights policies of the corporation, lack of trust on the corporate human rights policies in its business operations and the last is unreasonable trust, which are all connected to superior responsibility principle. Thus, the first hurdle for a future plaintiff would be to establish that he or she knew the corporation had a policy of protecting the human rights in its business operation and control over the subsidiary business, this constitutes the reliance and assumption element of the tort. Even though a corporate often publishes their human rights policies in the media, it does not follow through to reflect on the human right standards of its business with the subsidiary, thus, this could be another mechanism to hold the corporate accountability for its public information.

²¹⁵⁴ *Ibid.*

²¹⁵⁵ See above discussion on CSR.

Likewise, where inspection is, in fact, being carried out by or on behalf of a corporation, an employee's or the victim's litigation could be reinforced through the duty of care if he or she knew that the corporation is responsible for carrying out the human rights standard inspection. This will be easier for a plaintiff who engaged in employment with the subsidiary of the parent company (example where the defendant, the corporation is the main business partner), rather than for a plaintiff who works for a subsidiary who engages in business operations with multiple corporations. Where the plaintiff could be aware that inspections are carried out, but not to the required standard, and could not link the inspection to the parent corporation (this is also applied to victims).

In an assumption, if the plaintiff could establish that they were aware of the defendant business policy on human rights standards and exercise control over the policy, then the next challenge is for them to establish that a duty of care exists like the miners in *Fallowka*, and the plaintiff decided to work for specific corporation or took some other action in dependence on the corporate business policy at that particular time. Of course, the research acknowledges that this is very difficult to establish in practice, however, a plaintiff who has a choice about where to take up employment may be able to establish that they chose to work, for a particular corporation because they believed the corporation would require it subsidiary to uphold the minimum human rights standards. Contrarily, victims of human rights abuses do not need to prove working relations, if they are can prove foreseeability, proximity, fair, just, and reasonable.

This can be supported by Philips and Lim study in Vietnam's athletic footwear industry, the authors found that 50% of surveyed workers indicated that comfortable working condition was the main reason why they choose to take up employment in a particular corporation. Comparing to the only 2.5% that stated the main reason why they choose to work for a particular corporation is high salary.²¹⁵⁶ Additionally, Record, Kuttner and Phouxay, observed that low wages and working hours were the two main reasons as to why clothing employees in Lao decided to stop working for a particular corporate.²¹⁵⁷ Furthermore, where the workers are aware that the human rights inspection are in fact being carried out, they may argue that they have relied on that inspection as evidence that a particular human rights policy exists to protect their rights, therefore failure to adhere to this policy amounts to a failed duty of care to the

²¹⁵⁶ Joe Phillips and Suk-Jun Lim. 'Their 'Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees' (2009) 61 *Rutgers Law Review* 333, 1127.

²¹⁵⁷ Richard Record, *Stephanie Kuttner and Kabmanivanh Phouxay, Voting with Their Feet? Explaining High Turnover and Low Productivity in the Lao Garment Sector* (Palgrave Macmillan UK 2014)

employees. Hence, the court should be under obligation to pay attention to these failures, and whether this failure created or contributed to the harm suffered. A rebuttable presumption exists for a future plaintiff to argue that a duty of care exists when it is established that their dependence on the defendant (corporation) policy is reasonable.

Nonetheless, in *Fulowka*, the Canadian Supreme Court held that the miner's dependence was reasonable because of the defendant's presence at the mine and the assurance given to the miners.²¹⁵⁸ A crucial point to note here though, is that it would be very difficult for a plaintiff to establish that dependence was reasonable where he or she knew that the defendant was not responsible or engage in business activities with the subsidiary, monitoring, or enforcing minimum human rights standards. Likewise, it will also be very difficult for a plaintiff to establish that dependence is reasonable if it should be obvious to him or her that the corporation was turning a blind eye to human rights abuse that violated its business policy.

Even so, the point here is that dependence on policy for duty of care should be reasonable if the defendant appears to be engaging in business conduct with the subsidiary, monitoring and responding to human rights abuse in its business operation, in accordance with its standard of business activities. However, this is not to say that if other elements are present, the duty of care is not to be owed. If it can be established that there is foreseeability and proximity between the defendant and the victims of a human rights violation, then the presumption is that the court should find a novel duty of care in that case. This point is reached because it is argued that there exists a duty of the defendant corporation not to make the human rights violations worse or contribute to the harm suffered by the plaintiff if it assumed responsibility of the business operations. A duty of care can also be established if the defendant corporation and the plaintiff are deemed to have a relationship making it appropriate to depart from the general principle of the rule (rule of tort)

5.34. Making the Situation Worse

If a claimant cannot establish that he or she reasonably trusted the corporate undertakings, a duty of care could still be possible to establish if there is evidence that the subsidiary relied on the undertaking and this dependence cause harm to the plaintiff or made the situation worse. Therefore, when one or more factors, including the defendant's negligence,

²¹⁵⁸ *Fulowka v Pinkerton's of Canada Ltd* (n 2097).

are found to be a necessary condition of the plaintiff's harm, then the court should impose a duty of care on the corporation. This should involve two distinctive tests, the first is for the court to ask whether the harm was the result of the defendant's action through negligent conduct and the second is whether the subsidiary was acting in his own accord leading back to the defendant's (corporate) negligence. Each of these tests represents a value judgment on how far the court should think the defendant's liability should extend, that is, regarding the final question about whose responsibility it is, and whether the harm is appropriately allocated.

This was the case in *Goodwin v Godwin*, a decision of the British Columbia Court of Appeal.²¹⁵⁹ The defendant in *Godwin* was contracted by the local authority that it would keep roads clear from ice.²¹⁶⁰ The defendant advised the local authority that it would fulfil its contractual obligation of removing ice from a specific road, but, nonetheless, failed to do so once it recognised that work would fall outside its contract. The plaintiff was injured in an accident as a result of the ice on the road.²¹⁶¹ The Court held that there is a duty of care; if the defendant had not undertaken to remove the ice on the road, the local authority should have sought an alternative arrangement for the removal of the danger on the road.

Applying this to a corporate duty of care, the relevant analysis for the court is to consider whether a harm is too far from the consequence of the defendant's negligence (breach of duty) or there is an assumption of responsibility, what is essentially being asked is whether the consequence of the negligent actions was so far from it as to have been unforeseeable by the defendant (judged by the standard of the reasonable person) at the time the action occurred. Putting it another way, the defendant can argue that the consequence of their action is not foreseeable, that they were too far. If this is the case, then cause in law is not established and the claimant's case cannot go further. The formulation of duty of care here means that whether something is too remote is judged in light of what was known at the time the breach occurred, with foresight, and not with the benefit of hindsight. This will be the case in a scenario where there was evidence that a trade union, NGO or the media have supervised or reported on human rights violations or advocated for workers in a particular corporate factory, but did not do so in dependence on the corporation's employees. Another example is where the subsidiary of a

²¹⁵⁹ Dean Wilson Edward and Shelly Tomic, *In the Supreme Court of Canada* (1990).

²¹⁶⁰ 2007 BCCA 81 at para 31, 279 DLR (4th) 227 [*Goodwin*].

²¹⁶¹ *Ibid.*

parent corporation would have carried out appropriate human rights standard but did not do so in dependence on the defendant corporation.²¹⁶²

Similarly, if a negligent driver hits another person's vehicle, it is the evidence that damaged the vehicle itself which would be foreseeable, as would be the damage to the contents of the vehicle. It would not matter what the contents of the vehicle are, so if a truck was transporting cheap beans or expensive designer clothing, the negligent driver would be liable for the full cost of whatever was damaged. Therefore, once the type of harm is judged to be foreseeable, the defendant should be held liable for all the harm caused, even where the extent itself was not. The duty to care and not to harm a person or create a risk for a person, injury or damage as a result of the misconduct of the corporation can be found where the parent corporation assumed responsibility. Also, a duty of care can arise where the subsidiary parent corporation who is said to be under that duty has by its conduct assumed responsibility for the conduct of the subsidiary and safety of its employees. Likewise, where the parent corporation have created or make the human rights abuses and environmental damage worse.

5.35. Fair, Just and Reasonable (Third Limb of *Caparo* Test)

The House of Lords established that for a duty of care to be imposed, the third limb should be satisfied, that it is fair, just, and reasonable that the law should recognise the duty of care on the defendant to take reasonable care not to cause that damage to the claimant.²¹⁶³ However, the question to the court is whether there is a mandatory factor, rather than the overriding question of whether it is fair, just, and reasonable to impose duty of care on the corporation, having thoroughly considered the relationship (proximity) between the plaintiff and the defendant, to impose a duty of care on the defendant. The vital point here is that when a plaintiff is able to establish foreseeability and proximity, then the court should also apply a moral principle in conjunction to fair, just, and reasonable to impose a duty of care on the corporation.

²¹⁶² *Cooper v Hobart*, [2001] 3 S.C.R. 537. "McLachlin C.J. and Major J. found that if there is no existing category that would create a duty of care, the plaintiff must show proximity, a close and direct relationship with the defendant. In this case, there is no such proximity because the statute governing the Registrar imposed no such duty. While the losses to the plaintiff were foreseeable, proceeding to a policy analysis is unnecessary. The court noted that even if it had gone to a policy analysis, the duty of care would be negated by policy considerations as a ruling for the plaintiff would in effect create a public insurer for investors on taxpayer dollars".

²¹⁶³ John Murphy, John, 'Expectation Losses, Negligent Omissions and the Tortious Duty of Care' (1996) 55 (01) *Cambridge Law Journal* 43, 55.

In conjunction with the issues of control, corporate superior responsibility, the assumption of responsibility, and self-sufficiency as explained above, representations by the defendant that it will take action for the plaintiff's benefit can indicate proximity,²¹⁶⁴ as can be the case when the defendant has benefited economically from the circumstance giving rise to the violations.²¹⁶⁵ As also observed in the *Childs* case, "the vulnerability of the plaintiff and the later subjection to the control of the defendant creates a situation where the latter has an enhanced responsibility to safeguard against risk".²¹⁶⁶ Even though this research recognises that this statement was made regarding a paternalistic relationship (such as between a teacher and student), it acknowledges that a duty can be established by the high level of control by the corporate, attached with the specific vulnerability and dependence of the victim. Consequently, in a situation where it is not possible for the plaintiff to establish a duty of care due to the plaintiff own vulnerability, it may be fair, just, and reasonable to impose a duty of care. In the absence of evidence of the latter, the defendant receives an economic benefit from the subsidiary action. Through a reduced human rights standard, the corporation benefits from this, and establishes a reputation that has the ability to influence human rights condition of the business operations. Furthermore, a claim would be strengthened if the defendant knew that its undertaking was the main protective mechanism for employees and society in the subsidiary business operations.²¹⁶⁷

Therefore, the key factor for the court to consider when determining whether the defendant did indeed act reasonably is the likelihood and the gravity of the harm that could reasonably have been foreseen, so if example, the greater the likelihood of human rights violation, then the court should assume that greater care and discretion should be exercised to prevent and protect the rights of the victims. The best way for the court to make sense of this all is to understand that at each stage of foreseeability, proximity, and fair, just, and reasonable, the court must ask slightly different questions in relation to the duty of care. The first question is whether the human rights violations was a reasonably foreseeable consequence of the defendant careless action, the second question is asking whether the foreseeability was sufficiently grave and likely that the defendant should have done more than they did to avoid the human rights violation from happening. The third is asking not only if the violation was foreseeable but how likely was it that the violation might cause the serious harm that the

²¹⁶⁴ *Ibid.*

²¹⁶⁵ *Cooper v Hobart* (n 2132).

²¹⁶⁶ *Childs v Desormeaux* (n 1746).

²¹⁶⁷ *Ibid.*

defendant could reasonably have foreseen? If these questions are answered affirmatively then the court should conclude that it is fair, just, and reasonable to impose a duty of care on a corporation.

5.36. Parent Corporation Liability for Human Rights Violations Caused by Subsidiary Business Operation

Apart from the question of direct or collective corporate accountability for human rights abuses, international law, and tort law (vicarious liability) acknowledges a special and substantial form of omission liability in the doctrine of superior or command responsibility. The doctrine seeks to enforce responsible command by extending criminal liability to a superior who fails in a duty to prevent, stop, or punish the crime of their subordinates.²¹⁶⁸ This doctrine of superior responsibility has its route in the ancient origin and has been included in the national military law as well.²¹⁶⁹ It is thus established that superior responsibility is not only confined to military commanders or war but also extended to civil superiors,²¹⁷⁰ such as corporate officials, to crimes against humanity and genocide,²¹⁷¹ and environmental damage.

Relating this to business official's accountability (corporate official here is referred to the active brain of the corporation, i.e. the senior management and director) for corporate misconduct, the present study raises the possibility that when the doctrine of command responsibility that emerged in the international criminal law, duty of care, assumption of responsibility and vicarious liability in tort law applies to corporate officials duties. It will be perfect to impose a duty of care on the parent corporation, as the contractual obligation with the corporate established command responsibility principle. This then makes a business liable for the corporate subsidiary human rights violation.

This finding, while preliminary, suggests that three separate obligations will trigger corporate duties to protect and respect human rights. The first is the duty to prevent subordinate corporations and its officials from violating human rights; the second is the duty to intervene to stop ongoing human rights misconduct in its business operations; and the third is duty to

²¹⁶⁸ Alphons MM Orie, 'Stare Decisis in the ICTY Appeal System? Successor Responsibility in the Hadžihasanović Case' (2012) 10 (3) *Journal of International Criminal Justice* 635, 644.

²¹⁶⁹ Beatrice I Bonafé, 'Finding a Proper Role For Command Responsibility' (2007) 5(3) *Journal of International Criminal Justice* 599, 618.

²¹⁷⁰ Gideon Boas, James L Bischoff and Natalie L Reid, *Forms of Responsibility in International Criminal Law* (Cambridge University Press 2007).

²¹⁷¹ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Vol. 41. Cambridge University Press 2005).

sanction subordinate (subsidiaries), (refer them to punishment) for having engaged in human rights abuses.²¹⁷² Each of these duties is distinct and separate, hence, a corporation may be liable for failing to prevent a human rights violations in its business operations. Specifically, where the corporation have assumed the overall responsibility for the operation of the business. There will exist a rebuttable presumption that the corporation is liable for the misconduct, regardless of the knowledge of the abuses or the link between the home states.

This result may be explained by the fact that the extensive examination of post-World War II case law, the ICTY in the seminal 1998 *Celebic*²¹⁷³ judgment determined that doctrine has three essentials.²¹⁷⁴ The study suggests that corporate accountability subsidiary conduct follow the three essentials; first, the notion is that corporate officials and subordinates (including subsidiaries) must have a relationship where the former enjoyed effective control, that is, the material ability to prevent, stop or punish the subordinate (subsidiaries) for human rights violations.²¹⁷⁵ Effective control in this context means, for example, the corporate official power to issue order to the alleged subordinates (subsidiaries), the subordinates (subsidiaries), tendency to follow these orders, the corporate influence or respect among the subordinates (subsidiaries), and the corporate official ability to reprimand or stop suspected subordinates (subsidiaries) for committing human rights abuses.²¹⁷⁶

The second is, the corporation must have either the knowledge or reason to know the subordinates (subsidiaries) human rights misconduct.²¹⁷⁷ For the latter, two common standards that have been posited are (1) negligence, where the corporate bear liability if he should have known of the misconduct, implying a duty to stay informed of the subordinates (subsidiaries);²¹⁷⁸ or (2) constructive knowledge, where the corporate bear liability only if he

²¹⁷² ICC Statute Article 28 (a) (ii), (b) (iii); Volker Nerlich, 'Superior Responsibility under Article 28 ICC Statute for What Exactly is The Superior Held Responsible?' (2007) 5(3) *Journal of International Criminal Justice* 665, 682.

²¹⁷³ Marco Sassòli and Laura M. Olson, 'Prosecutor v. Tadić (Judgement) Case No. IT-94-aA. 38 ILM 1518 (2000) *American Journal of International Law* 571, 578.

²¹⁷⁴ Jean-Marie Henckaerts, Louise Doswald-Beck and Carolin Alvermann, *Customary International Humanitarian Law* (Vol. 1. Cambridge University Press 2005).

²¹⁷⁵ Sonja Boelaert-Suominen, 'Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of The First Significant Case Law Since The Second World War'. (2000) 41 *Virginia Journal of International Law* 747.

²¹⁷⁶ Mohamed Elewa Badar, 'Drawing The Boundaries of Mens Rea in The Jurisprudence of The International Criminal Tribunal for The Former Yugoslavia' (2006) 6 (3) *International Criminal Law Review* 313, 348.

²¹⁷⁷ Jenny S Martinez, 'Understanding Mens Rea in Command Responsibility from Yamashita to Blaškić and Beyond' (2007) 5(3) *Journal of International Criminal Justice* 638, 664.

²¹⁷⁸ Brian Seth Parker, 'Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations' (2012) 35 *Hastings International and Comparative Law Review* 1.

had enough information at his disposal to suggest misconduct and still took no action to learn where the human rights abuse had been, were being or were about to be committed,²¹⁷⁹ implying no duty to proactively seek out such knowledge.

The third and the last of the essential mechanism in this study which seeks to hold corporations accountable for their subsidiary misconduct, is that the corporation must fail to take necessary and reasonable measures to prevent, stop, or punish subordinate (subsidiaries) human rights abuse.²¹⁸⁰ The assessment of this failure depends on the corporate material ability to take action in the circumstance in question.²¹⁸¹ Finally, overall, this section strengthens the idea that parent corporate responsibility (superior responsibility) principles provide a strong avenue for corporate accountability for human rights violation under tort law. It also strengthens the idea that under command responsibility doctrine, the assumption of responsibility, the duty of care, the corporation can be held liable for human rights violation committed by its subordinates (subsidiaries).

The development of English and Canadian law recognised future plaintiff could also be assisted in the emerging principle that a parent company can be directly liable for human rights abuses caused by a subsidiary's business operation where it has assumed responsibility to either whole or partly for the business operation, as well as the protection of the plaintiff from the relevant human rights abuses. This is because the relationship between a parent corporation and subsidiary is very close, especially where the parent corporation has direct control over the actions of its subsidiary through finance, business policy, knowledge, and voting powers. Nonetheless, where a parent corporation, such as oil and gas, has significant control over its supplier's operations and, more specifically, its human rights standard, the relationship is parallel to *Caparo* Test, commander and servant relationship, thus, a duty of care is owed in this instance.

However, neither the UK, U.S., Canada nor the Netherland courts have yet made a final determination on a direct parent corporate responsibility. It is vital to note though, that the Ontario Superior Court have refused to strike out claims of this nature in the decisions at *United*

²¹⁷⁹ Protocol I, Article 43 (“Knew, or had information which should have enabled [superior] to conclude in the circumstance at that time”).

²¹⁸⁰ *Ibid*

²¹⁸¹ Volker Nerlich, ‘Superior Responsibility under Article 28 ICC Statute for What Exactly is The Superior Held Responsible?’ (2007) 5 (3) *Journal of International Criminal Justice* 665, 682.

Canadian Malt Ltd v Outboard Marine Corporation of Canada Ltd,²¹⁸² and *Choc v Hudbay Mineral*.²¹⁸³ Similarly, direct parent corporate liability is also noted in the recent decision in English Court of Appeal in *Chandler v Cape Plc*.²¹⁸⁴ If, however, there is more specific knowledge about the relationship between the corporation and the subsidiary, then, the court should treat the relationship as possessing sufficient proximity to impose a duty of care on the parent corporations. After a careful examination of supply chain, parent corporate and subsidiary liability throughout this part of the research, the study will now focus its attention on this principle and how it should altered corporate liability by piercing the corporate veil. The first is to examine Canadian authority from the court, before assessing the English court authority on parent corporate liability.

5.36.1. Canadian Authority

Direct parent company liability for human rights violation caused by a subsidiary's operation was first heard in Canada by the Ontario Superior Court of Justice in *United Canadian Malt*.²¹⁸⁵ The defendant in *United Canadian Malt* was an American corporation with a Canadian subsidiary. The plaintiff alleged the parent corporation effectively controlled its subsidiary. The victims alleged that chemicals used on the Canadian subsidiary's property drifted into the plaintiff property. Particularly, it was claimed that the American parent corporation management directed and controlled the clean-up of the subsidiary's property, had represented that it was responsible for the environmental problem occurring as a result of improper environmental protection mechanism by its subsidiary business and had seized assets from the subsidiary after noticing the environmental contamination.²¹⁸⁶ Even though the Court was of the view that the plaintiff had an indisputable case for piercing the corporate veil and holding the parent corporate liable for the subsidiary's tort, the Court also suggested that the American parent corporation could be directly responsible (example without piercing the

²¹⁸² *United Canada Malt Ltd. v Outboard Marine Corp. of Canada* (2000), 48 O.R. (3d) 352 (S.C.). Can LII 22365 (ON SC) Environmental Protection Act struck out Environmental Protection Act, R.S.O. 1990, c. E.19, s. 99.

²¹⁸³ *Choc v Hudbay Minerals Inc.* 2013 ONSC 1414.

²¹⁸⁴ *Chandler v Cape plc* [2012] EWCA Civ 525.

²¹⁸⁵ Madeleine Conway, 'New Duty of Care-Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains' (2014) 40 *Queen's Law Journal* 741.

²¹⁸⁶ *United Canada Malt Ltd. v Outboard Marine Corp. of Canada* (n 1812)

corporate veil) on the fact that it had assumed responsibility for the environmental contamination issues.²¹⁸⁷

Likewise, the Ontario Superior Court of Justice considered this issue again in 2013 in *Hudbay Minerals*,²¹⁸⁸ another signal to strike the corporate veil. The claimant in *Hudbay Mineral* were indigenous Guatemalans that have lived in a community where the Guatemalan subsidiary of Canadian Mining Corporation operated. The plaintiff claims that a security company working for the Guatemalan subsidiary committed serious human rights violations (including rape and murder) when removing the indigenous residents from their own land for the purpose of the mining operation.²¹⁸⁹ The claimant brought an action against the Guatemalan subsidiary and the Canadian parent corporation.

The Superior Court refused to strike out the claim against the parent corporation. The Court specifically depend on the evidence that the parent corporation had made a public statement that it was committed to promoting human rights in its Guatemalan operations (including claiming to have conducted extensive training of security personnel), that will have led to a high expectation of adherence to human rights standards.²¹⁹⁰ The decision acknowledges public statements by a corporation to protect subsidiary, which can illustrate a relationship of proximity and assumption of responsibility.²¹⁹¹ Consequently, liability for subsidiary misconduct is controlled by this similar concept. The relationship between the plaintiff and the defendant are important here also, as the court has held that a high level of proximity is required before a duty of care will be imposed. This work in two ways, either there is sufficient proximity between the defendant and the claimant (such as in many contractual relationships) that make it appropriate for the defendant to be liable when subsidiary cause harm to the claimant, or there is sufficient proximity between the defendant and the subsidiary. Likewise, the court should find a duty of care if there is a relationship of control and/or responsibility between the corporate and the subsidiary. Additionally, the corporation may be

²¹⁸⁷ *Ibid.*

²¹⁸⁸ Valerie Crystal, Shin Imai and Bernadette Maheandiran, 'Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala' (2013).

²¹⁸⁹ *Ibid.*

²¹⁹⁰ *Ibid.*

²¹⁹¹ *Ibid* "Justice Brown was satisfied that the plaintiffs had alleged that CGN was Hudbay's agent at the relevant time, which if ultimately provable at trial would justify the piercing of Hudbay's corporate veil". Justice Brown noted that "whether or not this agency relationship is ultimately found to have existed at the relevant time, the allegation is not patently ridiculous or incapable of proof, and therefore must be taken to be true for the purposes of this motion".

liable for the action of the subsidiary when either were involved in human rights violations that caused the harm or have failed to abate a known human rights abuse by the subsidiary.

5.36.2. English Authority

Even though Canadian courts have yet to make a final determination on the direct liability of parent corporate responsibility, the English Court of Appeal recently affirmed in *Chandler* that under English law, a parent corporate may, in an appropriate situation, be directly liable for the subsidiary's workers.²¹⁹² Even though the appropriate circumstance illustrated by the Court of Appeal are particularly related to parent corporation and subsidiary relationship, the relevant parallels to the corporate duty of care in the tort of negligence is substantial same here.

The claimant in *Chandler* had contracted asbestosis from exposure to dust while employed by Cape Products, a subsidiary of Cape Plc.²¹⁹³ The asbestos business was legally owned and operated by Cape Products, but Cape Plc maintained a significant level of control over Cape Products. Cape Plc was not responsible for the executing health and safety measures at Cape Product or for devising or implementing operational health and safety policies. Nonetheless, there was a fact to prove that Cape Plc was involved in specific problems relating to health and safety policy at Cape Products. Specifically, Cape Plc was engaged in a study of whether an employee diagnosed with asbestosis could continue to work in the corporation. The conclusion is that Cape Plc had a superior knowledge of the asbestos business because it operated its own asbestos factories and had a greater knowledge, resource than Cape Products. Hence, Cape Plc was aware of the link between asbestos production and asbestosis because its group medical adviser was engaged in the study on this issue and was aware that Cape Product's asbestos business was carried out in a way that exposed the employee to the risk of health problems.²¹⁹⁴ The claimant brought a negligence claim against Cape Plc, contesting that it owed him the direct duty of care to advise on or ensure a safe work environment.²¹⁹⁵ Following this valid argument, the Court of Appeal upheld the plaintiff's claim.

²¹⁹² Martin Petrin, 'Assumption of Responsibility in Corporate Groups: Chandler v Cape PLC' (2013) *Modern Law Review* 76, 603.

²¹⁹³ *Ibid.*

²¹⁹⁴ Charles Wild and Stuart Weinstein, *Smith and Keenan's Company Law* (Pearson Education 2013).

²¹⁹⁵ Robert McCorquodale, 'Waving Not Drowning: Kiobel Outside The United States' (2013) 107 (4) *American Journal of International Law* 846, 851.

What is relevant in *Chandler* case is that there is a significant parallel between the amount of control the parent corporate have over its subsidiary's health and safety operations and the amount of control it has over some of its research regarding the employee, in comparison with the other case in the Ontario Superior Court. Reviewing these positions, the presumption is that a duty of care may exist in *Chandler*, therefore, the court should result in the appropriate human rights duty of care test and questions established here to determine the extent of the liability of the parent corporation.

Accordingly, the authority to monitor and respond to a particular human rights issues in a subsidiary working environment may have, at the very least, control over specific human rights problems as Cape Plc had over its responsibility to Cape Product. Likewise, there could be a sufficient relationship to establish that the defendant has also an ongoing involvement in the problem that is relevant to health and safety policy if the court applies the concept of proximity to the defendant's conduct. Thus, taking a more general approach, the corporate responsibility for on-the-ground implementation of health and safety policies and the management of human rights problem, fulfil the three essential elements of imposing a duty of care, which includes foreseeability, proximity, fairness, justness, and reasonability.

The Court of Appeal in *Chandler* also identified four factors relevant to a duty of care, two of which would be difficult to apply in a situation where the parent corporation does not engage or have full control over the subsidiary conduct.²¹⁹⁶ In summary to Cape Plc's involvement in Cape Products operations, the Court of Appeal concluded that "in appropriate circumstance, the law may impose on a parent corporate responsibility for the health and safety of its subsidiary employee".²¹⁹⁷ The Court then set out the four factors that, in the case before it, supported a duty of care such as

- “1. the business of the parent and subsidiary are in a relevant respect the same;
2. the parent has, or has, superior knowledge on the relevant aspect of health and safety in the particular industry;

²¹⁹⁶ *Chandler v Cape plc* (n 2104). “The basis on which the judge found there was a duty of care on the part of Cape is on the basis of an assumption of responsibility. This falls within the second and third parts of the three-part Caparo test for determining whether there is a duty of care, namely proximity and the further requirement that it be fair, just and reasonable to impose liability. These two requirements are directed to the essentially same question. As Lord Oliver pointed out in Caparo: “Proximity” is, no doubt a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances in which, pragmatically, the courts conclude that a duty of care exists”.

²¹⁹⁷ *Ibid.*

3. the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and

4. the parent corporation knew or ought to have foreseen that the subsidiary or its employee would rely on its using that superior knowledge for the employee protection".²¹⁹⁸

In an observation, the Court of Appeal's first factor is the business operations of the parent and the subsidiary. In *Chandler*, the court found that the business operations of the parent corporation are the same as the subsidiary, indicating a requirement that the parent corporation and the subsidiary are operated as one, at least in regard to the relevant dangers posed by the nature of the business. However, in a critical analysis, it could be observed that the court did not intend such a high threshold. This is evidenced by the Court of Appeal's acceptance that health and safety was not, on the whole, centrally managed by Cape Plc.²¹⁹⁹

Likewise, there was no evidence that Cape Plc, was controlling Cape Product health and safety policy or was responsible for the actual implementation of health and safety policy at Cape Product. The problem is whether Cape Plc was expected to take a step or give advice about the dangers of asbestos to the health of the employee working at Cape Product factory, given that Cape Plc had involved itself in some matter of health and safety policy (i.e. in relation to capital expenditure and product design).²²⁰⁰ Another meaning of this is suggested by Sanger, where the author stated that parent corporation and a subsidiary in *Chandler* produced the same product.²²⁰¹ However, the vital point is that this factor is not properly discussed in the judgment, thus, it is difficult to see how the overlap in the business product is, of itself, vital to the establishment of a duty of care for the parent corporation. Having said that, if the Canadian court adopts this factor in a parent corporation and in a subsidiary context, it should satisfy a duty of care claim, where the parent corporation business objective is same as the subsidiary.

The second challenging factor from *Chandler* concerns asymmetrical information that a parent corporation has or should have had, superior knowledge of some aspect of health and

²¹⁹⁸ *Ibid.*

²¹⁹⁹ *Ibid.*

²²⁰⁰ Peter Rott, and Vibe Ulfbeck, 'Supply Chain Liability of Multinational Corporations?' (2015) 23 (3) *European Review of Private Law* 415, 436.

²²⁰¹ Andrew Sanger, 'Crossing The Corporate Veil: The Duty of Care Owed By a Parent Company to The Employees of Its Subsidiary' (2012) 71 *Cambridge Law Journal* 3, 478

safety in the specific industry.²²⁰² A typical example of asymmetrical information would be where a defendant corporation knows more about the danger of a specific piece of equipment than its subsidiary. Nonetheless, the asymmetric information would not be present where the defendant corporation had allegedly failed to monitor or respond to a danger associated with the work or working environment. It is argued here that the purpose of the asymmetric information factor in the English Court of Appeal's reasoning was to limit its duty of care to a situation where it should have been obvious to the defendant that relevant corporate would not address the risk unless the defendant intervened, which is relevant to a duty of care claim.

For that reason, it must be stressed that the Court of Appeal did not frame the four factors as a requirement, but rather as an example of the situation, where it is appropriate to find a duty of care.²²⁰³ Furthermore, when addressing a parent corporation and its subsidiary relationship it may be appropriate for a court to find a duty of care even though not all of the factors observed in *Chandler* will be present. Specifically, if there is evidence of a high degree of control and involvement by the parent corporation in the subsidiary business operation. In this circumstance, it will be perfect for the court to seek the basic principle of duty of care, in order to arrive at a moral and legally justifiable conclusion. This is because the recognition of a duty to avoid harm to person or his property raises no unique problem of the neighbourhood principle in *Donoghue v Stevenson*.²²⁰⁴

5.36.3. The Application of Duty of Care in Shell Nigeria Litigation

The Hague District Court recently rejected an attempt by Nigeria, fisherman and farmers, to apply the *Chandler* decision to three cases against Shell parent companies in situations similar to the duty of care claim in the English Court of Appeal (the Shell Nigeria Litigation).²²⁰⁵ A court considering a duty of care claim would be unlikely to give much weight to this judgment due to their unusual origin and problems with The Hague District Court's reasoning. The claimant in the Shell Nigeria lawsuit claims that they suffered harm due to the oil pollution from installations operated by Shell in Nigeria and brought a lawsuit against two

²²⁰² *Chandler v Cape plc* [2012] EWCA Civ 525.

²²⁰³ *Ibid.*

²²⁰⁴ *Donoghue v Stevenson* [1932] UKHL 100.

²²⁰⁵ *A.F. Akpan v Royal Dutch Shell Plc*, NO C/09/337050/HA/ ZA 09-158 (Netherland), *Dooh v Royal Shell Plc*, No, NoC/09/337058 HA ZA 09-1581 (Netherland), *Oguru v Royal Dutch Shell Plc*, No C/09?330891/ HA ZA 09 057.

Shell parent companies, as well as Shell Nigeria a subsidiary.²²⁰⁶ What is interesting in the case is that The Hague Court applied Nigeria law, but depends on English jurisprudence, specifically in *Chandler*. The claimant argued that Shell parent corporations owed a duty of care because they were aware of the risk of the oil spillage in Nigeria²²⁰⁷ and had publicly announced that they intended to prevent oil spillage in Nigeria, and in practice interfered with the exercised influence on the subsidiary in Nigeria.²²⁰⁸

The Hague District Court found those factors were insufficient to give rise to a duty of care for five reasons. ‘1. the relationship between the parent corporation and the workers of its local subsidiary (as *Chandler*) is not closer than the relationship between a parent corporation and a person living in the community where a local subsidiary carry out its business activities;²²⁰⁹ 2. Shell’s subsidiary was indirectly responsible for the oil spillage, as the court found the oil spillage was caused by sabotage,²²¹⁰ whereas in *Chandler* the subsidiary had directly harmed its workers by allowing them to work in a dangerous environment, that have caused harm to their health;²²¹¹ 3. The business of the parent corporations and the subsidiary were not fundamentally the same because the parent corporations created general policy guidelines and were involved in a global strategy and risk management, whereas the subsidiary was involved solely in oil production in Nigeria;²²¹² 4. It was not clear that Shell parent corporations had more knowledge regarding the specific dangers of the oil spillage than the local subsidiary, which was directly engaged with the business operations in Nigeria;²²¹³ and 5. Because the Nigeria subsidiary was the party on the ground with the greatest awareness of

²²⁰⁶ Liesbeth Enneking, ‘Future of Foreign Direct Liability: Exploring the International Relevance of the Dutch Shell Nigeria Case’ (2014) 10 *Utrecht Law Review* 44.

²²⁰⁷ Judith Schrempf-Stirling and Florian Wettstein, ‘Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations’ Human Rights Policies’ (2015) *Journal of Business Ethics* 1, 18.

²²⁰⁸ *Ibid.*

²²⁰⁹ Lee J McConnell, ‘Establishing Liability for Multinational Oil Companies in Parent/Subsidiary Relationships’ (2014) 16 (1) *Environmental Law Review* 50, 59.

²²¹⁰ *A.F. Akpan v Royal Dutch Shell Plc* (n 2140).

Akpan submitted that he came in possession of the land and the fish ponds by using and cultivating them. Under Nigerian common law, this can lead to possession of land and fish ponds, as inter alia follows from *Mogaji & Ors. V Cadbury Fry Export Ltd.* (1972), given that in that matter, the Nigerian court found that if a person demonstrates that he cultivates agricultural land, this constitutes sufficient evidence to determine that he is in possession of that land. The same will apply for the fish ponds on the land. In addition, after the interlocutory judgment of 14 September 2011, Milieudéfensie et al. furnished the statement described in ground 2.12 above by sixteen chiefs of the Ikot Ada Udo community, from which the District Court understands that according to the local community, Akpan in any event had and has the required possession of the contaminated land and fish ponds at issue.

²²¹¹ *Ibid.*

²²¹² *Ibid.*

²²¹³ *Ibid.*

local conditions, it was not clear why the community would rely on the parent corporation to protect them from oil spillage.’²²¹⁴

However, in an overview of the case, this study argues that the Hague District Court received the judgment and the interpretation of *Chandler* principles in a wrong manner. It did not correctly apply the principle of duty of care, as well as the concept of foreseeability, proximity, and fair, just and reasonable to impose a duty of care on the parent corporation. The appropriate question for the court is to ask, whether at any time: did Shell exercise control over the subsidiary, both financial and sharing of business knowledge; and did Shell assumed responsibility at any time for the operation of the oil project in Nigeria? Did Shell turn a blind eye that led to environmental damages? Perhaps, if the court were to ask the appropriate question in this circumstance, they should have found that Shell does owe a duty of care to the subsidiary company and the plaintiff. This point is reached because another way someone can assume responsibility for the wellbeing of someone else's is by actions or by doing nothing (omission). To put it another way, what someone does in relations to someone else can indicate, by conduct, an assumption of responsibility. A clear example can be seen in the English case in *Barrett v Ministry of Defence*.²²¹⁵

Shell knew about the subsidiary misconduct, knew about the danger posed by oil spillage that is why it has developed a global strategy and policy to deal with the problem. Shell benefits from the subsidiary business activities, Shell has a greater knowledge about the dangers and the expert knowledge of the protective guidelines for oil spillage, therefore there is a presumption that Shell should owe a duty of care and it is fair, just and reasonable to impose liability on Shell as it is in a much better position to afford the damages for the harm caused to the plaintiff. Also, in terms of turning a blind eye for the risk of oil spillage, the established English case *Goldman v Hargrave*, illustrates a similar idea. Here, a tree caught fire after being struck by lightning. The landowner ensures that the tree was cut down, but decided to let it burn itself out and took no further precaution to stop the fire from spreading. As a result, although he had not caused the fire, in deciding not to take any further steps to completely extinguish it he had adopted the risk that it might spread. Extensive damage was caused to a

²²¹⁴ *Ibid.*

²²¹⁵ *Barrett v MOD* [1995] 1 WLR 1217. “The MOD were liable, not through breach of a duty of care to prevent him becoming dangerously intoxicated, Until the deceased became unconscious, he alone carried the legal responsibility for his own actions, however, once the senior officer assumed a responsibility for him by ordering the Petty Officer to look after him a duty of care did arise. He was in breach of duty by failing to ensure the deceased received the appropriate supervision”.

neighbouring property when the fire was revived by the wind and spread. The Privy Council found that a duty of care was owed in relation to adopted danger existing on one's land when that danger could spread to a neighbour land.²²¹⁶

The final question is what did Shell do and what it did not do, answering this question could prove a vital point in the case. Therefore, it is argued here that the court judgment lacks legal standing and moral merit in relation to the principle of a duty of care. Nonetheless, Shell Nigeria lawsuit has a limited persuasive value for a duty of care claim because it was decided by a Dutch court applying English via Nigerian law. Furthermore, the Dutch Court's reasoning is very confusing and lacks an understanding of the concept of the tort of negligence in three ways. 1. The Court appears to have treated the collection of factors identified in *Chandler* as mandatory and applied it incorrectly, rather than as guidelines to find a duty of care in an appropriate circumstance, as they were framed by the English Court of Appeal;²²¹⁷ 2. The difference between an offshore parent corporation and local subsidiary is not supported by *Chandler*, therefore, the court should have resulted to the basic principle of finding a duty of care, as establish in *Caparo* and 3. The indirect cause of the oils spillage should not be relevant in assessing whether the parent corporation has a duty of care to take a step to prevent oil spillage as a result of its subsidiary's negligence operations.

In summary, the Dutch Court should only have considered this factor as part of Shell breach of the duty of care and causation examination. Considering the facts in the judgment, the Shell Nigeria lawsuit illustrates, at most, the factual difficulty in establishing a duty of care where a third party have caused harm to a society and also has a degree of responsibility to protect the claimant. Consequently, the recommendation here is that for a corporation to be exempt or escape liability, its conduct must meet a certain standard, the standard of reasonable care. Accordingly, a corporation will breach the duty of care where their conduct falls below the standard the law set for all actors (the neighbourhood principle). The requirement that the corporate will be liable for the tort of negligence only where it has failed to exercise reasonable care suggests that negligence liability is both premised and dependent on fault. For that reason,

²²¹⁶ *Goldman v Hargrave* [1967] Ch 645 Privy Council A 100. A 100 foot red gum tree on the defendant's land was struck by lightning and caught fire. The following morning the defendant contacted a tree feller to cut down the tree saw it into sections. The wood was still smouldering and the defendant failed to douse it with water to eliminate the risk of fire. Over the next few days the weather became very hot and reignited the fire which spread to neighbouring property.

Held: The defendant was liable for the naturally occurring danger that arose on his land as he was aware of the danger and failed to act with reasonable prudence to remove the hazard

²²¹⁷ *Chandler v Cape plc* [2012] EWCA Civ 525.

a claim should be successful if the plaintiff is able to establish the fault, and the essential elements of tort explained at the beginning of the chapter.

5.36.4. The Application of Duty of Care in The Ninth Circuit's Decision in *Doe I v Wal-Mart Stores*

The US Ninth Circuit Court's judgment in *Wal-Mart Stores* was inevitable to address in this research because it is the only decision to consider the duty of care to protect employee's rights in subsidiary business operations in America. However, this research took the opposite view and argued that the Ninth Circuit Court decision conflict with the undertakings to protect a contractual duty, which is inconsistent with the principle of duty of care. The claimant in *Wal-Mart Stores* were employed by Wal-Mart's subsidiaries in a number of countries such as China, Bangladesh, Indonesia, Swaziland, and Nicaragua.²²¹⁸ Wal-Mart's contract with the subsidiaries included a code of conduct requiring the subsidiaries to comply with the labour law and industry standards (the Wal-Mart Standards).²²¹⁹

The subsidiary contract also provided that Wal-Mart would undertake strict conditions to implement and monitor the labour law and industry standard, including on-site inspection of production facilities (which were carried out).²²²⁰ Therefore, the failure for the subsidiary to comply with these standards could result in Wal-Mart ending the contractual relationship. Also, the subsidiary contract further required the subsidiary to post local language copy of the Wal-Mart Standards in their workplace. Examining Wal-Mart's conduct, it is clear that the corporation has control over its subsidiaries and has assumed responsibility. Its failure to have acted to enforce these standards has resulted in the creation of risks (i.e. human rights violations). In assessing the Ninth Court judgment, the court depends on the California Supreme Court's summary of the principle of negligent undertaking in *Delgado v Trax Bar and Grill*, which concluded that "a volunteer who, having no initial duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertakings if one of the two conditions is met: either (a) the

²²¹⁸ *Wal-Mart Stores* (n 2011).

²²¹⁹ *Ibid.*

²²²⁰ *Ibid.*

volunteer's failure to exercise such care increase the risk of harm to the person, or (b) the other person reasonably relies upon the volunteers undertakings and suffer injury as a result".²²²¹

As noted, condition (a) and (b) of the test overlaps significantly with the duty of care requirement for the third party under English legal system or the reasonable man test rule. The Ninth Circuit Court focused on the initial problem of whether Wal-Mart had undertaken to provide service to the claimant.²²²² Wal-Mart contests that this required a clear express, active undertaking.²²²³ Similarly, in the initial decision, the Ninth Circuit Court had rejected a different claim based on the third party beneficiary of the contract, arguing that Wal-Mart had simply reserved the right to inspect its subsidiary workplace, but had not adopted a duty to inspect the factory. This was the court's initial finding, because the contract contained consequences for a subsidiary failing an inspection, but contained no consequence for Wal-Mart if it did not fulfil its contractual claims.²²²⁴ This is very contradictory, as it appears that the Ninth Circuit Court treated the claimant negligent undertaking case essentially as a repeat of this third party beneficiary claim, by asserting that "Wal-Mart merely reserved the right to cancel its supply contract if inspection revealed contractual breaches by the supplier".²²²⁵ It seems that the court is of the view that any inspection carried out by Wal-Mart did not distort the conclusion as there was no duty to inspect, so any inspection carried out was gratuitous.²²²⁶

²²²¹ *Delgado v Trax Bar & Grill* (2005) 36 C.4th 224, Accordingly, *Ann M. v Pacific Plaza Shopping Center* (1993) 6 C.4th 666, 25 C.R.2d 137, 863 P.2d 207, 6 *Summary* (10th), *Torts*, §1136, guards. Under *Ann M. and Sharon P. v Arman Ltd.* (1999) 21 C.4th 1181, 91 C.R.2d 35, 989 P.2d 121, 6 *Summary* (10th), *Torts*, §1135, it is only when there is "heightened foreseeability" of third-party criminal activity on the premises shown by prior similar incidents, or other indications of a reasonably foreseeable risk of violent criminal assaults, in that location that the proprietor's special-relationship duty. Relying on *Hassoon v Shamieth* (2001) 89 C.A.4th 1191, 107 C.R.2d 658, defendant asserted that a showing of heightened foreseeability, generally including proof of prior similar incidents, is always required when a plaintiff seeks to impose on a proprietor special-relationship liability related to the criminal conduct of a third party. (36 C.4th 242.) This position is inconsistent with *Ann M.* and its progeny, all of which, when articulating and applying the heightened foreseeability doctrine, expressly reaffirm the sliding-scale balancing formula articulated prior to and in *Isaacs v Huntington Memorial Hosp* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, 6 *Summary* (10th), *Torts*, §1134. These decisions recognise that, as a general matter, imposition of a high burden requires heightened foreseeability, but that a minimal burden may be imposed on a showing of a lesser degree of foreseeability. Thus, to the extent *Hassoon* "suggests that a showing of heightened foreseeability is required in all premises liability cases regardless of the extent of the burden sought to be imposed upon the defendant that aspect of *Hassoon* is disapproved". (36 C.4th 243, 244).

(e) Analysis of present case. Here, defendant owed a duty to plaintiff under the special relationship doctrine. (36 C.4th 244).

²²²² *Wal-Mart Stores* (n 2201).

²²²³ *Ibid.*

²²²⁴ *Ibid.*

²²²⁵ *Ibid.* "This statement was made with cross-reference to the Courts decision regarding the third party beneficiary claim."

²²²⁶ *Wal-Mart Stores* (n 2210). (Appellant's Reply Brief at para 48).

The fundamental flaw in the judgment is that the decision that there is no undertaking is surprising given that Wal-Mart publicly stated that its basic objective of its Factory Certificate Program, which it used to implement the Wal-Mart Standards, was to enhance the implementation of the necessary steps that will finally lead to the improvement of human rights standards for the employees who work in its subsidiary factory. Nonetheless, in England and Canada, there is no threshold question of whether this corporation has assumed responsibility or undertaken to protect the claimant. However, such an argument can be negated, as the question is whether there is a sufficient proximity between the plaintiff and the defendant. The UK Supreme Court has addressed this point affirmed, “holding that assumption of responsibility simply mean that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by the law”.²²²⁷ In addition, the Ninth Circuit Court considered that employee duty of care claim was answered by the fact that there is no contractual duty to protect them,²²²⁸ whereas in the UK and Canada courts do not require a contractual duty or legal relationship to find a duty of care, even in a duty to act case or where the loss happened indirectly.²²²⁹ An example is the case of *Godwin*, where the British Columbia Court of Appeal did not limit the defendant contractor’s duty to protect simply because it had not contracted to remove the ice from the specific part of the road.²²³⁰

The *Wal-Mart stores* case shows how difficult it to establish a duty of care in corporate negligence conduct, it also shows the jurisprudential differences and the different interpretation of the concept of duty of care, but, the indication in this study suggests that the court in America and the Netherland have failed to establish *prima facie* legal justification for not finding a duty of care. In a further analysis, it also found that the court has applied the legal concept of a duty of care incorrectly. The suggestion here is that the duty of care should not be restricted or limited to particular contractual obligations but should be seen and examined through control, knowledge and conduct. Likewise, the Ninth Circuit Court did not consider whether the claimant had relied on the undertakings in dismissing the lawsuit. This study also acknowledges that this problem was briefly addressed in the hearing as well as the question from the bench during the oral argument. However, the duty of care should require Wal-Mart to take reasonable steps to assess whether their conduct could lead to violations of rights or

²²²⁷ *Phelps v Hillingdon* [2001] 2 AC 619.

²²²⁸ *Wal-Mart Stores* (n 1700).

²²²⁹ Allen M Linden and Bruce Feldthusen, ‘Canadian Tort Law, 8 e éd. Markham’ (2006) *LexisNexis Butterworths* 568.

²²³⁰ *Goodwin v British Columbia (Superintendent of Motor Vehicles)* [2015] 3 SCR 250.

contribute to it, which it has failed. On the point of law, a duty of care could be said to exist. In a certain situation, the relationship between the corporation and the subsidiary should meet the requirement for the three tests to impose a duty of care. Especially, where it is established that the defendant had a sufficient control of the risk of human rights abuse of the claimant in the workplace.

Finally, to some extent, the UK Court of Appeal's decision in *Chandler*, concerning direct parent liability to a subsidiary set out a clear guideline for a future duty of care claim to follow. Therefore, this research suggests that future corporate human rights violation decision should follow the development in the UK Court of Appeal and the Neighbourhood Principle. In short, corporations must take reasonable care to avoid harm to those (or should) reasonably foresee that there will be harm if they do not take such care. Though note, however, that Lord Atkin makes no reference to the specific type of damage in relation to whether a duty of care may arise or how damage may be caused. The concept of duty of care suggests that if it was to be applied correctly to the above cases, then, the presumption will be that a reputable duty of care arises in these cases and the parent's corporation should have been found liable for the misconduct of their subsidiaries and effective remedy should be awarded.

What is evident in all these cases is that the defendants could be said to owe a duty of care to the victim for the subsidiary misconduct. This also means the defendant's conduct falls below a certain standard, the standard of the reasonable care exercised by the corporation. Accordingly, a defendant breaches their duty of care where their conduct falls below the standards that have been set, they should be liable for the harm caused. It is further suggested that the judgment of *Vedanta*, *Equion Energia*, and *Xstrata Ltd* should follow the principle of duty of care laid down in this study. This principle will allow the courts to be able to find a corporate duty of care without any jurisdiction or corporate impunity impediment. Also, it has been observed in this research that courts in the past have proved a duty of care by using the “*but for test*” hence this not a new developing concept. In cases from other jurisdiction raising the issue of the inability to prove which of two negligent defendants actually caused harm, the court long ago found another novel way to circumvent a duty of care impediment by using the *but for test*. In the U.S. case of *Summers v Tice* (1948)²²³¹ and the similar Canadian case of *Cook v Levis* (1948),²²³² the court shifted the burden of proof in this type of situation to the

²²³¹ *Summers v Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). “The trial court held that both Defendants were liable. Defendants appealed on the grounds that they were not joint tortfeasors, they were not acting in concert and there was insufficient evidence to show which of them was negligent”.

²²³² *Cook v Levis* [1951] SCR 830.

defendant. Shifting the burden of proof meant that the court asked the defendant to prove that he was not responsible and if neither could do this then, the court could hold both to accountable. This means that if a parent corporation claims it is not liable or owed a duty of care, then the court can also result to the *but for test* and to impose a duty of care on both parties (meaning the parent corporation should be liable for the subsidiary harm). In these circumstances, it is fair, just, and reasonable to impose liability on the parent corporation. This principle will also allow the court to examine the core context of the corporate conduct and liability finding. It will also allow the court to pierce the corporate veil in certain circumstances when it is fair, just, and reasonable to impose a duty of care on the parent corporate.

5.37. Problematic Aspect of Duty of Care

It is acknowledged in this research that it is a matter for the court to decide, through the fundamental concept of duty of care whether a defendant owe the claimant a legal responsibility not to cause harm or violate the human rights of the employees. Therefore, if a *prima facie* duty of care is found, the next question for the court to ask is whether there is an outstanding policy issue to suggest that a duty of care should not be recognised or should be restricted. Possible policy concerning international politics, international relations, opening the floodgate argument, deterring corporate from engaging in business operations with subsidiary abroad, the existence of another avenue of judicial remedy, economic concerns and intrusion on the sovereignty of states in the country where the corporate conduct its business. This concerns will only negate the *prima facie* duty of care if they are compelling and a real potential for negative consequence is apparent, but it should not stop the court from finding a duty of care and award an appropriate remedy for the victims. However, it should serve as a guideline for the consequence of the court decision on corporate human rights violation cases.

5.37.1. Floodgate

The research recognised that the most commonly relied on policy ground to deny a duty of care is that it would open the floodgates to an indeterminate number of the claim at court.²²³³ Even though this has served as an obstacle in many duty of care claims, the study suggested here that the proposed duty of care here, however, would not carry “risk of liability for an

²²³³ *Hill v Hamilton-Wentworth Regional Police Services Boar* (1399).

indeterminate amount for an indeterminate time to an indeterminate class”.²²³⁴ This is because a breach of the duty of care will lead to a heavy sanction and remedy for human rights violations, as a result, it will force the corporation to abandon business conduct or policy that will give rise to a breach of the duty of care. It will also promote good business practice and force the corporation to only conduct business with a subsidiary that respects and enforces human rights standards, as the corporation will know that it will be liable for the future misconduct of the subsidiary.

As indicated throughout this chapter, in the *prima facie* duty of care analysis above, a corporation will only owe a duty of care in its business operation with a subsidiary where it has indirectly or directly assumed responsibility, has controlled, created, or contributed to the human rights violation. Therefore, the floodgate argument would be more compelling if the duty of care was not required to establish proximity because a corporation would then owe a duty of care to everyone in society, rather than only the victim that may have been affected by the misconduct. Nonetheless, even in this case, the proposed duty of care here would be restricted to situations where there is a significant economic relationship between the corporation and its subsidiary. The corporation could constrain its exposure by making accurate and demonstrable facts about the extent to which it is involved in the subsidiary operation, exercise control and protecting human rights in the subsidiary business activities.

5.37.2. Deterring Human Rights Violation in Corporation Business Operations

A more compelling policy concern is one that recognises that this duty of care would deter corporation from taking on the protective role in the subsidiary business operation, and therefore have a chilling effect on behaviour that should be encouraged. However, this study argues the contrary and observes that a duty of care will promotes good business practices and human rights standards. This argument was put forward in *Hudbady Minerals*.²²³⁵ Tort liability would unlikely put extreme responsibility on corporations, it will only impose a duty of care on corporations where their conduct is below what is seen as unreasonable in the eyes of the law, court, and where it has foreseen that its conduct will violate human rights, yet still continues with its despicable business conduct.

²²³⁴ *Ibid.*

²²³⁵ *Choc v Hudbay Minerals In* (n 2153).

Most importantly, a duty of care arises from a human rights violation in its subsidiary, where it has control, assumed responsibility, created or contributed to the harm, it does not deter the respect of human rights standards, but encourages the corporation to carry out a meaningful human rights policy and practice in all its business operations. A typical example is Nike, where it displays a poster of a child, for the argument that a corporation would be deterred from adopting an aspirational code of conduct due to fear that they would be sued for false and deceptive advertising,²²³⁶ but Nike has now arguably become an industry leader in addressing human rights problem in its subsidiary operations.²²³⁷ The issue of effective human rights standard has the possibility to deter corporations from engaging with human rights standards and lacks effective remedy. More generally, there is not one single empirical evidence to support the idea that corporation will step back from human rights responsibility initiative following Nike litigation.²²³⁸

5.37.3. Other Avenue for Corporate Human Rights Liability

Another potential policy issue is whether existing mechanism provides a sufficient path for a remedy for corporate human rights violations.²²³⁹ As observed above, corporations that falsely claim to regulate human rights in their subsidiary business operations could potentially be liable to the investor and other stakeholders in society. Likewise, the workers and the community that could allege that the corporation has failed to comply with the human rights standards is recognised universally by the international community. However, following the indication in chapter III and the argument throughout this study, none of the existing instrument would provide an effective remedy to the victim that have suffered loss due to a corporation negligent conduct in its business operations with the subsidiary. Accordingly, it is unlikely that the existence of these instruments would be sufficient to displace a *prima facie* duty of care for victims of corporate human rights abuses.

²²³⁶ Nicole Deitelhoff and Klaus Dieter Wolf, 'Business and Human Rights: How Corporate Norm Violators Become Norm Entrepreneurs' (2013) *The Persistent Power of Human Rights: From Commitment to Compliance* 22, 38.

²²³⁷ *Ibid.*

²²³⁸ David Hess and Thomas W Dunfee, 'The Kasky-Nike Threat to Corporate Social Reporting: Implementing a Standard of Optimal Truthful Disclosure as a Solution' (2007) 17 (01) *Business Ethics Quarterly* 5, 32.

²²³⁹ *Elliott v Insurance Crime Prevent Bureau*, 2005 NSCA 115 at para 84, 256 DLR (4th) 674 (where the court found that the existence of an alternative compensatory mechanism was a compelling policy reason against imposing duty of care).

5.37.4. Economic Concerns

The proposed corporate duty of care here could arguably have negative repercussions for international business. This argument was raised by US Chamber of Commerce, an amicus in *Wal-Mart Stores* case.²²⁴⁰ The chamber argued that:

“If such as Plaintiffs’ were actionable, companies operating in the United States will face a new burden in doing business overseas. Every time they entered into a commercial arrangement with a foreign company or in a foreign locale, they might be exposing themselves to potential liability, even when their action like the Defendant’s, in this case, are far removed from alleged harm. A retailer like a defendant, which stocks myriad types of merchandise, has thousands of suppliers in countries all over the globe. Controlling labour practice of all of this companies is simply impossible. In addition to the immediate harms to global companies, secondary harms will likely fall on consumers in the form of higher prices, as companies attempt to pass on their extra cost”.²²⁴¹

Nonetheless, this contention will be ignored here because of the fact that the proposed duty of care would reflect only on the level of control the corporation has over its subsidiary and the particular relationship between the corporations and its subsidiary business operation. Likewise, the study contested that if the level of control is internationally erased, the court should exercise discretion in order to find a novel duty of care. Additionally, the proposed duty of care will not impose an absolute duty on the corporations to guarantee the human rights of the employees and the communities which the subsidiary operates. Therefore, it is wholly appropriate, to state that the proposed duty of care may increase the operational cost for a corporation who operates overseas, but the increased cost are only borne by the consumer and investors. Therefore, in contentions, the corporation does not need to bear the cost for respecting human rights. As also observed by the former Supreme Court Justice, Binnie, “ordinary tort doctrine would call for the losses to allocated the ultimate cost of the products and borne by the consumers who benefit them, not disproportionately by the farmers and peasants of the Third World”.²²⁴²

²²⁴⁰ Anita Chan, ‘Walmart Workers in China’ (2008) *Globalization & the Workplace* 437.

²²⁴¹ *Wal-Mart Stores DC* (n 1700). (Brief of the Amicus Curie, chamber of Commerce of the United State of America at 12).

²²⁴² Ian Binnie, ‘Judging and Judges; May The Boldly Go Where Ivan Rand Went Before’ (2013) 26 (1) *Canadian Journal of Law & Jurisprudence* 5. This passage was relied on by the plaintiff in *Hudbay v Minerals*.

5.37.5. Impediment of State Sovereignty on Duty of Care

The last policy argument is that it is not the jurisdiction of home state courts to regulate human rights conduct of subsidiary in the host state. The general issue arising from human rights duty of care is the tension between the sovereignty of states that subsidiary operates and the human rights duties and corporate objective from state to uphold human rights duties in its jurisdictions. This tension is appropriately shown by the recent stalemate in the factory safety in Bangladesh between Bangladeshi government and two subsidiary collectives that were created following the Rana Plaza building disaster.²²⁴³

Nevertheless, it is the corporations themselves that run the risk of intruding on state sovereignty by undertaking to carry out a voluntary human rights duty to respect human rights, as well forcing states to reduce its human rights standards.²²⁴⁴ Thus, the enforceability of such undertakings by victims of human rights violations in a home state court would not substantially aggravate this intrusion on sovereignty. In certain cases, it may be inappropriate for the home state court to refuse to hear human rights violation that are linked with parent corporations within its jurisdictions. Therefore, the duty of care has no significant bearing on the sovereignty of the state, but, this problem can be dealt with on a case by case basis.

5.38. The Evidence Supporting the Imposition of a Duty of Care

The problem discussed above must be balanced against policy matters that support the imposition of a duty of care.²²⁴⁵ First, the imposition of a duty of care could deter corporations from turning a blind eye to human rights violations in its business operations and will additionally stop corporations in aiding and abetting human rights violations, as well as deterring corporations from falsely claiming to protect human rights in their business operations. Conversely, it will also encourage corporations to carry out more effective human rights impact and environment assessment. This is consistent with the principle of tort law, which includes, a disincentive to risk-creating behaviour.²²⁴⁶ It is also consistent to the acknowledgement that corporations should carry out subsidiary human rights assessment and

²²⁴³ Steven Greenhouse and Julfikar Ali Manik, 'Stalemate over Garment Factory Safety in Bangladesh' (2014) *New York Times*. "The tension has arisen due to attempts by the primary European-based Accord on Fire and Building Safety in Bangladesh and the North American-based Alliance for Bangladesh Work Safety to close building Bangladesh that have failed safety inspection".

²²⁴⁴ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP Oxford 2006).

²²⁴⁵ *Choc v Hudbay Minerals Inc* (n 2153).

²²⁴⁶ *Resurface Corp. v Hanke* [2007] 1 S.C.R. 333.

the general international commitment of promoting responsible business practice in the host state, in which the corporation carry out its business operations.²²⁴⁷

Furthermore, imposing a duty of care would also provide a remedy in a situation where the plaintiff would otherwise be denied a remedy or justice for a harm resulting from a parent corporation and its subsidiary negligent conduct, which is also the primary objective of tort law. Lastly, a defendant corporation would have benefited from the subsidiary human rights abuses in business operation, before a duty of care could be imposed. However, in the absence of control, assuming responsibility, creation, or contribution for human rights violations, then the corporation should be given the benefit of the doubt without imposing a duty of care on them.

5.39. Summary

There are calls for binding obligations for corporations to respect human rights.²²⁴⁸ This is formally highlighted in the voluntary mechanisms such as the Guiding Principles,²²⁴⁹ the OECD Guidelines,²²⁵⁰ the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,²²⁵¹ SA800 Standards,²²⁵² and now the proposed UN Binding Treaty on Transnational Corporations and Human Rights.²²⁵³ Nonetheless, the duty proposed in this thesis is much narrower. It would require corporations to ensure their conduct does not cause harm to those who can be affected by their business conduct, hence, it will only impose an obligation on a corporation whose conduct falls below the reasonable man standard. Additionally, the requirement of proximity would likely limit successful claims of a victim of human rights abuse, as the victims need to establish that the corporation foresaw the harm, the proximity between the victims and the corporation, and whether it is fair, just, and reasonable

²²⁴⁷ Radu Mares, ed. *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2011).

²²⁴⁸ Cindy S Woods, 'It Isn't a State Problem: The Minas Conga Mine Controversy and The Need for Binding International Obligations on Corporate Actors' (2014) 46 *Georgetown Journal of International Law* 629

²²⁴⁹ United Nations, *Guiding Principles on Business and Human Rights: Implementing The United Nations 'Protect, Respect and Remedy' Framework* (UN 2008)

²²⁵⁰ Elisa Morgera, 'OECD Guidelines for Multinational Enterprises' (2011) *The Handbook of Transnational Governance: Institutions and Innovations* 314

²²⁵¹ Hans Gunter, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (History, Contents, Follow-up and Relationship with Relevant Instruments of Other Organisations)* (No. 214282. International Labour Organization 1981)

²²⁵² Social Accountability International, 'SA8000 Standard Documents' (2014). <<http://www.sai-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937>> accessed 26 December 2016

²²⁵³ United Nations General Assembly, Doc A/HRC/RES/26/9 (2014). <<https://www.ihrb.org/pdf/G1408252.pdf>> accessed 26 December 2016

to impose a duty of care. However, it is argued here that this requirement should not be mandatory when it is absolutely clear that the corporation knows what it is doing or should have known what it ought to do and what it ought not to do, then the court should have found a novel duty of care.

This study has argued that in the right circumstance, tort law provides an effective remedy for victims who have suffered as a result of corporate negligence and a failure to respect human rights standards. It is further argued that the scope of the duty of care should expand through modification to incorporate the obligation which may arise in the UN treaty on transnational corporations and human rights to reflect on the development of tort law and the reality of the global economy. Nonetheless, a duty of care could also promote effective subsidiary respect to human rights standard in business operations. Finally, tort law may, therefore, have a significant role to play in promoting the accountability of the corporation for their human rights impact in the global economy more than the UN Binding Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights. Lastly, it is important for the court to first consider the question of liability in light of the general principles of negligence law, which is to impose liability for omissions parsimoniously. This demonstrates that the position of corporations can be considered without resorting to special immunities, this will allow the corporate to be held liable for most human rights violation caused by omissions. Therefore, the human rights law underlying the reluctance to impose liability for omissions in negligence more generally should be considered in the light of human rights duty of care.

Part II

Remedy and Enforcement of Human Rights and Environmental Damages

Chapter VI

6. Aims and Objectives of Chapter VI

The aims and objectives of this chapter are to examine the remedies that may be available to the victim of a corporate human rights violation in tort law. Under tort law, remedies should be considered once it is established that a tort has been committed and that no defence applies. The award of effective damage is the most important part of a remedy in practice; therefore, the tort of negligence must aim to put the victims back to where they were before the tort was committed. Sometimes, the commission of a tort that involves the misappropriation of the claimant's rights might enable the defendant to make a profit at the claimant's expense. In such cases, the claimant might be in a position to elect between a tort measure of damage and one based on the defendant's unjust enrichment.²²⁵⁴ Hence, the question is what is the appropriate remedy, what remedy should the legal system provide to victims of corporate human rights abuses and environmental damages?

This part of the chapter shall attempt to address this question by first looking at tort remedies for victims of transboundary environmental damage. It will assess the cause of action under the civil liability treaty and its effectiveness. It also uses Regime Theory to develop a model that explains how the intersection of international law and International Relations theory

²²⁵⁴ Peter Birks, *Unjust Enrichment* (OUP Oxford 2005), Dennis Klimchuk, 'Unjust Enrichment and Reparations for Slavery' (2004) 84 *Boston University Law Review* 1257 and Caprice L Roberts, 'The Case for Restitution and Unjust Enrichment Remedies in Patent Law' (2010).

Unjust Enrichment. A general equitable principle that no person should be allowed to profit at another's expense without making restitution for the reasonable value of any property, services, or other benefits that have been unfairly received and retained. English courts have recognised that there are four steps required to establish a claim in unjust enrichment. If the following elements are satisfied, a claimant has a *prima facie* right to restitution:

- the defendant has been enriched;
- this enrichment is at the claimant's expense;
- this enrichment at the claimant's expense is unjust; and
- there is no applicable bar or defence.

A claim for unjust enrichment may be brought against a contractor or owner as an equitable claim to address unexecuted change orders. As the Court stated in *Della Ratta v Della Ratta*, 927 So.2d 1055 (Fla. 4th DCA 2006), "to state a claim for unjust enrichment, a plaintiff must plead the following elements: 1) the plaintiff has conferred a benefit on the defendant; 2) the defendant has knowledge of the benefit; 3) the defendant has accepted or retained the benefit conferred; and 4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it".

explain how states negotiate over liability rules for transnational accountability. It then uses the model to help to understand the past difficulties in human rights liability treaties, in particular, those between the developed nations and the developing nations, and indications of how liability negotiation varies from other types of human rights obligations. Using author's model, this study explains these difficulties by making three conclusions about the fundamental causes of the problematic history of civil liability in international law and human rights law. The first is the Foundation Model of how two states negotiate over ongoing cross-border pollution emissions. This type of bilateral model has dominated both political scientific scholarship spectrum and legal scholarship on the changes of the transnational pollution to the present. The second looks at alterations to the Foundation Model to develop a Protracted Model that covered other human rights liability negotiations, which carry more suspicions, involve more parties and address the risks that may not occur until years after the negotiations.

The second part will examine the alternate approach to an effective remedy for corporate human rights violation under tort, by first seeking to establish the type of remedy that could be available for the victims under the principle of duty of care. It also analysing the impediment of future corporate human rights accountability treaties, before explaining why there exists conflict of interest between developed state and developing state. It then moves on to recommend an appropriate remedy for corporate human rights abuse, after critically analysing the current remedies under tort law. It went on to recommend an appropriate remedy for corporate human rights abuses, which is based on the perception of the victim's understanding of remedies in the literature, and the assessment of appropriate remedy for the victim, which reflect on the gravity of corporate human rights violations, environment damage, domestic law and its legal systems.

6.1. The Flaws of Civil Liability Treaties for Transnational Human Rights Violations and Environmental Damage

In the past states have discussed, considered, and debated how to strengthen tort liability principles within international environmental law. This development at the state level can be noted in the form of international declarations, conferences on human rights standards and obligations, report on corporate human rights violation, and treaties that established human rights duties for both state and non-state actors.²²⁵⁵ States have committed to making liability

²²⁵⁵ Marcelo Dias Varella, *Internationalization of Law: Globalization, International Law and Complexity* (

work for the environment, both as a means of deterring harmful operations and as a means of compensating victims harmed by transboundary environmental damage.²²⁵⁶

Despite significant developments through the declarations, such as Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,²²⁵⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change,²²⁵⁸ European Agreement Concerning the International Carriage of Dangerous Goods by Inland Waterways (AND),²²⁵⁹ Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region²²⁶⁰ and Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Cartagena de Indias,²²⁶¹ states' actual achievement in securing liability for environmental tort has achieved little on minimising the impact of business activities on the environment, which leads one to question the sufficiency of remedy and enforcement of civil liability.

Likewise, countries have been unwilling to accept treaty language that would impose liability for transboundary pollution on states directly (the so-called state liability).²²⁶² Perhaps this is due to the fact that the mere circumstance that a wrongful act has been identified does not necessarily mean that there is a remedy, because only injured states possess standing to invoke the responsibility of a state that has violated international law.²²⁶³ Likewise, treaties as positive law have been largely impotent, with a negligible impact on resolving actual disputes in the international arena.²²⁶⁴ More importantly, treaties trump national law, having the same

Springer 2014).

²²⁵⁶ Noah Sachs, 'Beyond The Liability Wall: Strengthening Tort Remedies in International Environmental Law' (2008) 55 *UCLA Law Review* 837.

²²⁵⁷ Basel Convention on The Control of Transboundary. Movements of Hazardous Wastes and Their Disposal. Text. 5. Annex I. 46. Annex II. Effective, 5 May (1992).

²²⁵⁸ Kyoto Protocol to The United Nations Framework Convention on Climate Change
Kyoto, 11 December (1997).
<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&lang=en> accessed 12 October 2017.

²²⁵⁹ European Agreement Concerning The International Carriage of Dangerous Goods by Inland Waterways (AND), Geneva, (2000).

²²⁶⁰ Convention for Co-operation in The Protection and Development of The Marine and Coastal Environment of The West and Central African Region, Abidjan, (1981).

²²⁶¹ Convention for The Protection and Development of The Marine Environment of The Wider Caribbean Region, Cartagena de Indias, (1983).

²²⁶² René Lefebvre, *Transboundary Environmental Interference and The Origin of State Liability* (Vol. 24. Martinus Nijhoff Publishers 1996), Thomas Gehring and Markus Jachtenfuchs, 'Liability for Transboundary Environmental Damage Towards a General Liability Regime' (1993) 4 *European Journal of International Law* 92.

²²⁶³ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002).

²²⁶⁴ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005).

status as a state's Constitution.²²⁶⁵ This means that activists can take the governments to court and have national law quashed on the basis of a treaty commitment. Judges can also instruct the government to take steps to meet treaty commitments.²²⁶⁶ In addition, in the realm of private international law,²²⁶⁷ states have also rejected most civil liability treaties establishing the tort liability of private actors, such as enforcing human rights duties on corporation operating in its jurisdiction, as well as ensuring victims of corporate misconduct have access to effective remedy.²²⁶⁸ Therefore, it is clear that the effective remedy for tort liability rules seem to be the appropriate remedy mechanism and right objectives for state and human rights victims to have pursued under international law for decades, but are only spotted on the side-lines, and, remarkably, have never been included or enforced through a binding treaty. A possible explanation for this might be that in practice, the remedy for environmental damage is very elusive. The long-standing distance between the remedy and enforcement of civil liability treaty pose a major threat to any business and human rights treaty on transnational corporations.

Similarly, over the fourteen major civil liability treaties (however, only 10 will be examined in the table below (ref to the appendix))²²⁶⁹ that have been adopted in the

²²⁶⁵ Guri Bang, Jon Hovi and Detlef F Sprinz, 'US Presidents and The Failure to Ratify Multilateral Environmental Agreements' (2012) 12 (6) *Climate Policy* 55, 763.

²²⁶⁶ Theodor Meron, 'The Time Has Come for The United States to Ratify Geneva Protocol I' (1994) 88 (4) *American Journal of International Law* 678, 686.

²²⁶⁷ Martin Wolff, *Private International Law* (Clarendon Press 1950).

Private international law refers to that part of the law that is administered between private citizens of different countries or is concerned with the definition, regulation, and enforcement of rights in situations where both the person in whom the right inheres and the person upon whom the obligation rests are private citizens of different nations. It is a set of rules and regulations that are established or agreed upon by citizens of different nations who privately enter into a transaction and that will govern in the event of a dispute. In this respect, private international law differs from public international law, which is the set of rules entered into by the governments of various countries that determine the rights and regulate the intercourse of independent nations.

²²⁶⁸ Kirsten Engel, Katharina Kummer, *International Management of Hazardous Waste: The Basel Convention and Related Legal Rules* (Oxford Clarendon Press, 1995) 455 pages, (1996) 6(1) *Yearbook of International Environmental Law* 737, 742.

²²⁶⁹ Thomas Schoenbaum and Jessica McClellan, *Schoenbaum and McClellan's Admiralty and Maritime Law, 5th (Hornbook Series)* (West Academic, 2012).

1. Paris Convention on Third Party Liability in the 1960
2. Supplementary Convention, Amending Protocol 1964 Amending Protocol 1982
3. Convention on Not the Liability of 1962
4. IAEA Vienna Convention on Civil Liability 1963
5. IAEA Convention Supplementary Compensation installed Force for Nuclear Damage,
6. Convention on Civil Liability for Oil Pollution Damage Not Resulting From the Exploration Force for and Exploitation of Seabed Mineral Resources 1977
7. UNECE Convention on Civil Liability for Damage Caused During Carriage of Goods by Road, Rail and Inland Navigation Vessels 1989
8. IMO International Convention on including4 Civil Liability for Oil Pollution Damage one million (replaced 1969 units of gross Convention)1992

environment field since 1960, only six have ever been entered into force;²²⁷⁰ in fact, claiming for a remedy under these treaties is uncommon.²²⁷¹ Civil liability treaties are designed to synchronise private tort across jurisdictions for particular types of transboundary environmental damage, and yet, when it comes to the enforcement of the treaty obligation, this is not eminent. Additionally, civil liability contains rules in respect of which actor can be held financially accountable, the fundamental type of liability (strict or fault-based), procedures for bringing claims, caps of damages, and insurance requirements. Nonetheless, with the vast number of treaties created, there is no evidence of effective remedy and the practical impact of the civil liability treaties on human rights violations and environmental damages.²²⁷² Also, the promotion of tort remedies has been negligible by both state and international law. Remarkably, not a single major civil liability treaty outside the contexts of oil spillages and nuclear accidents has entered into force. Each have fallen far short of the number of necessary implementations and enforcement. As a consequence, these treaties can be best described as dead letters, or, as the UN Environmental Programme stated, to put it nicely without prejudice, they have fallen into a “spell of dormancy”.²²⁷³ In addition, the lack of effective remedy from the civil liability

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9. International Convention on the Establishment of an International Fund for Oil Pollution Damage (replaced 1971 Convention) 1992
 10. Council of Europe Lugano Convention on Civil Liability including Damage Resulting From Activities Dangerous to the Environment 1993
 11. IMO Convention on Liability & Compensation in Connection with Carriage Hazardous and Noxious Substances by Sea 1996
 12. Basel Protocol on Liability and Compensation for Damage Transboundary Movements of Hazardous Wastes 1999
 13. IMO International Convention on Civil Liability for Bunker Oil Pollution Damage 2001
 14. UNECE Protocol on Civil Liability and Compensation for Damage Caused by Transboundary Effects of Industrial Accidents on Transboundary Waters 2003.

²²⁷⁰ Abdelnaser Zeyad Hayajneh, ‘Civil liability for Environmental Damage: a Comparative Study between Jordanian and English legal systems’ (2004).

1. International Convention on Civil Liability for Oil Pollution Damage (CLC) Adoption: 29 November 1969; Entry into force: 19 June 1975; Being replaced by 1992 Protocol: Adoption: 27 November 1992; Entry into force: 30 May 1996
2. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989
3. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972
4. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992
5. United Nations Convention on the Law of the Sea LOS Convention, 1982
6. Convention on the Protection and Use of Transboundary Watercourses and International Lakes (ECE Water Convention) 1992

²²⁷¹ Gunther Handl, ‘Transboundary Nuclear Accidents: The Post-Chernobyl Multilateral Legislative Agenda’ (1988) 15 *Ecology Law Quarterly* 203.

²²⁷² Michael Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law The Answer’ (2001) 41 *Washburn Law Journal* 399.

²²⁷³ United Nations Environmental Programme [UNEP], Liability and Compensation Regimes Related to Environment Damage 63 (2002) [hereinafter]. <www.unep.or/DEPI/programmes/Liability-compens-papers.pdf. > accessed 07 January 2017.

treaties can be explained in four different scenarios. The first is states will not always agree to enforce civil liability against actor in their jurisdiction;²²⁷⁴ the second is treaties do not necessarily impose or give rise to an effective remedy for victims.²²⁷⁵ For instance, most international human rights laws, such as labour rights,²²⁷⁶ rights to free and clear air²²⁷⁷ and other basic human rights standards,²²⁷⁸ do not provide process and type of remedy for victims.²²⁷⁹ The third is that most language used in the civil liability treaties are weak and do not carry the legal enforcement²²⁸⁰ required to impose liability; an example is the environmental liabilities treaties²²⁸¹ indicated above. The fourth is that the concept of duty of care is not evident in the civil liability treaties.²²⁸² These four scenarios explain two distinctive aspects of why a treaty may lack enforcement: the first is that treaties allow actors to escape liability because the state may have failed to ratify the treaty or implement it into its domestic law, and the second²²⁸³ is the flaws in corporate obligation under human rights treaty, such as corporate duty to respect and observe human rights law and standards.²²⁸⁴

Taken together, these flaws have resulted in a similar predicament as the other human rights treaties created to protect human rights and the environment at both domestic and the international arena, thus, the treaty words of human rights and environmental can be seen as posh hollow words without any gravity. Likewise, it does not impose any legal obligation on the state to ratify or implement it into its national law. Therefore, the repercussion can be seen in two dimensions. The first is the ambiguity and vagueness of the treaty language and the second is state unwillingness to ratify and to give effective enforcement of civil liability rules.

²²⁷⁴ David R Hodas, 'Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the Untied States, and Their Citizens' (1995) 54 *Maryland Law Review* 1552.

²²⁷⁵ Michael Mason, 'Civil liability for Oil Pollution Damage: Examining The Evolving Scope for Environmental Compensation in the International regime' (2003) 27 (1) *Marine Policy* 1, 12.

²²⁷⁶ Arne L Kalleberg, 'Precarious Work, Insecure Workers: Employment Relations in Transition' (2009) 74 (1) *American Sociological Review* 1, 22.

²²⁷⁷ Julian Conrad Juergensmeyer, 'Control of Air Pollution Through the Assertion of Private Rights' (1967) *Duke Law Journal* 1126.

²²⁷⁸ David. Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Law School Human Rights Journal* 101.

²²⁷⁹ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press USA 2015).

²²⁸⁰ Alan E Boyle, 'Saving The World-Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law and Litigation* 229.

²²⁸¹ Michael Mason, 'Civil liability for Oil Pollution Damage: Examining The Evolving Scope for Environmental Compensation in the International Regime' (2003) 27 (1) *Marine Policy* 1, 12.

²²⁸² Lucas Bergkamp, *Liability and Environment: Private and Public Law Aspects of Civil Liability for Environmental Harm in an International Context* (Martinus Nijhoff Publishers 2001).

²²⁸³ Melissa A Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) *Columbia Law Review* 628, 705.

²²⁸⁴ Harold Hongju Koh, 'How is International Human Rights Law Enforced' (1998) 74 *Indian Law Journal* 1397.

These affect the deterrence, accountability, and remedy for victims, human rights obligations and the global environmental health. However, this study argues that in a general view the unwillingness of states to ratify and implement treaties is the major obstacle of the enforcement of obligation deriving from the treaty.²²⁸⁵ As a result, many victims are left without an effective remedy for some of the gross human rights violations that the world has seen.²²⁸⁶ This is because of the fact that, without the civil liability treaties setting out the specific ground rules for tort liability, victims harmed by corporation operation have few practical paths for remedy, due to the liability obstacles, procedural for bringing transnational tort suit. A corporation that is seen to be violating human rights is protected by these liability obstacles. Hence, they continue to externalise liability of human rights abuse to other countries.²²⁸⁷

This failure is illustrated by the illegal dumping in August 2016, of 528 tons of caustic hazardous waste²²⁸⁸ in a village in the Ivory Coast.²²⁸⁹ In *Trafigura*, the defendant broke key international environmental treaties, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989²²⁹⁰ and Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972.²²⁹¹ Nonetheless, since Ivory Coast did not ratify the conventions, this lack of ratification and enforcement in the country may have led or contributed to the illegal dumping of the hazardous waste in the country.²²⁹² An implication of this to the victims is that there is no appropriate environmental law and forum for them to address their rights and to seek reparation for the harm suffered.²²⁹³ The hazardous waste was offloaded by a Greek-owned tanker, flying under a Panamanian flag, leased by the London branch of a Swiss trading corporation, whose physical headquarters are in the Netherlands.²²⁹⁴ The toxic sludge caused eight deaths, and several

²²⁸⁵ Wade M Cole, 'Mind The Gap: State Capacity and The Implementation of Human Rights Treaties' (2015) 69 (2) *International Organization* 405, 441.

²²⁸⁶ Rebecca M Bratspies, 'Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities' (2005) 13 *Michigan State Journal of International Law* 9.

²²⁸⁷ Simon Chesterman, 'The Turn to Ethics: Disinvestment from Multinational Corporations for Human Rights Violations the Case of Norway's Sovereign Wealth Fund' (2008) 23 *American University International Law Review* 577, 615.

²²⁸⁸ *Motto v Trafigura Ltd* [2011] EWCA Civ 1150.

²²⁸⁹ Lydia Polgreen and Marlise Simons, 'Global Sludge Ends in Tragedy for Ivory Coast' (2006) 2 *The New York Times*.

²²⁹⁰ Sejal Choksi, 'The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal: 1999 Protocol on Liability and Compensation' (2001) *Ecology Law Quarterly* 509, 539.

²²⁹¹ Rodney N Duncan, 'The 1972 Convention on The Prevention of Marine Pollution by Dumping of Wastes at Sea' (1973) 5 *Journal of Maritime Law and Commerce* 299.

²²⁹² Lydia Polgreen and Marlise Simons, 'Global Sludge Ends in Tragedy for Ivory Coast' (2006) 2 *The New York Times*.

²²⁹³ Kathryn Lee Boyd, 'The Inconvenience of Victims: Abolishing Forum Non Conveniens in US Human Rights Litigation' (1998) 39 *Virginia Journal of International Law* 41.

²²⁹⁴ *Ibid.*

people in the village were hospitalised as a result of the failure to implement environmental law into domestic legislation.²²⁹⁵ Though, international law academia largely ignored the lack of ratification of civil liability treaties and has instead engaged in a diminutive examination of specific treaties, analysing the design problem such as the choice between imposing human rights obligation on corporations and the fault-based liability, the types of accountability for human rights violations that should trigger liability, channelling of liability to specific corporations, and the implications of governmental instruments for private liability.²²⁹⁶

Nonetheless, what is clear in remedy and enforcement of rights is that the designed treaties of civil liability have little relevance and effect on corporate duties under human rights law and environmental law.²²⁹⁷ However, only a few legal scholars have highlighted the lack of entry into force as a major problem in the field of corporate accountability for human rights violations and environmental damages.²²⁹⁸ The evidence of the treaty failure raises a more basic question about the future of the proposed binding UN Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights²²⁹⁹ and the type of remedy will arise from the treaty and how it can be enforced at a domestic level to meet the required justice for victims. Likewise, it is vital to ask the question: what is the problematic aspect of civil liability in the international human rights field? Why are stronger treaties that enforce rights and remedy on non-actors often rejected by many developed states? How can the established voluntary mechanism governing accountability mechanisms for international human rights duties provide a remedy for victims? It is argued in this study that the empirical answers to these questions are not present in the current literature. Part of this flaw in civil liability can be partly explained by the intense conflict of interest between the developed states and the

²²⁹⁵ *Ibid.*

²²⁹⁶ Hague Conference on Private International Law, Civil Liability Resulting From Transfrontier Environmental Damage: A Case for the Hague Conference? 5-16 Preliminary Doc 8 (2000) <http://www.hcch.net/upload/wop/gen_pd8e.pdf> Accessed 07 January 2017, Also see, Røben Betsy Baker, 'Civil Liability as a Control Mechanism for Environmental Protection at The International Level' (2000) *International Regional and National Environmental Law* 821.

²²⁹⁷ Philippe Sands and Jacqueline Peel. *Principles of International Environmental Law* (Cambridge University Press 2012).

²²⁹⁸ David M Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) 12 (4) *European Journal of International Law* 685, 726, Patricia Feeney, 'Business and Human Rights: The Struggle for Accountability in The Future and The Future Direction of The Advocacy Agenda' (2009) 6 (11) *South International Journal of Human Rights* 174, 191

²²⁹⁹ United Nations Human Rights Council, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, 26th Session, 14/07/2014. A/HRC/RES/26/9.
The second session took place from 24 to 28 October 2016 and the open-ended intergovernmental working group presented its report to the Council at its thirty-fourth session in March 2016 (A/HRC/34/47).

developing states with regards to civil liability rules, which have generated animosity and distrust around the concept of corporate human rights accountability under international law and human rights law.²³⁰⁰ This study argues that developed states, seeking to protect national corporations, are very keen on mounting liability obstacles for corporate accountability. In this illustration, these developed states have become the opposition of corporate human rights accountability and have contributed largely to keeping effective corporate accountability off the international human rights agenda.

Additionally, the multilateral treaties and regulations for human rights obligations development entail high transaction costs that are linked with coordinating the interest and legal system of all states yet, when it comes to advocating for human rights enforcement and remedy for violations, only a handful of states are normally present in the negotiations.²³⁰¹ This position from the states illustrates that most developed countries have no interest in regulating corporate behaviours that have impacts on the human rights of people in developing countries.²³⁰²

This irregularity provides a strong impediment to harmonising liability for human rights violation rules on an *ex-ante* basis. It also means that the remedy for corporate human rights violations cannot necessarily be met by UN Treaty, but rather through the incorporation of another legal mechanism for remedy, such as the remedy under tort law. Also, the adoption of civil liability has been frustrated by treaty provision that is very difficult for states to accept and ratify in practice. The key question for the international legal system is how to develop and strengthen the role of tort liability in international human rights law, or to continue to advocate on treaty-based mechanisms for harmonising domestic human rights accountability, or to strengthen liability principles outside the treaty process. This study shall contest that a mixture of treaty-based and non-treaty-based (tort law liability) is required in order to develop an effective remedy for victims of human rights abuses. It shall be stressed here that the corporate accountability treaty should not be abandoned, but it should be reformed through the layering of corporate liability with effective sanction and remedy. It should also be conducted on a global basis to facilitate regime development for an effective remedy, which closely matches

²³⁰⁰ Ximena Fuentes, 'International Law-Making in The Field of Sustainable Development: The Unequal Competition between Development and the Environment' (2002) 2 (2) *International Environmental Agreements* 109, 133.

²³⁰¹ Carlos Lopez and Ben SHEA. Ben, 'Negotiating a Treaty on Business and Human Rights: A Review of The First Intergovernmental Session' (2016) 1 (01) *Business and Human Rights Journal* 111, 116.

²³⁰² Irene Massimino, *Multinational Corporations: Human Rights Beyond States' Responsibility* (Diss School of Advanced Study 2011).

individual countries and continental needs. It will also help states to fulfil their human rights duties that include positive and negative obligations.²³⁰³ This means that, in limited circumstances, such an approach may have a duty to take proactive steps to protect individuals' rights²³⁰⁴ (rather than merely refraining from directly violating those rights), including from non-state action.²³⁰⁵ In addition, this approach will demand for protections beyond what the traditional civil and political sphere have offered so far. Furthermore, it will increase the number and variety of interests which are now considered rights, particularly in the area of economic, social and cultural concerns. It will serve as a mechanism for states to fulfil their duties to respect, protect, and fulfil the enjoyment of human rights.²³⁰⁶

It is imperative for the international legal system, besides the treaty context, to establish cohesive rules demanding that corporations who violate human rights abroad should not be able to use the corporate veil and the principle of sovereignty of state through judicial jurisdictions as a legal shield to escape liability. Such a norm should be evident in corporate accountability lawsuit under existing domestic legal system, international tribunals, governmental declarations and non-binding declarations. Also, the development of human rights norms through a transnational legal process involving national and international actors should serve as a model for how human rights liability might be evolved at the international level.²³⁰⁷

Furthermore, the problem of remedy for corporate human rights abuses and environmental damage under international law was dominant in the last four decades, but none of these issues has developed into an effective mechanism to regulate corporate conduct. For example, the liability for environmental harm was a major concern of the 1972 Stockholm Declaration on the Human Environment, the founding text of international environment law, which encourages all states to "co-operate to develop further the international law regarding liability and compensation for victims of pollution and other environmental damages".²³⁰⁸

²³⁰³ David P Currie, 'Positive and Negative Constitutional Rights' (1986) 53 (3) *University of Chicago Law Review* 864, 890.

²³⁰⁴ Mark S Kende, 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective' (2003) 6 *Chapman Law Review* 137.

²³⁰⁵ Ran Hirschl, 'Negative' Rights vs. 'Positive' Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order' (2000) 22 (4) *Human Rights Quarterly* 1060, 1098.

²³⁰⁶ Stephen P Marks, 'The Human Rights Framework for Development: Seven Approaches' (2005) *Reflections on The Right to Development* 23, 60.

²³⁰⁷ Hanqin Xue, *Transboundary Damage in International Law* (Vol. 27. Cambridge University Press 2003).

²³⁰⁸ UN General Assembly, *United Nations Conference on The Human Environment*, 15 December

Echoing the Stockholm Declaration, the 1992 Rio Declaration (adopted by consensus by more than 175 countries including the United States) restated that there is a requirement for all states to cooperate “in an expeditious and more determined manner to developed international law in respect of liability and compensations”.²³⁰⁹ Nonetheless, neither of these declarations clearly specified whether a cohesive and effective rule about a remedy for environmental damage should be applicable through domestic law (holding the state accountable) or private law (holding individuals or corporations accountable through tort law).

Perhaps, this is because the declaration left the implementation and enforcement of an effective remedy for the state to choose the appropriate legal method to enforce redress. Possibly, this could be due to the fact that in international human rights law, state responsibility is very strict, this is due to the fact that “states are responsible for violations of their treaty obligations even where they were not intentional or negligent”.²³¹⁰ Also, noted by the European Commission, “human rights treaties are law-making treaties of an objective nature in that they create general norms that are the same for all states parties”.²³¹¹ In general, therefore, it seems that, these norms have to be applied by a state party irrespective of the state of implementation by other states’ parties. The traditional principle of reciprocity does not, in other words, apply to human rights treaties.²³¹² Nonetheless, as the evidence points, in practice states have failed overwhelmingly to implement or strengthen private international remedies when these rights under the declaration are violated.²³¹³

The incentive for private international law remedies often arises after a serious accident, such as the Torey Canyon oil spillage in the North Sea in 1972.²³¹⁴ This accident resulted in an intense negotiation and discussion throughout the 1980s on the appropriate remedy through treaty. A multilateral negotiation over private liability rules came about due to the extensive

1972, A/RES/2994. <<http://www.refworld.org/docid/3b00f1c840.html>>accessed 7 January 2017, U.N Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, Declaration of The United Nations Conference on The Human Environment, princ. 22, U.N Doc. A/CONF.48/14/REV. 1 (1972.).

²³⁰⁹ United Nations Conference on Environment and Development, Rio De Janerio, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, princ 13, UN Doc. A/CONF.151/26 (Vol. 1) (1992).

²³¹⁰ John K Setear, ‘Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility’ (1997) *Virginia Law Review* 1, 126.

²³¹¹ European Commission of Human Rights, Application No. 788/60, *Austria v Italy*, Decision of 11 January 1961 on the Admissibility, (1961) 4 *Yearbook of the European Convention on Human Rights*.

²³¹² Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press USA 2008).

²³¹³ Barbara Rose Johnston, ‘Reparations and The Right to Remedy’ (2000) *World Commission on Dams Contributing Report, Thematic Review 1*.

²³¹⁴ M Blumer, ‘Oil Pollution’ (1972) 176 *Persistence and Degradation of Spilled Fuel Oil, Science* 1120, 1122.

environmental damages, such as air pollution, ocean contamination, hazardous waste shipments, climate change, and a spread of invasive species and toxic chemicals.²³¹⁵

Consequently, the repercussion of these risks created by export and import of environmental hazards resulted in negotiation and development of environmental law and regulations to protect human rights and the environments.²³¹⁶ Also, there has been a consistent interest in creating strong tort law remedies for breaches of human rights, which is not evident in civil liability. Accordingly, it can be said that private international law has become a key battleground for developing an effective remedy for human rights violations. Indeed, few remedies for human rights violations and environment damages have been filed under tort law, for example in cases such as *Namba v McCourt*,²³¹⁷ also in *Linder v Calero Portocarrero*,²³¹⁸ in *Doe v Unocal Corp.*,²³¹⁹ *Bowoto v Chevron*²³²⁰ and *Doe v Exxon Mobil Corp.*²³²¹ where the ATCA is used to bring tort claim against corporation instead of under the civil liability treaties.²³²² What this shows is that the victims were able to exercise their rights under tort law doctrine rather than international human rights law and treaties. This approach of seeking remedy for the victims of human rights violations is crucial because the current civil liability treaty has failed to provide the required legal framework and procedures that will facilitate the victim's access to justice.

The question is, why are the victims of human rights abuses choosing to bring an action under tort law, instead of a civil liability? Could this be that tort law is capable of providing the tool needed to hold corporations accountable for human rights violations? This is because tort has three major benefits for victims of human rights violations. The first is, tort remedy can provide victims of human rights violations with effective compensation when it is established that an actor has breached its duty of care to the victims. While many national governments may, in some cases, take criminal or regulatory action against an entity that violates the fundamental rights of humanity, tort provides a monetary compensation that should

²³¹⁵ Marla Cone, *Silent Snow: The Slow Poisoning of the Arctic* (Grove/Atlantic Inc 2007).

²³¹⁶ Robert EB Lucas, David Wheeler and Hemamale Hettige, *Economic Development, Environmental Regulation, and The International Migration of Toxic Industrial Pollution, 1960-88* (Vol. 1062. World Bank Publications 1992).

²³¹⁷ *Namba v McCourt*, 204 P.2d 569, 583 (Or. 1949).

²³¹⁸ *Linder v Calero Portocarrero*, 963 F.2d 332, 333–34 (11th Cir. 1992).

²³¹⁹ *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883–84, 892 (C.D. Cal. 1997).

²³²⁰ *Bowoto v Chevron Corp.*, 621 F.3d 1116, 1121–31 (9th Cir. 2010).

²³²¹ *Doe v Unocal Corp.*, Nos. BC 237980, BC 237679, 2002 WL 33944506 at 13–14 (Cal. Super. Ct. June 11, 2002).

²³²² Ariadne K Sacharoff, 'Multinationals in Host Countries: Can They be Held Liable Under The Alien Tort Claims Act for Human Rights Violations' (1997) 23 *Brooklyn Journal of International Law* 927.

help the victim to be back to where they were before the violation occurred. This is evidenced in criminal and civil proceedings in common law countries such as the UK²³²³ and civil law countries such as France,²³²⁴ where tort liability is used as a principle to remedy victims after criminal conduct.

The second is, tort provides forceful transnational remedies that have the possibility of a justice and deterrent effect, by forcing corporations to develop a policy that will protect human rights and the environment.²³²⁵ The deterrent effect will provide that the corporation is not only responsible for the damages caused by its own conduct, but also for damages “caused by the acts of the subsidiary for whom the corporation is responsible, or caused by matters which are under its supervision”.²³²⁶ Thus, this deterrent element may have the potential to force a corporation to change its conduct that may have a negative impact on human rights. In this understanding, therefore, tort remedies are seen as an accountability instrument, which will ensure corporate operation are check and balance against human rights standards, and to provide reasons for a corporation to take protective measures to observe and respect human rights in the host state. This approach will stop the corporate from benefiting from unjust enrichment,²³²⁷ thus, forcing the corporate to avoid a business conduct that may have the potential to damage the environment and human rights, (this liability can be seen as a form of restitution for remedying corporate human rights violations).²³²⁸ Therefore, it is not surprising that the move to enhance tort law remedies for victims of human rights violation has been growing for over decades now.²³²⁹

The third is, tort law can act as a regulatory mechanism by filling the gap in the majority of public international law treaties. A possible explanation for this might be that the existing treaties that govern global trade and business operations in the international arena, and other soft law approach to international human rights and environmental accountability have failed

²³²³ David J Seipp, ‘The Distinction Between Crime and Tort in The Early Common Law’ (1996) 79 *BUL Review* 59.

²³²⁴ Jean Larguier, ‘Civil Action for Damages in French Criminal Procedure’ (1964) 39 *Tulane Law Review* 687.

²³²⁵ Michael Anderson, ‘Transnational Corporations and Environmental Damage: Is Tort Law The Answer’ (2001) 41 *Washburn Law Journal* 399.

²³²⁶ Indonesian Civil Code, art. 1367.

²³²⁷ George P Roach, ‘How Restitution and Unjust Enrichment Can Improve Your Corporate Claim’ (2007) 26 *Review of Litigation* 265 and *Georgia Malone & Co. v Rieder*, 132, 2012 NY Slip Op 05200 (N.Y. June 28, 2012).

²³²⁸ Alfonso Ascencio Herrera, ‘The Transboundary Movement of Living Modified Organisms: Issues Relating to Liability and Compensation’ (1997) 6 (3) *Review of European Community & International Environmental Law* 293, 303.

²³²⁹ Patricia Birnie and Alan Boyle, *International Law and The Environment* (Oxford: Oxford University Press 2002).

to prevent corporate human rights abuses and environmental damages for different reasons. This deficiency is significant because perhaps damages for human rights violations may be the type, which is not foreseen by the treaty negotiators, or the treaty could be weak in its legal context, there could be a widespread noncompliance by states and non-state actors, or a state may lack the regulatory power or be unwilling to regulate the conduct of the corporation, or fail to control human rights abuses happening in its jurisdiction. The significant strength of tort law in relation to a treaty is that treaties as a whole may under-enforce in a revolutionary international legal system that lacks an authoritative judicial organ.²³³⁰ Tort liability, in theory, could solve these gaps by providing a private law path for compensation and redress for victims of human rights violations and environmental damages. In this understanding, it is clear that private litigation can contribute to a larger regulatory system for human rights accountability, thereby producing a public good, while pursuing their private aims for victims of human rights violations.²³³¹

Harmonising tort law across jurisdictions for specific human rights violations remedy has one important advantage in comparison to treaties: the judgment of civil lawsuits under tort for transnational human rights abuses can be enforced by national courts, given them the discretionary power to pass a judgment that meets the need of the local people. Also, domestic courts have a well-established judicial system at their disposal to enforce judgments and attach the corporation's assets to the remedy.²³³² On the other hand, civil liability treaty empowers domestic courts to address transnational human rights violations, therefore relying heavily on the current sovereign authority of the state for the enforcement and implementation of human rights law and norm. However, this is not enough if human right victims are to seek remedy against the corporations. This is because the state-to-state dispute resolution in treaties, in contrast, is disreputable, unwieldy, and lacks a mandatory enforcement mechanism.

Likewise, many human rights treaties and voluntary mechanism containing dispute resolution procedures have rarely been used in practice, and states are unlikely to expend diplomatic capital on transnational human rights violation cases ex-post, except in

²³³⁰ Jon Hovi and Ivar Areklett, 'Enforcing The Climate Regime: Game Theory and The Marrakesh Accords' (2004) 4(1) *International Environmental Agreements* 1, 26.

²³³¹ Sanford E Gaines, 'International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse' (1989) 30 *Harvard International Law Journal* 311.

²³³² Karen Knop, 'Here and There: International Law in Domestic Courts' (1999) 32 *New York University Journal of International Law and Politics* 501, Mary Ellen O'Connell, 'Enforcement and the Success of International Environmental Law' (1995) *Indiana Journal of Global Legal Studies* 47, 64.

extraordinary situations²³³³ such as gross human rights violation or war crimes. Tort remedies, on other hand, do not require extensive government resources, other than establishing the remedies and operating a court system to hear human rights violation cases. As noted by Sand, “instead of internationalising a local issue (via an enormous detour to respective national capital), civil liability has the advantage of adopting local decision-making process so that they can handle trans-frontier problems like ordinary local ones of comparable sizes”.²³³⁴

6.2. Obstacles to the Current Mechanism of Civil Liability

The most crucial question here is why have states turned to favour soft human rights standards to regulate transnational corporate conduct instead of binding mechanisms? Also, on the other hand, if the national legal system provides remedies for tort cases, then the plaintiff in transnational human rights abuses should be able to rely on existing law and procedures in a domestic court to vindicate their rights and access effective remedy at the national level.

A lawsuit under domestic law for transnational human rights violations have been exceedingly hard to proceed due to the constant procedural impediment to transnational corporation tort litigation, through the state jurisdiction. These difficulties can be seen in obtaining personal jurisdiction over foreign corporations, extraterritorial service process,²³³⁵ the domestic action rule (which posits that claims in tort for damage to real property must be brought where the property is located),²³³⁶ determining the choice of law query.²³³⁷ Overcoming the motions to dismiss on the ground of *forum non conveniens*, determining whether a defendant’s legal system will permit relevant tort liability,²³³⁸ and enforcing judgments.²³³⁹ However, it is likely that these impediments can be overcome by the creation of international corporation court, to facilitate or act as an intermediate forum for corporate accountability. For corporate human rights abuses that occur transnationally, the *locus*

²³³³ Charles Phillips, ‘Nordic Co-Operation for The Protection of The Environment Against Air Pollution and The Possibility of Transboundary Litigation’ (1986) *Transboundary Air Pollution, Nijhoff, Dordrecht*.

²³³⁴ Peter H Sand, ‘The Role of Domestic Procedures in Transnational Environmental Disputes’ (1976) *Legal Aspects of Transfrontier Pollution* 146, 202.

²³³⁵ Donald H Regan, ‘Siamese Essays:(I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine: (II) Extraterritorial State Legislation’ (1987) 85 (8) *Michigan Law Review* 1865, 1913.

²³³⁶ Sam Blay and Julia Green, ‘Development of a Liability Annex to The Madrid Protocol’ (1995) 25 *Environmental Policy and Law* 24.

²³³⁷ Said Mahmoudi, ‘Some Private International Law Aspects of Transboundary Environmental Disputes’ (1990) 59 *Nordic Journal of International Law* 128.

²³³⁸ Linda J Silberman and Andreas F Lowenfeld, ‘Different Challenge for The ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute’ (2000) 75 *India. Law Journal* 635.

²³³⁹ Hanqin Xue (n 2277).

commissi delicti, (the concept of *locus commissi delicti* applies both in criminal and tort law)²³⁴⁰ or place of the tort, is often fiercely disputed. In addition to the obstacle of the current civil liability, the mechanism is the issue of the expense of bringing a lawsuit against a foreign corporation and proving negligence.²³⁴¹ Likewise, for the over 2.8 billion individuals living in developing countries on income less than \$2 per day,²³⁴² access to remedy for transnational corporate human rights abuses and environmental damages as a practical matter is simply beyond their reach, making it very hard for victims of human rights abuses to bring a civil lawsuit against transnational corporations.

The impact of these obstacles is severe: “potential claimants are likely to be reluctant to sue in the unfamiliar and perhaps unfriendly courts of the actor causing the harm, and the defendant will resist appearing in the courts of the victims”.²³⁴³ While this research does not endeavour to give a detailed explanation of the barriers to the current civil liability mechanism, this brief note here is to draw attention to the difficulties that arise in civil liability and to show why tort remedy with universal application could be the best way forward for human rights abuses claims in tort at either the domestic or international court. However, for the present research, the vital point to note here is that the decentralised substitute of resting on national judicial procedures has not proven to be adequate in providing a remedy for victims of human rights abuses and environmental damage.²³⁴⁴ Therefore, corporate liability for human rights abuses cannot be identified as solely an issue of international law or domestic law but it is truly a transnational problem, which may have its solution in the core foundation of the tort of negligence and international court, such as corporate court.²³⁴⁵

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- ²³⁴⁰ Pier Terblanche, ‘Lex Fori or Lex Loci Delicti? The Problem of Choice of Law in International Delicts’ (1997) 30 (3) *Comparative and International Law Journal of Southern Africa* 243, 263. Courts follow the traditional rule of *lex loci delictus* in determining which state’s substantive law is applicable to actions sounding in tort[i]. *Lex loci delictus* holds that the substantive law of the place where the tort occurs applies. It is a recognised principle of the law of the conflict of laws that the law of the state where an alleged tort is completed controls the liability. Where a tort is committed in one state and sued on in another, the *lex loci delicti* principle controls.
- ²³⁴¹ Organisation of Inter-American Judicial Committee, Annual Report of The Inter-American Judicial Committee to The General Assembly, 126-38 OEA Doc. OEA/Ser. Q/VI.34 CJI/doc.145/03 (2003) <<http://www.oas.org/en/sla/iajc/docs/INFOANUAL.CJI.2003.ING.pdf>> accessed 8 January 2017.
- ²³⁴² Barbara Crossette, ‘UN Report Says New Democracies Falter’ (2002) 24 *New York Times* A 8.
- ²³⁴³ John H Knox, *The Flawed Trail Smelter Procedure: The Wrong Tribunal, The Wrong Parties, and The Wrong Law Transboundary Harm in International Law: Lesson from the Trail Smelter Arbitration*, Rebecca Bratspies and Russell Miller (2005).
- ²³⁴⁴ Shi-Ling Hsu and Austen L. Parrish, ‘Litigating Canada-US Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity’ (2007) *Virginia Journal of International Law* 1.
- ²³⁴⁵ Anthea Roberts, ‘Comparative International law? The Role of National Courts in Creating and Enforcing International Law’ (2011) 60 (1) *International & Comparative Law Quarterly* 57, 92. The court for corporation should only hear human rights violations cases by corporations.

The possible explanation behind this recommendation in this research is that under the dualism doctrine, a clear distinction is created between international and domestic law, establishing them as separate legal orders which regulate different subjects.²³⁴⁶ Thus, international law involves the regulation of the relationship between sovereign states, while domestic law confers rights to persons and entities within the sovereign state.²³⁴⁷ In contrast, monism asserts the supremacy of international law within the domestic sphere and describes the individual as a subject of international law.²³⁴⁸ The doctrine is established when international and domestic law form a part of the same system of norms which are based on general notions of fairness.²³⁴⁹ The latter concept somewhat translates into an alternative theory which entails that international and domestic law are superseded by a general legal order which rests upon the rules of natural law.²³⁵⁰ An implication of this is that under the principle of rule of law,²³⁵¹ corporations should respect international law and human rights law. Thus, bringing a case against a corporation in an international corporate court will ensure the corporation is adhering to the principles of international law and human rights at both domestic and international spheres. Another possible reason for this is that any international entity that operates in the international arena, should be subject to two regulatory mechanism, which is the domestic court and the international court. This is due to the fact that their business operation cross jurisdictions. Consequently, the advocate of tort liability and corporate international court is not a departure from the international norm, but rather the conclusion of the long-standing argument about corporate liability under the international mechanism.

6.3. Flaw of Civil Liability Treaties

In spite of the many efforts over decades, civil liability treaties have rarely entered into force or been used as a mechanism to establish remedies for transnational human rights violations and environmental damage. However, as it shall be noted below and already noted above, some civil liability treaties have entered into force. Observing the consistent oratorical

²³⁴⁶ Joseph Gabriel Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Year Book of International Law* 66.

²³⁴⁷ Armin Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 (3-4) *International Journal of Constitutional Law* 397, 413

²³⁴⁸ Robert Jennings and Arthur Watts, *Oppenheim's International Law* (Volume 1, Peace 1995).

²³⁴⁹ Hans Kelsen, *General Theory of Law and State* (Vol. 1. The Lawbook Exchange Ltd 1945).

²³⁵⁰ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: with Special Reference to International Arbitration* (The Lawbook Exchange Ltd 2002).

²³⁵¹ Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 (4) *University of Chicago Law Review* 1175, 1188.

commitment to promoting liability rules and the vast efforts taken to negotiate civil liability treaties, the absence of evidence of the accomplishment and effect in this area of law making is disappointing. This problem associated with civil liability have caused this research to doubt the practical implementation and effective of the ongoing discussion on the Transnational Corporations and Other Business Enterprises with Respect to Human Rights treaty.²³⁵² As a constructive law, the treaty perhaps has been generally ineffective, with a negligible impact on resolving civil liability claims that have impacted society and the environment.

This study will illustrate this deficiency in the civil liability treaties by grouping them into a table format. The first table looks at all the data on negotiations, implementation, and when the treaties came into force. The first pillar in Table 2 gives the name of the treaty. The second pillar in Table 2²³⁵³ gives the year of implementation, when the text of the treaty was agreed by the negotiators, usually by consensus, and opened for signature.²³⁵⁴ The third pillar in Table 2 illustrates the number of countries that sign the treaty since its adoption. The signature on the treaty confirms the treaty text as the final legal text that was adopted, it also shows the number of support of the signer, such as the member of the government, for example, a foreign minister or head of state; however, signatures alone usually do not show a state's approval to be bound by the terms and conditions of the treaty.²³⁵⁵ The fourth pillar in Table 2 indicates the number of states that ratify the treaty. Through the ratification, a state formally gives its approval to be bound by the terms of the treaty upon entry into force of that particular treaty.²³⁵⁶ However, it should also be noted that, in many countries, ratification cannot proceed until national procedures for approving treaties have been put in place. An example is a legal advice on the implementation of a treaty into domestic national law; this can be seen in the US,

²³⁵² Bethany N Bella and Geoffrey D Dabelko, *UN Special Rapporteur Calls for Business & Human Rights Treaty to Protect Human Rights Defenders* (2016). <<https://business-humanrights.org/en/un-special-rapporteur-calls-for-business-human-rights-treaty-to-protect-human-rights-defenders>> accessed 10 January 2017, also see; Gianna M Politheor, *UN Guiding Principles & Proposed Binding Treaty Will Reinforce Human Rights Protection from Corporate Abuses* (2016). <<https://business-humanrights.org/en/commentary-un-guiding-principles-proposed-binding-treaty-will-reinforce-human-rights-protection-from-corporate-abuses>> accessed 10 January 2017.

²³⁵³ Appendix.

²³⁵⁴ United Nations, *Vienna Convention on The Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. <<http://www.refworld.org/docid/3ae6b3a10.html>> accessed 10 January 2017, “the process of adopting, signing, and ratifying treaties is governed by the Vienna Convention”.

²³⁵⁵ Durwood Zaelke, David B Hunter and James Salzman, *International Environmental Law and Policy* (Foundation Press 2011).

²³⁵⁶ United Nations Handbook Treaty, ‘Prepared by The Treaty Section of The Office of Legal Affairs’ (2006) *United Nations*.

where two-thirds of the Senate must approve a treaty, based on advice and consent,²³⁵⁷ before it can become part of domestic law.

The last two pillars in Table 2 show the link between ratification and entry into force, which is the point at which the treaty enforces binding duties on all parties who ratified it. The civil liability treaties in Table 2 all show the date the treaty entered into force, after some minimum number of states ratified it. As Table 2 indicates, the vast majority of the treaties have not received enough ratification to enter into force. Over the whole ten civil liability treaties listed in Table 2, only six of them have entered into force, and these six were all in the field of liability for oil spillage and nuclear accident. It illustrates that the continuous effort to negotiate liability treaties in other fields has been a clear disaster, leaving a significant accountability gap in corporate misconduct.²³⁵⁸ This is the fundamental reason why the study is advocating the enforcement of tort liability rule in corporate accountability at the international level, as an inclusion to the enforcement of human rights law at the domestic level.

Critically analysing the status of the Civil Liability Treaties in Table 2, what is clear from the findings in the table is that the vast diplomatic energy spent on development and negotiation of all the civil liability treaties over the last four decades has resulted in only a small amount of operational agreements. Even then, there is only a little evidence to show its effectiveness in practice. Arguably this is due to the fact that national state saw the treaty negotiation and ratification as “getting to yes” exercise when completing negotiation on a treaty text. Thus, this is why the treaty has not resulted in an effective accountability and remedy for victims of corporate human rights abuses and environmental damages “getting it done” (bringing the treaty to life through entry into force and ratification through national legislation),²³⁵⁹ which is the major problem facing the enforcement of rules under the treaties.

As was observed by Boyle, the lack of participation in treaty negotiation is a problem with most of the liability mechanism created to date; this lack of participation have casts some

²³⁵⁷ Hongju Koh Harold, ‘President Versus The Senate in Treaty Interpretation: What's All The Fuss About’ (1990) 15 *Yale Journal of International Law* 331.

²³⁵⁸ International law Association, The Hague Conference, International Law on Sustainable Development (2010). <[file://wh-stud1/users/D25/u1536678/Downloads/sustainable_development_report_the_hague_2010%20\(1\).pdf](file://wh-stud1/users/D25/u1536678/Downloads/sustainable_development_report_the_hague_2010%20(1).pdf)> accessed 10 January 2017.

²³⁵⁹ Bertram I Spector, ‘Deconstructing the Negotiations of Regime Dynamics’ (2003) *Getting It Done: Post-Agreement Negotiations and International Regimes*. Washington, DC, United States Institute of Peace Press, also see; Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement without Giving In* (Random House 2012).

doubt on their acceptability or reliance at both domestic court and the international arena.²³⁶⁰ What this means is that, regardless of the development and ratification of a treaty, there will always be a gap in its implementation. It is unlikely that any treaty imposing accountability on a transnational corporation will have a significant effect in enforcing human rights standards on that corporation. It also means that the state will reject the implementation of an enforceable treaty that will impose a direct obligation on the transnational corporation, thus weakening the ability of the treaty to serve as an instrument for corporate accountability.

Also, Table 2 shows the part of the whole problem associated with civil liability treaties. Of course, it is also clear the table does not capture the circumstance where a civil liability treaty is in force; however, the most crucial point here is that the table indicates the problems in enforcing liability and effective remedy under treaties and state reluctance to ratify binding treaties into its domestic law. For instance, the developed nuclear states, such as the United States, Canada, South Korea, and Japan, have all declined to ratify the nuclear liability conventions.²³⁶¹ No developed state has ratified the major civil liability treaties governing shipments of hazardous waste and cargo (i.e., the Basel Protocol and the Hazardous and Noxious Substances (HNS) Convention).

Table 2 also does not cover circumstances where negotiations on tort liability rules started but never came into existence, or where liability negotiations did not start, even though such negotiation were clearly calling for another international convention or treaty on liability for human rights and environment damages. There are over a dozen illustrations of treaties for human rights accountability and environment; the most recent one is the ongoing binding human right treaty negotiation for business and transnational corporations. Also, the study did not observed the call for future liability treaties negotiations that were never followed by an agreement on the enforcement of accountability at the international level.²³⁶²

²³⁶⁰ Alan E Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39 (01) *International and Comparative Law Quarterly* 1, 26, also see; Akiho Shibata, *International Liability Regime for Biodiversity Damage: The Nagoya-Kuala Lumpur Supplementary Protocol* (Routledge 2014).

²³⁶¹ International Atomic Energy Agency [IAEA], Vienna Convention on Civil Liability for Nuclear Damage (2007). <www.iaea.org/Publications/Documents/Conventions/liability_status.pdf> access on 12 January 2017.

²³⁶² Convention for the Protection and Development of Maritine Environment of The Wider Carribean Region, art. XIV, Mar. 24, 1983, 157 <<http://www.cep.unep.org/pubs/legislation/lbsmpnut.html>> The Contracting Parties Shall co-operate with a view to adopting appropriate rules and procedures in the field of liability and compensation for damage resulting from pollution of the Convention area. Convention for the Protection of the Natural Resources of the South Pacific Region, art. 20 Nov, 1986, 26 I.L.M 38. "stating that parties to the convention shall cooperate in the adoption of rules and procedures concerning liability and compensation for damages resulting from pollution". Convention on the Protection of the

In the current literature on civil liability in international human rights, environmental damage, and corporate accountability, scholars have rarely expanded and critically analysed the poor ratification record of civil liability treaties and have failed to pay significant attention to the consequence of this poor record for future attempts at treaty negotiation, for human rights accountability and liability²³⁶³ for such violation. Certainly, the Basel Liability Protocol often has been suggested to be a model for the future; however, it has still not entered into force, nine years after its preliminary adoption.²³⁶⁴ Perhaps parts of this failure have led legal scholars to strongly support the UN Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights. However, this study does not dispute the proposed treaty but states that its practical aspect will be very difficult to implement.

Knowing the evidence gathered to date, perhaps it is time to consider moving the stick and to change from the detailed discussion about how to structure civil liability and corporate human rights accountability and focus on critically analysing the alternate form of remedy in tort. What this means is that analysing the past flaws in human rights accountability and the lack of a mutual cooperation on civil liability treaties in the past decades will help develop a substitutions remedy mechanism for future civil liability. A continuation on the same path of negotiation and seeking remedy may be unfruitful if not counterproductive. As stated by Daniel, “a continuing series of sectoral liability treaties could result in implementation overload that could challenge even the most robust national legal systems”.²³⁶⁵

Maritime Environment of The Baltic Sea Area, art. 17, Mar. 22, 1974, 1507 UNT.S 167. “The Contracting parties much undertake, as soon as possible, jointly to develop and accept rules concerning liability responsibility for damage resulting from acts or omissions in contravention of the present Convention, including *inter alia*, limits responsibility, criteria and procedures for the determination of liability and available remedies”. United Nations Convention on the Law of the Sea, art. 235 (3), Dec. 10 1982, UN Doc. A/CONF.62/122 (Oct. 7, 1982). “States shall cooperate in implementation of existing international law and the further development of international law relating to responsibility and liability and criteria and procedures for payment of adequate compensation”.

²³⁶³ Kröner P Ralph, *Transnational Environmental Liability and Insurance* (Kluwer Law International 1993.). (“Describing the provisions of the treaty details and noting that, it is not very likely that the Convention will enter into force within within the foreseeable future”), Michael Tsimplis, ‘Liability and Compensation in The International Transport of Hazardous Wastes by Sea: The 1999 Protocol to The Basel Convention’ (2001) 16 (2) *The International Journal of Marine and Coastal Law* 295, 346 (“Calling the lack of entry into force of the Basel Liability Protocol ‘sobering’ after a forty page discussion of its contents and requirement”)

²³⁶⁴ Paola Bettelli, *Summary of The Fifth Conference of The Parties to The Basel Convention on The Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1999), Earth Negotiations Bill., Dec. 13, 1999, at 1, 13. <<http://www.iisd.ca/download/pdf/enb2006e.pdf> > accessed 12 January 2017 “At the time of negotiations, the Basel Liability Protocol Was Widely Seen as “Breaking New Ground” on the International Law of Compensation and Liability”.

²³⁶⁵ Anne Daniel, ‘Civil liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?’ (2003) 12 (3) *Review of European Community & International Environmental Law* 225, 24.1

6.4. Analysing the Impediment of Future Corporate Human Rights Accountability Treaties

The understanding of the causes of failure of civil liability treaties needs a critical analysis and investigating the dynamics of how and why states cooperate (or refuse to cooperate) in the international arena on corporate human rights accountability. To understand the divergence in this development, the study draws on Noah studies in conjunction with Regime Theory to develop a model that explains the intersection of international law and International Relations Theory, to show the way states act in negotiation over liability rules for transnational accountability.²³⁶⁶ The model helps to understand the past difficulties in human rights liability treaties, in particular, those between the developed nations and the developing nations, and indications of how liability negotiation varies from other types of human rights obligations. Using the author's model, this study explains these difficulties by making three conclusions about the fundamental causes of the problematic history of civil liability in international law and human rights law. It illustrated that perhaps there is a need to rethink the remedy and enforcement strategy for the UN Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights Treaty in a different dimension.

This model is noted in the Regime Theory, which looks at the formation, dissolution, and consequences of the international regime.²³⁶⁷ Also, several explanations of a regime are provided in the literature. The most cited definition of a regime is Krasner's; the author stated that "a regime is a set of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area international relations".²³⁶⁸ Krasner's explanation of a regime covers the informal arrangement and understandings of the concept of the regime, such as cooperation among allies over time. Though, in a discretionary legalistic civil liability, it is perfectly adequate to view the Regime Theory as the point at which a treaty enters into force, thus imposing binding legal duties, as the purpose is of an obligation when a regime is formed.²³⁶⁹ This illustrates that civil liability

²³⁶⁶ Noah Sachs, 'Beyond The Liability Wall: Strengthening Tort Remedies in International Environmental Law' (2008) 55 *UCLA Law Review* 837.

²³⁶⁷ Stephan Haggard and Beth A Simmons, 'Theories of International Regimes' (1987) 41 (03) *International Organization* 491,517.

²³⁶⁸ *Ibid.* also see, Volker Rittberger and Peter Mayer, *Regime Theory and International Relations* (Oxford University Press USA 1993).

²³⁶⁹ Bertram I Spector and Anna R Korula, 'Problems of Ratifying International Environmental Agreements:

is based on the complex coordination of legal organisations through treaties. Following this argument, Dimitrov also observed that “a regime is a formal intergovernmental policy agreement that involves their specific commitments to policy targets and has entered into force according to the terms of the legal text”.²³⁷⁰

In this illustration, it can be said that regime theory was developed in the late 1970s and 1980s by political scientists such as Krasner, Keohane, Axelrod, Snidal, Oye, and Young to explain the interaction between governments on the international stage. This period saw the increase of international organisations in the field of security, trade, human rights, environment, and development. Consequently, the regime theorists seek to explain the foundation and function of multilateral cooperation between states, including the powerful political changes seen after the Cold War conflict.²³⁷¹ In contrast, the fundamental principle behind the Regime Theory in the literature focuses on the positive example of institutions building. Yet, the concept in this study is to use regimes theory to explain the circumstances where nations have periodically tried, but failed, to build cohesive and collective legally binding treaties and international institutions to hold corporations accountable for human rights violations. The non-regimes, which is derived from a collective of political decisions as a successful regime, are crucial to examine in order to understand the conditions under which nations will cooperate to achieve a high standard of corporate human rights accountability.

Nevertheless, the current concept of Regime Theorists are a rationalist; they assume that governments are egotistical unitary actors in the quest to secure their interest in a revolutionary international system.²³⁷² In this view, it is believed that states act to maximise their absolute gains, rather than their relative gains in connection with the needs of other states. Likewise, regime theorists contest that cooperation is possible and common in the international arena and that international organisation (both formal and informal) can shape and change state

Overcoming Initial Obstacles in the Post-Agreement Negotiation Process’ (1993) 3 (4) *Global Environmental Change* 369, 381. “Explaining that while countries sometimes comply with treaty language without formal ratification, ratification is the more usual practice and provides a verifiable measure of state support for treaty”.

²³⁷⁰ Radoslav S Dimitrov, ‘Knowledge, Power, and Interests in Environmental Regime Formation’ (2003) 47 (1) *International Studies Quarterly* 123, 15.

²³⁷¹ Harold Hongju Koh, Abram Chayes, Antonia Handler Chayes and Thomas M. Franck, ‘Why Do Nations Obey International Law?’ (1997) 2599, 2659.

²³⁷² Robert O Keohane, ‘The Demand for International Regimes’ (1982) 36 (02) *International Organization* 325, 355. “Assuming that states are rational utility maximisers, in that they display consistent tendencies to adjust to external changes in ways that are calculated to increase the expected value outcome to them”.

behaviour over an extended period of time, even when the powerful state is against the development of the institution,²³⁷³ this study observed that these views are disputed.

For that reason, the fundamental principle of Regime Theory is that state interest determines how the regimes are formed or what kind of regime formation is needed for a particular treaty negotiation.²³⁷⁴ To put it another way, the state only seeks to create a regime where cooperative arrangements will aid the overlapping benefits in a way that states could not achieve by acting solely. An example is the role of NATO in serving the collective interests of the UN, Canada, and Western European nations in countering the Soviet threat. Nonetheless, where there is a benefit aggregate, regime formation is not foreseeable because cooperation can be disrupted through behaviour, miscommunication, or enticements to defect or free-ride.²³⁷⁵

The possible implication this may have on a future treaty on corporate human rights obligations is that it will lead to a weaker accountability system; the state will force the amendment of the treaty, which could have no meaningful purpose, or reject it all together because it does not serve its interest. Therefore, establishing corporate human rights obligations under a treaty perhaps could sound like a legitimate and moral obligation for the international community to fulfil but not a practice legal duty. However, this research is not convincing that this approach alone will solve corporate human rights abuse. The critical question is underlying what the enforcement and remedy should be in practice, rather than what duty should or should not be incorporated in the treaty, and who are the duty bearers.

6.5. Two Models for Past Transnational Corporation Human Rights Treaty

This part of the study looks at two models of states negotiating a transnational corporation human rights treaty. The first is the Foundation Model of how two states negotiate over ongoing cross-border pollution emissions. This type of bilateral model has dominated both political scientific scholarship and legal scholarship on the changes of the transnational pollution date. The second looks at alterations to the Foundation Model to develop a Protracted

²³⁷³ Oran R Young, 'The Politics of International Regime Formation: managing Natural Resources and The Environment' (1989) 43 (03) *International Organization* 349, 375.

²³⁷⁴ Arthur A Stein, *Why Nations Cooperate: Circumstance and Choice in International Relations* (Cornell University Press 1990).

²³⁷⁵ Kenneth A Oye, 'Explaining Cooperation Under Anarchy: Hypotheses and Strategies' (1985) 38 (01) *World Politics* 1,24

Model that covers other human rights liability negotiations, which carry more suspicions, involve more parties and address the risks that may not occur until years after the negotiations.

6.6. The Foundation Model

In the Foundation Model, State A's corporations are engaged in a cross-border human rights violation in State B and State B's citizen demands for a formal intergovernmental consultation to negotiate an agreement and remedy to stop the corporation from engaging in future human rights violations and environmental damage. State B can choose not to negotiate, engage in a treaty negotiation or a law that will impose a legal obligation in a case against state A for the harm caused by, for example, pollution from toxic gases. This model is evident in the Stockholm Declaration, the Rio Declaration, and many other voluntary mechanisms, recommending that no state may use its territory to cause harm or environmental damage in the territory of another state.²³⁷⁶ The most crucial part of human rights accountability and environmental law cases is the *Trail Smelter* arbitral decision of 1941,²³⁷⁷ which will more likely support State B's lawsuit of legal remedy for the damage caused to the livelihood of citizens and the environment.²³⁷⁸

However, with all the legal mechanisms supporting State B, regime theory would model this legal case or negotiation as deadlock, where one actor always favours mutual defection (fail to cooperate) to mutual cooperation.²³⁷⁹ In this circumstance, the transnational human rights violations and environmental damage are likely to continue without any effective solution. Following this scenario, it is likely that no human rights treaty will ever be concluded

²³⁷⁶ United Nations Conference on The Human Environment, *UN Conference on Environment and Development* (1992). <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>> accessed 14 January 2017 also see; Bertram I Spector, Gunnar Sjöstedt and William I Zartman, *Negotiating International Regimes: Lessons Learned from The United Nations Conference on Environment and Development (UNCED)* (Graham & Trotman/Martinus Nijhoff 1994)

²³⁷⁷ The *Trail Smelter* Arbitration Case (*United States v Canada*) 1941, UN Rep. Int'l Arb. Awards 1905 (1949). The *Trail Smelter Case* arose in the field of late 1950's and came up with the issue of International Environmental Law. In this case "it was damage caused by one State to the environment of the other that triggered the legal claim. Legally the issue was not viewed as different from damage caused to the public or private property, for instance by the inadvertent penetration of a foreign State's territory by armed forces. For the first time an International Tribunal propounded the principle that as State may not use, or allow its national's to use, its own territory in such a manner as to cause injury to a neighboring country". "The Columbia River rises in Canada and flows past a lead and zinc smelter located at Trail, in British Columbia (Canada).

²³⁷⁸ Karin Michelson, 'Rereading Trail Smelter' (1993) 31 *Canadian Yearbook of International Law* 219, also see; Russell Miller and Rebecca M Bratspies, '*Transboundary Harm in International Law: Lessons from The Trail Smelter Arbitration*' (2006).

²³⁷⁹ Kenneth A Oye (n 2345). "Noted That in a Game of Deadlock, Conflictual Outcomes Follow Directly and Simply from Payoff Structure".

in this setting because State A, the source state, gains from causing human rights violation and environmental damage to State B through business operations, the affected State. Thus, with directly conflicting interests, State A will always face a negative interest from adhering to a control regime or standards. The Foundation Model illustrates that transnational human rights violations and environmental damage often lead to a kind of victim pays result, where the victims of human right abuses are left to suffer without any legal protection. What is clear from this research is that the changes in regimes, means that the source state has no interest to cooperate, stopping, mitigating the human rights violations or even assisting in alleviating the lack of effective remedy for the victims.²³⁸⁰

International legal scholars often express their examination of transnational human rights abuses and environmental damage as a problem in term of the Foundation Model. For instance, Merrill modelled a bilateral, state-to-state conflict in one of the most substantial American law review articles on the changing aspects of transnational environmental damage.²³⁸¹ According to the author, transnational pollution falls under public law, state-centred conflict, in which a claimant state and defendant states bring their civil claims to court or to negotiation appropriate remedial mechanism for victims, or the process of bringing a lawsuit before a tribunal, “much like an appellant argument”.²³⁸²

The Foundation Model is, therefore, inadequate for liability for human rights violations and environmental damage; however, to clarify the distinctions of civil liability negotiations, it provides some valuable explanation of state behaviours in treaty negotiation. It assumes that a state, as an actor, is the party causing the human rights violations and environmental damage and that another state is the victim suffering as a result of this violations. However, this complicates the true nature of the legal arguments and changes in relations to transnational human rights violations accountability, specifically where corporations or transporters are normally the cause of human rights abuses and environmental damage and private parties are

²³⁸⁰ Jonathan Baert Wiener, ‘Global Environmental Regulation: Instrument Choice in Legal Context’ (1999) 108 (4) *Yale Law Journal* 677, 800. “Contesting that the polluter pays principle cannot be implemented in an international system of voluntary assent to treaties because polluters will simply decline to participate in a regime that impose net cost on them”.

²³⁸¹ Thomas W Merrill, ‘Golden Rules for Transboundary Pollution’ (1997) 46 (5) *Duke Law Journal* 931, 1019.

²³⁸² *Ibid* “Merrill recommends that transboundary pollution should be handled on a case-by-case basis, after environmental damage occurs, through application of two golden rule, of reciprocity whose content will vary depending on the state involved. The golden rule is do unto other states as you do to your own citizens, and the other reverse golden rule is do not ask of other states as what you do not ask of your own citizen. Before an international tribunal or in bilateral negotiations, a state could propose a decision rule (related to the standard of liability, limit on the damage, or procedural protection that is no more favourable than the way that state treats its own citizen or industries in a similar context”.

the victims. States provide the political setting for such conflicts, but the long-standing benefit in civil liability rules shows that states are looking for private dispute resolution among directly affected victims as a solution to the conflict. By doing this, states are able to create liability obstacles for corporate human rights accountability, in order to protect their domestic economic interests. To put it another way, it is a tactical game of preventing legal redress that seems to be a detriment to the economy of the state in question.

6.7. The Protracted Model

It is clear from the above explanation that the Foundation Model is insufficient to explain the current problem of civil liability treaty negotiations. Hence, the model needs to be expanded to cover how states might negotiate over a treaty that establishes private liability for transnational human rights abuses and environmental damages, as opposed to a treaty aimed at mitigating the circumstance where human rights abuses may arise. To illustrate how the current impediment to liability affects states' incentive to ratify civil liability treaty, the study expands the Foundation Model in two significant parts.

First, the Protracted Model recognises national components as the true party-in-interest in the negotiation and indicates how state action to promote the interest of their national corporation and citizen, as well as economic gains. For instance, a state with a significant number of multinational corporations capable of violating human rights and causing environmental damages will oppose an agreement on civil liability treaties that will facilitate liability for human rights violations and expose those corporations to a lawsuit.

Second, the Protracted Model multilateralises the Foundation Model by including different parties and multidirectional human rights violations and environment damage. The multilateral Protracted Model recommends that there is delicate transaction cost to regime formation due to the vast number of parties at the negotiation table, and it also shows that states can both be the perpetrator and can also be the victim, depending on nature of the violations target by the civil liability.

This study will further discuss the elements of the Protracted Model in turn, by first examining any of the models of liability negotiation that must cover the role of national interests because civil liability negotiation involves state negotiating over the interest of their national corporations, economies and citizens, (for instance, the interest of DEF corporation that conducts business in State A or the interest of the community of State B affected by

corporate human rights abuses and environmental damage. It continues the development of tort remedy here by stressing that even though tort remedy itself is retrospective and compensatory, a negotiation over incorporating tort remedy in human rights violations and environmental damage can be seen as a fight between states over which forthcoming legal principles, decision procedures, liability limits, and insurance duties will be appropriate for the national interests of the state. The Foundation Model overlooks this complexity that states themselves are both the cause of the harm to their citizens, and can also be the victims and the solution.

The regime theorist rarely investigates what was in the black box of national politics,²³⁸³ but it is vital to do so in order to understand the root causes of the past failures of regime formations in the concept of international treaty negotiations. A negotiation over a new human rights duties treaty is a two-level game in which states aim to win on both the international arena (vis-a-vis other states) and national arena (by negotiating an agreement that benefits powerful national interests).²³⁸⁴ Accordingly, conduct that is normal in the international arena (including, perhaps, agreeing with a close associate on civil liability) may be difficult for decision makers to take because of national constraints and politics. A “win-set”²³⁸⁵ is the set of treaty requirements or policies attainable in the international arena that is also adequate and rectifiable at the national level.

Nonetheless, the question is, how states serve their national citizens in a negotiation over liability rule? This can be answered in different forms; however, the primary interest of a coherent source nation is mitigating the risk that national corporations will get sued for damages linked to their business operations in another state (example State B). Liability obstacles are therefore vital to understanding state motivations vis-a-vis civil liability treaties. A state hosting the corporation that violates human rights overseas is likely to be strongly wedded to the legal *status quo*, with its vast procedural hurdle to transnational tort litigation for human rights violation and environmental damage. Likewise, the orthodox approach to the private international law governing jurisdiction, choice of law, enforcement of judgements has created an impediment and a defensive mechanism that benefit national corporations that violate human rights and damage the environment overseas.²³⁸⁶

²³⁸³ Stephan Haggard and Beth A Simmons (n 2337).

²³⁸⁴ Robert D Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ (1988) 42 (03) *International Organization* 427, 460.

²³⁸⁵ *Ibid.*

²³⁸⁶ Harold G Maier, ‘Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law’ (1982) 76 (2) *American Journal of International Law* 280, 320.

The implication of this old rule is that the affected state that is, the victim state -has the opposite motivation, which is to support a civil liability treaty as a means of mitigating the obstacles to human rights accountability and to ensure its citizens have appropriate avenue for remedy and compensation in the event of significant human rights violations and environmental damage. Therefore, the Protracted Model helps in predicting a very high degree of conflict among states over liability treaties, depending on the interest of the national states and their economic positions.

The second element of the Protracted Model acknowledges that liability negotiations are usually multilateral and incorporate human rights violations and environmental damage that flows from multiple directions. It is argued that nations engaged in civil liability treaties negotiations are rarely solely source states or solely affected states, as in the types of activities that may have caused the harm to society and the environment. Hence, the many nations that contribute to transnational human rights violations (even to a small extent or in a diffuse manner) are also somehow affected by transnational corporation human rights abuse. Thus, it could be in the best interest of both nations to enforce remedy for human rights abuses in the jurisdiction, to deter corporate misconduct.

This research uses a two-by-two grid, as indicated in Table 3,²³⁸⁷ to illustrate the multidimensional characteristic of civil liability negotiations.²³⁸⁸ The rationale here is that a state's negotiating position on a civil liability treaty is a role of two factors. The first is national economic pervasiveness of the business operation targeted by the civil liability treaty (because of the state's interest in protecting the corporation from transnational tort claim) and the second the state's exposure to environmental damages from foreign corporations involving the targeted business operations (because of the state's interest in making sure that the citizens can bring a claim against the corporation that violates their rights).

In Group I, states are bystanders, and thus these are states that are not victims of any gross violations from the category of corporate human rights violations and environmental damage targeted by a civil liability treaty and that do not have a significant economic reliance on such corporate business operations that pose transnational human rights risk and environmental damage. Therefore, with nothing to gain or lose from a treaty, they are likely to refrain from negotiations on civil liability treaties or to offer only unenthusiastic support. Group

²³⁸⁷ Appendix.

²³⁸⁸ Detlef Sprinz and Tapani Vaahtoranta, 'The Interest-Based Explanation of International Environmental Policy' (1994) 48 (01) *International Organization* 77, 105.

II, states are likely to demonstrate strong opposition because, by reducing the obstacles to liability, a civil liability treaty may threaten significant national economic development, specifically the ones that have had negative impacts on human rights and the environment. Group III, states in disparity, are likely to be supporters of a civil liability treaty. This is because they are frequently exposed to corporate human rights and environmental abuses from transnational economic activities; additionally, they do not have a high degree of economic dependence to rely on corporate business activities that violate human rights and damages the environment. As in the Foundation Model, the Protracted Model still envisages intense conflict between Group II states and Group III states over the terms of any civil liability treaty.

Therefore, it is very hard to see how and where a new binding human rights treaty on corporation will sit in practice. However, it is clear that any development and ratification of a future treaty shall have no bearing on a corporation's duty to respect human rights, access to remedy, and enforcement. This position adopted here could be seen in Group IV because Group IV has a very high degree of economic activities in many states, which might be targeted by a civil liability treaty as well as a high degree of transnational environmental damages. Thus, Group IV states are likely to be in opposition because of the effect civil liability treaty may have on their economic output. Similarly, business opposition to civil liability treaty could contest raucously against adoption of a binding human rights treaty on corporations, and business lobby may have a larger influence on government negotiation compared to the political influence of NGOs, individuals and communities who may be victims of human rights abuses and environmental damage. Additionally, communities and individuals do not know, ex-ante, whether they will be a victim of transnational corporation misconduct and environmental damage. Thus, in both developed and developing states, they have little motivation to lobby in support of a treaty.

Finally, Table 3 shows the negotiating changing aspects in a different context of civil liability treaty. So, instead of assuming that governments are either the perpetrators of human rights violation or victims of human rights abuses and environmental damage, Table 3 illustrates how state interests with respect to a potential civil liability treaty are shaped as a function of competing factors of geography, human rights abuses, environmental damages and the intensity of the state economic strategy and operations. Furthermore, it also shows the importance of national consideration in structuring negotiation positions.

6.8. Using the Protracted Model to Identify the Causes of Failure in Civil Liability Treaty

The distinction in the Protracted Model helps to explain three persistent causes of failures in civil liability treaties. The first is the conflict of interest between the developed states and the developing states; the second is the high economic cost associated with the adoption, and ratification and implementation of civil liability treaties, in conjunction with the low incentive. These costs make it difficult for states to incorporate a treaty provision as part of their legal system.

Following this development, the essential argument here is that the concept of remedy and enforcement could not be derived from the treaty alone, due to the different causes of failures highlighted here. Likewise, as long as the states are left with the will to choose the method and process to implement a binding treaty, the significant purpose of the treaty will not be achieved. Therefore, this will lead to the question of a unilateral approach to remedy and enforcement of a human rights standard where the state has a part to play but the judiciary is the main actor in deciding and enforcing human rights on corporations through the concept of duty of care. Hence, the question to the court should be one of effective remedy and enforcement, with the aim of putting the state (victims) back to the place they were before the human rights violation and environmental damage (tort) were committed.

6.9. Conflict of Interest between Developed State and Developing State

The Protracted Model has a similar feature such as the Foundation Model in one crucial aspect: it shows the underlying outlines of conflict in negotiation over new civil liability treaties (especially between the Group II states and Group III states in Table 3). Looking at these conflicting interests in respect of liability obstacles, the fundamental prediction of deadlock in the Foundation Model is also evident in the Protracted Model. In this illustration, it is argued that there will be no demand for a regime unless there is some benefit to motivate the states to be part of the treaty, thus, this can only happen if the state is viewing themselves as either the winner or loser in a more harmonisation system of corporate liability for human rights violations and environmental damage.²³⁸⁹

²³⁸⁹ Oran R Young (n 2343) “the author argued that regime formation is unlikely under these circumstances because of the absence of a clear concentration environment in which all parties can see joint gains from devising new institutional arrangements”.

In addition, there are unquestionably many developing states that fall into Group II for specific treaties. For instance, their economy may be highly dependent on a corporation that is engaging in human rights violations and environmental damage abroad. However, in the past, the flaws in treaty negotiation has been the difference between developed states and developing states. Ever since the 1972 Stockholm conference, developed countries have been the most reliable and outspoken opponents of civil liability treaties, because the objective is to create a civil liability regime to “remove obstacles from the transnational lawsuit and in some cases to ensure that liability conditions are included and effective remedy is guaranteed. It is not surprising that most developed nations have refused, in big numbers, to sign and ratify the treaties”.²³⁹⁰ Therefore, developed nations are more likely to be concentrated in Group II, with a substantial interest in protecting their corporations from civil liability, due to the effect it may have on their economic activities and national interests. When this model is applied to the binding UN Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights it shall be predicted that the exact pattern of behaviours will emerge.

By contrast, developing nations have been the primary supporters of negotiating new civil liability treaties, such as the binding UN Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.²³⁹¹ Likewise, developing nations have supported coordinated liability rules and the imposition of strict liability as a means to overcome liability obstacles and, hence, promoting paths for compensation and remedy against multinational corporations.²³⁹² Therefore, developing nations are likely to be concentrated in Group I and Group III in Table 3. This is crucial for them because tort law provides an avenue for them to shift the cost of the violations and environmental damage onto the responsible party, internationally agreed-upon liability rules, from the point of view of developing nations, as the procedure to correct global economic injustice, global power imbalances remedying historical inequities, and to help their citizens. Certainly, developing states negotiating a position on civil liability treaties have been closely entangled with larger objections, such as the lack of accountability of multinational corporation activities in developing countries and the whole

²³⁹⁰ Peter H Sand (n 2270).

²³⁹¹ Jutta Brunnee, ‘Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection’ (2004) 53 *International & Comparative Law Quarterly* 2, 351.

²³⁹² *Ibid.* “According to Brunnee, in negotiations over liability rules for the Cartagena Biosafety Protocol, developed countries opposed an enabling clause that would lead to subsequent discussions on liability for environmental damage from living modified organisms (LMOs). Also developing countries, in contrast, were concerned at their limited capacity for risk assessment and risk management. They saw liability regime as essential to their protection against the risk of transnational movement of living, genetically modified organism”.

disproportions in wealth that undergird international human rights standards and international shipments of hazardous waste to the developing world.²³⁹³

The conflict between developed and developing states in regards to civil liability rules are therefore not just about interest (how national components in each set of nations will pay under different liability regimes), but also about power (who will exercise control over the international human rights law agenda). The power inequalities between developed and developing states help to clarify why liability rules have so often been pushed off negotiating programmes and demoted to following protocols that have a thin chance of adoption.

An example is a negotiation in 1998 and 1999 over a treaty regulating international shipments of genetically altered seeds and plant tissues, known as living Modified Organism (LMOs), which shows how the conflicts of interest indicated on the Protracted Model is evident in practice. Substantial conflicts emerged between developed nations that are big biotech exporters (these nations include US, Canada, and Australia) and over 120 developing nations that were present at the negotiations. Specifically, the developing nations, under the leadership of Damena of Ethiopia, pushed to get tort liability rule incorporated in the text of a treaty on LMOs because they were worried about the environmental impact it may have in developing countries, where the LMOs were being severely imposed by biotech corporations in the developed countries.²³⁹⁴ Also, the US and a few of other biotechnology exporters' countries opposed the incorporation of any tort liability provisions in the entry of the treaty text. The developing countries were faced with opposition, seeking to disrupt the whole treaty; and as a result, the developing states were forced to suspend the liability discussion to later date. As noted by Damena delegate:

“The negotiation on liability and redress were particularly chilly, as there was a stunned silence from the delegates of the industrialised countries every time the issue was raised. It was perhaps the only issue in which the industrialised countries invariably showed their lack of interest and successfully stalled the talks, repeating that the issue is a complex one. It is difficult to understand why some of these states opposed rules on liability and redress when they already had the tough law at the domestic level. The developed countries' sincerity about providing an

²³⁹³ Gino J Naldi, 'The Regulation of The Transnational Trade in Hazardous Wastes: The African Response' (2000) 7 *South African Journal of Environmental Law and Policy* 213, 236.

²³⁹⁴ Christoph Bail, Robert Falkner and Helen Marquard, *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development* (Routledge 2014).

adequate regime for a new technology to which they are objecting the developing world was suggested by their bleak position on liability and providing remedy”.²³⁹⁵

Similarly, as observed by Cook, developing states consistently explicate “the message that if this subject liability for LMO release were left out, the prospect for successfully finalising a protocol would be minimal”.²³⁹⁶ In contrast, the author indicated that the opposition from the developed states against the liability rules comes from their concern that “significant resources would be diverted into a complex and time-consuming exercise for which there was not, as yet, any demonstrable need.”²³⁹⁷ According to Cook, the likely cause of the split between developed and developing countries was conflicting “perception of how well their own countries will be able to cope with the consequences of any incident that might occur in the future. Therefore, developing countries have generally supported the inclusion of liability, while most developed countries opposed them”.²³⁹⁸ It should also be acknowledged that developed nations have not universally opposed all civil liability treaties. The developed nations have for the past few years respected and implemented the regimes governing oil spillage liability and nuclear liability; this is subject to debate, due to the little evidence available in this area. Contrary, one of the main reasons for the relative success of the oil spillage liability regime was that oil shipment has been conducted under rules set by international convention for many decades. Well, does this mean that if human rights remedy and enforcement are also governed by strict international law rule, there will be a substantial result?

This is also not clear; however, it will be difficult for one to support the idea of strict remedy and enforcement for human rights abuses and environmental damages, due to the complexities surrounding the treaty negotiations. However, International Maritime Organisation (IMO) supervises a series of treaties governing accident prevention, the design of tankers, and emergency response procedures. Therefore, a possible implication of this might be that to address civil liability for environmental damage from oil spillage in a civil liability rule through the international convention is not seen as a radical departure from the current precedent established by human rights law and other environmental treaties explained in this section.

²³⁹⁵ *Ibid.*

²³⁹⁶ Kate Cook, ‘Liability: No Liability, No Protocol’ (2002) *Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology With Environment and Development* 371, 384.

²³⁹⁷ *Ibid.*

²³⁹⁸ *Ibid.*

This pattern of events shows that perhaps human rights remedy and enforcement under tort law will not be seen as a radical departure from international law routine, as tort law is universally applicable to all nations. However, this could be complex. Also in the case of the nuclear liability regime, the developed countries were enthusiastic to adopt a treaty that assigned liability solely to nuclear plant operators so as to exclude suit against the state, which are the main suppliers of nuclear raw materials.²³⁹⁹ What this means is that a future treaty liability for corporate human rights violation could be possible if the focus is on tort law principle, with the state being the primary actor promoting human rights standards in its jurisdiction.

The state as the primary actor in tort lawsuit is crucial because developed states in the past were likely supported by the oil spillage and nuclear accident liability regimes, which mean that tort liability may encourage the essential operations of oil shipment and nuclear power generations by the corporation, to respect human rights law and the environment standards. The civil liability treaties that help to overcome the barriers for transnational tort litigation were perceived to have the potential to help victims, as well as to encourage and facilitate the business operation that is targeted by the civil liability treaties. However, this can only be achieved in human rights accountability context by providing tort liability that is able to deter corporations from violating human rights and environmental damage. It can also be achieved by overcoming political opposition to new liability, as well as creating legal remedies in the case of violations and environmental damage.

This encouragement here could provide some motivation for the host state or home state, specifically the industrialised nations whose economies strongly rely on the underlying corporate operations that are targeted by the civil liability treaty. As mentioned by Boyle, international coordination of liability law creates “a more equitable balance between the interests of the plaintiff and the defendant, helping to establish shared expectations on a regional or global basis which may make the risk posed by hazardous activities more socially acceptable to those likely to be affected.”²⁴⁰⁰

In addition, the nature of corporate human rights accountability and remedy in tort contexts should contribute toward developed countries’ adherence to international human

²³⁹⁹ Gunther Doeker and Thomas Gehring, ‘Private or International Liability for Transnational Environmental Damage-The Precedent of Coventional Liability Regimes, (1990) 2 *Journal of Environmental Law and Litigation* 1

²⁴⁰⁰ Alan E Boyle, ‘Globalising Environmental Liability: The Interplay of National and International Law’ (2005) 17 (1) *Journal of Environmental Law* 3, 26.

rights standards in the global community. In both cases, violation and environmental damage can affect all countries, and there is no easy calculation to be made in advance of a treaty with respect to who will be the duty bearer and whose fault it is. As observed by Young, if a state “cannot know in advance whether it will occupy the role of site of an accident, victim state, or unharmed bystander with respect to a specific accident, then there is a strong incentive to consider the common good in devising institutional arrangements”.²⁴⁰¹

Nevertheless, under these two contexts, the ratification record of civil liability treaties indicates a sharp discrepancy between developed and developing states, as projected by the Protracted Model and Table 3. The result is that a small number of developing states have signed and ratified civil liability treaties, but these numbers are not enough to bring the treaties into force. In many circumstances, developing countries that have a small national reliance on the economic operations being regulated (Group I or II states) are the only states enthusiastic about ratifying the treaties and becoming a formal member. In contrast, developed nations, defined in this section as a member of the OECD,²⁴⁰² have in some circumstances signed the civil liability treaties; however, in general, they have refused to become formal parties through ratification or accession. Table 4²⁴⁰³ demonstrates some of the civil liability treaties adopted since 1989 but never ratified by most developed states.

The Protracted Model illustrates that developed nations will normally oppose civil liability treaties in order to protect their corporations. The empirical question is why do the vast majorities of developed countries sign treaties but not ratify these agreements, rather than just oppose them outright?

The outline of the OECD countries signing but not ratifying the agreement is very disappointing, and this convention is quite striking. This is a very delicate and complex question; however, there are two possible explanations for this despicable behaviour of the industrial countries. Some of the possible explanations are that there was a post-signature breakdown in support for the civil liability treaties, or there was little or no support to start with during the negotiation of the treaties and industrial countries signed these civil liability treaties

²⁴⁰¹ Oran R Young (n 2343).

²⁴⁰² The Member of the OECD are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, France, Netherland, New Zeland, Norway, Poland, Portugal, Slovak Republic, Soth Korea, Sweden, Switzerland, Turkey, United Kingdom and United State. OECD, Ratification of the Convention on The OECD. <http://www.oecd/document/0,3343,en_2469_201185_1889402_1_1_1_1.00.html> accessed 15 January 2017.

²⁴⁰³ Appendix.

because they felt it was a moral duty to sign it, without any intention to ratify it and become formal parties.

The literature on post-agreement negotiation advocates that both explanations are adequate. Post-agreement negotiations are the “dynamic and cooperative process, system, procedures and structures that are institutionalised to sustain dialogue on issues that cannot, by their very nature, be resolved by a single agreement”.²⁴⁰⁴ The post-agreement negotiation literature saw the preliminary treaty text as just the beginning of a decades-long process of the following negotiations, in both the national and international arena, with respect to treaty ratification, interpretation, and revision.²⁴⁰⁵ Gaining national support for ratification of the treaty is only a step in this process,²⁴⁰⁶ and conflict can arise at any level of the post-agreement negotiation that leads to unconcealed or concealed defections from the previous uniform relationship.

As a result, there are four emerging reasons why states may refuse to ratify a treaty after primarily signing it: the first is the exact details of the treaty factors, for example, the development of national resistance to the text of the treaty; the second is the peripheral factors, such as other problems that have gained a higher priority in national legislation; the third is procedural components, such as public force or the level of personal engagement by state leaders in pushing to ratify the treaty, and the fourth is status components, such as the environment of the national politics process, the degree of economic development, and public spending in the problem area.²⁴⁰⁷ However, in some circumstances, heads of state of the OECD nations may have a genuine intention to support the treaty or are willing to support the civil liability treaty but, due to the emerging opposition over time at the domestic level, it complicates the multilevel negotiation games recognised by Putnam and other Regime Theories. For instance, after the head of state signs a treaty, the governmental legal department needs to ratify and implement the treaty in national legislation may have caused the opposition of national legislator or corporate lobby groups who were not involved in the initial treaty negotiation process, to distort the process.²⁴⁰⁸ Therefore, even though the treaty may be signed

²⁴⁰⁴ Roger Fisher, William L Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin 2011).

²⁴⁰⁵ William I Zartman, ‘Negotiating The Rapids: The Dynamics of Regime Formation’ (2001) 11 (1) *Japan Negotiation Journal* 3, 27. “The process of regime formation does not stop with adoption of founding agreement, the idea of an ultimate instrument governed thereafter by *pacta servanda sunt* is a notion of a by gone era”.

²⁴⁰⁶ Bertram I Spector and Anna R Korula (n 2339).

²⁴⁰⁷ *Ibid.*

²⁴⁰⁸ *Ibid.* “Argued that new players involved in domestic ratification process can out maneuver government

at the international level, it will lose its significance at the national level due to the difference in political and national interest.

It is also possible to contest that political changes, such as election and changes in political power, may have led to the difficulties in ratifying the initial agreement. In the United States, for instance, the Bush Administration rejected both the Kyoto Protocol²⁴⁰⁹ and the Rome Statute creating the International Criminal Court after the Clinton Administration had signed both conventions.²⁴¹⁰ Also, in 2017, President Trump announced that the United States would withdraw from the Paris Climate Accord, weakening efforts to combat global warming and embracing isolationist voices in his White House who argued that the agreement was a pernicious threat to the economy and American sovereignty.²⁴¹¹ This evidence illustrates that some industrialised states may have primarily signed a civil liability treaty but will either refuse to implement it into their domestic law or redraw from the agreement all together when there is a change in the politics at the state level. What this means is that the changes in state behavior observed above strengthen the idea behind the Protracted Model and the predictions of a state refusal to develop or ratify a binding civil liability treaty into its domestic law. Observing this discussion presented by both models here, it is clear that, even though this research is not dismissing a binding legal treaty on corporations, this study argues that an effective binding treaty on the corporation will be very hard to achieve and enforce at both international and domestic levels. Therefore, it is crucial for the international legal system to look for an alternate

officials who initially supported and signed a treaty; negotiation representing their countries before an international forum may be sufficiently flexible, but stakeholders back home (such as ministry bureaucrats, political parties, business, union, citizens lobbies) may be more hard-nosed and tough as internal domestic negotiation, responsible for approving and implementing the product of international omitted”.

²⁴⁰⁹ Vice President Al Gore signed the Kyoto Protocol on behalf of the United States in November 1998, even though it was clear at the time that there was not a two-thirds Senate majority in favour of the treaty. Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (OUP Oxford 2003). The outcome in the Senate was fairly certain because of the passage of the Byrd-Hagel resolution, which passed by a 95-0 vote. See S. Res 98 105th Cong. (1997) (stating the sense of the Senate that the United States should not be a signatory to any climate treaty that did not include binding target and timetables for developing as well as industrialised nations or that “would result in serious harm to the economic of the United States”).

²⁴¹⁰ The Clinton Administration signed the treaty establishing the International Criminal Court Treaty in December 2000, Curtis A Bradley, ‘US Announces Intent Not to Ratify International Criminal Court Treaty’ (2002). President Clinton stated that the treaty had “significant flaws but that with signature we will be in a position to influence the evolution of the court. The Bush Administration quickly signalled its opposition to the treaty, citing a number of objections”.

²⁴¹¹ Michael D Shear, ‘Trump Will Withdraw US from Paris Climate Agreement’ (2017) *New York Times*. <<https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>> accessed 13 October 2017.

mechanism for effective remedy at both national and international levels, which is closely related to the current universal legal principles, such as tort.

6.10. Lower Expected Benefits of Treaties

One of the reasons behind the expansion of the Foundation Model through an overview of the most practical setting of multilateral negotiations in the Protracted Model aids to highlight the second biggest problem to regime formation in the civil liability remedy enforcement. The second biggest problem with civil treaty negotiations and implementing agreements is the comparatively low advantages that state get for being party to the treaty, in order word the cost of the state being party to a civil liability treaty outweighs the benefits.

On the financial side, the Foundation Model has been unsuccessful in explaining the significant financial implications of negotiating multilateral civil liability treaties. Hence, the bilateral settings of the Foundation Model have shown that the state has no incentive or little incentive to stop or mitigate corporate human rights violations and environmental damage, apart from some remedy. This is definitely a roadblock for any future civil liability treaty, but it is theoretically manageable. Also, from the bilateral setting of the Foundation Model arises the likely scenario of “Coasian negotiation”,²⁴¹² in which the corporation could offer some form of payment to the victims of human rights violations and environmental damage, to either put the victim back to where they were before the violations occurred or to mitigate or restore the environment back to its original way.

In distinction, contemplating on the Protracted Model, where there are many states attempting to negotiate a civil liability treaty, with complicated human rights violations and environmental damages issues, many states and states acting as both defendant and victim states, will depends on the extent of the human rights violations and environmental damages on that particular state, the time and cost factor in negotiating the treaty. The prospect for “Coasian negotiations” in these settings is dramatically weakened, and the prospect of achieving any effective civil liability treaty lost its significance in a legal and moral context.

²⁴¹² Ronald H Coase, *The Problem of Social Cost* (Palgrave Macmillan UK 1960) *Classic Papers in Natural Resource Economics* 87, 37. “Coase argued that private parties involved in a pollution or nuisance dispute will bargain over abatement, and that the bargaining could occur among states if the transaction cost are low”.

Oye and other Regime Theorists have observed that the rising numbers of parties engaged in negotiation tend to raise the cost of regime formation by making it very hard to find a compromised level of agreement among the nations and by increasing the chance that the parties will move away from the agreement once it is reached.²⁴¹³ Likewise, the “analytical constructs closely tied to a two-party of the world shows that states cannot carry us far in coming to terms with politics of international regime formations”.²⁴¹⁴ Therefore, in regards to civil liability treaties, many parties are usually at the negotiation table to bargain the terms and conditions of liability rules that suit their national interest only, not the interest of the majority or the international communities. Some provincial treaties that cover over twenty potential parties, establish a significant number of issues in regard to the transaction cost of the negotiating the treaties.²⁴¹⁵

However, on the other hand, multilateral liability treaties have a number of issues that serves as an impediment to the enforcement of civil liability treaty and regime formation.²⁴¹⁶ Any country considering being part of a civil liability has only a small risk of having its corporations victimised by the specific text of the business and human rights treaty that covered human rights violations and environmental damages. However, the difficulties arise when a party rejects the prospect of a larger negotiation for multilateral corporate human rights treaty if it recognises that there are only minimum benefits for its own corporations and citizens joining the treaty. As also observed by Merrill:

“Most transboundary pollution problems are perceived as being relatively isolated and localised disputes. People tend to focus on this particular transboundary air pollution problem or that particular transboundary water pollution problem, therefore, the ones they focus on, are the ones that have an immediate impact on them”.

The implication is that if people and nation-state see each individual transboundary dispute as just an example of a more generic human rights violations and environmental damages that affect them, then it can be argued that nearly everyone (including themselves) will likely see a significant support for a generalised regime of regulations of transboundary pollution and human rights.²⁴¹⁷ It is not only the number of members in the Protracted Model

²⁴¹³ Kenneth A Oye (n 2345).

²⁴¹⁴ Oran R Young (n 2343).

²⁴¹⁵ The CRTD Convention, for Instant was Negotiated under The Auspices of The United Nations Economic Commission for Europe, which Has Fifty-Six Member Countries Located in Europe and Central Asia. <http://www.unece.org/oes/member_countries/member_countries.html>accessed 17 January 2017.

²⁴¹⁶ Kenneth A Oye (n 2345)

²⁴¹⁷ Thomas W Merrill (n 2351).

that hamper civil liability, but also the uncertainties inherent in the treaty being negotiated. Liability negotiations encompass more uncertainties in comparison to regime controlling transnational human rights and environmental problems, as in the Foundation Model, because there is no soft provable science or technology to predict the strict and fix obligation imposed by civil liability and because liability treaties are concerned with old and new tort rules that are applicable to future human rights violations and environmental damages. Thus, in many instances (such as nuclear accidents or environmental damage of release of LMOs), the chances of the accident triggering liability, the gravity of the resulting damage, and the prospect of a monetary recovery for the harm to victims pursuant to a treaty are all highly undefined.

In theory, though, if nations are to operate in a Rawlsian “veil of ignorance”²⁴¹⁸ with ambiguity about who will be the ultimate bearer of duty of care and pay for the judgement and about the limit of suits and amount of remedy for damages, then the prospect for contractual regime could rise. Hence, the nations may soften negotiating positions; for instance, if they are not sure how their own corporation will fall under a new civil liability regime. As stated by Young, such a veil increases the “shadow of the future” and “has the effect of increasing interest in the formation of arrangement that can be justified on the grounds that they are fair in procedural”.²⁴¹⁹ Certainly, Young is of the opinion that nations are often uncertain about what their own priority and choices are, in particular when starting the treaty negotiations. This establishes some disparities in a civil liability, rather than *Pareto* optimality or maximisation of individual gain, the dominant anxiety over negotiations.²⁴²⁰

It is more likely that the uncertainty inherent from treaty negotiating over forthcoming liability rules has the opposite effect in toughening negotiation positions and obscuring calculation of the advantages of being party to the treaty. Subsequently, for the affected nations and victims of human rights abuses and environmental damages, the advantages of joining a civil liability treaty may not be realised until transnational corporations’ human rights violations and environmental damage occur and a claim for a remedy for the injured victims is fully judged.

Treaty-based tort liability is written generally, and the details of implementation are left to national legal systems. On the other hand, civil liability treaties differ in term of human

²⁴¹⁸ John Rawls, *A Theory of Justice* (Harvard University Press 2009).

²⁴¹⁹ Takashi Inoguchi, ‘Oran Young, International Governance: Protecting The Environment in a Stateless Society’ (1996) 111 *International Relations* 190, 192.

²⁴²⁰ *Ibid.*

rights obligations, it sometimes deviate from the core principles of remedy and it deflects in terms of liability for non-state actor. This can be noted in the fact that a party is non-cooperative may not be apparent until a future event that triggers liability and the injured party seeks remedy for the harm. The incapability to observe the cooperation in the near future is likely to create a serious disincentive to forming the treaty in the first place. Under international law and human rights law, in contrast, it is usually easier to verify in the future whether a state is actually implementing the prerequisite regulations that are required to control corporate operations that may have a significant impact on human rights and the environment. Similarly, if one is to assume that a category of nations has an underlying common interest in more harmonised tort rules for transnational human rights violations and environmental damages, nations within that category might still find cooperation to be dangerous because “the actor following a cooperative strategy is vulnerable to losses inflicted by defecting partners”.²⁴²¹

6.11. Treaty Content as a Cause of Civil Liability Failure

One of the final major obstacles to establishing a civil liability treaty and remedy under international law for corporations is that the content of civil liability treaties themselves is frequently too difficult and distasteful for large categories of states to adopt. The Protracted Model highlights the predominance of protecting national interests and components. It appears that many nations are concerned about the effect of the treaties on the national economy, corporations and citizens, deciding in their game of theoretical calculus whether it is better to be part of the treaty all. In addition, the study also argued that the significant obligations of civil liability treaties, such as requirements to change national liability law and the threat to enforcement of monetary judgment, can become an obstacle to future corporate human rights liability treaties if care is not taken to develop a treaty that already has its root in domestic law doctrine. It is argued that conflict of interest, lack of cooperation, effective procedures, conflict with domestic legal systems, and the conflict between developed and developing countries are the main obstacles to civil liability treaty in the international arena.

²⁴²¹ Christer Jönsson, ‘Cognitive Factors in Explaining Regime Dynamics’ (1993) *Regime Theory and International Relations*.

6.12. Summary

In spite of the invocations of the past problems in building civil liability remedies, there is still an argument for the development and strengthening of tort remedies for human rights violations and environmental damages. The lack of practical legal remedies for victims of human rights violations is a conspicuous and longstanding gap in international law and international human rights law, and private solutions, which can address transnational issues without dispute resolution among national governments. So, a duty of care does offer this avenue to build on effective tort remedy, which is familiar to most states.

In international law and human rights law in terms of nature, gravity, and the nations and their citizens affected, there is arguably no single policy, treaty or declaration to solve the current problem of the lack of effective remedy in civil liability, except by strengthening tort remedies for transnational human rights violations and environmental damages. Therefore, multiple approaches are needed, which could operate in tort law principle in numerous judicial systems. The recommendation given here can be observed in two dimensions: the first is that there is a need to reform the process and the element of civil liability treaties, with the aim of saving consent-based rules,²⁴²² and the second is that civil liability treaty system approaches should be mainly focused on tort remedies through the spread of liability norm under the duty of care.

6.13. Remedy for Corporation Human Right Abuses and Environmental Damage

6.13.1. What is Remedy?

An important component of tort law is that it is based on a set of values that seeks to root out abuse of power from any source and secure respect for the essential rights of every

²⁴²² Claire A Cutler, *Private Power and Global Authority: Transnational Merchant Law in The Global Political Economy* (Vol. 90. Cambridge University Press 2003) and Cecilie Halmsted, Kongsholm and Klemens Kappel, 'Is Consent Based on Trust Morally Inferior to Consent Based on Information?' (2017) *Bioethics*. The exponents of the doctrine of consent maintain that the will of the State is the binding force of international law, but they also put emphasis on the way the consent is expressed by the State. The will of the State is said to be expressed in domestic law through legislation and in the case of international law through consent to international rules. The consent theory is divided into two forms, the actual consent theory and the theory of hypothetical consent. According to some theorists international law is based on the actual consent of the States, it may be implied by way of custom or it might be expressly shown through treaties or other international agreements. The State's will is manifested in the form of conventional and customary rules and since they have consented to them, the rules are binding upon them, and nothing can be law to which they have not consented.

individual.²⁴²³ The specific objective of tort law is to ensure that the loser is awarded remedy for the harm caused by the tortfeasor. As such, the framework in which victims' of tort of negligence has evolved gives a distinctive emphasis to violation of the fundamental rights, privacy,²⁴²⁴ the effective investigation of human rights abuses, protection from intimidation in court, and even the effect on "indirect victims" like close family members, as well as the obligation on the court to award remedy and deter future violations.²⁴²⁵

The tort law remedy foundation is based on the norm of *ubi jus ibi medium* (which means there is no wrong without remedy). Therefore, both judicial and extra-judicial remedies are available against every tort committed by an actor. The question is the extent of the tort and the remedy needed to put the victims back to where they were before the incident happened. There are two types of remedies to the victims whose rights have been violated by an actor through a negligent conduct. The victim of a tort can claim for damages to compensate for the harmed suffered, where suitable, an injunction to avoid future harm. In this tort remedy principle, it can be argued that damages are the principal remedy for most tort victims, such as violation of their human rights and property.²⁴²⁶ Therefore, the special role of tort law is remedying victims of human right abuses, whether by stopping the perpetrators from acting oppressively or preventing and restraining private parties from doing so.

The general rule of tort law is that damages must be recovered once and for all.²⁴²⁷ A plaintiff cannot bring a second action upon the same fact simply because his/her injury proves to be more serious than was thought when judgement was given. It should be the duty of the court in human rights violation and environment damages to award an effective remedy that

²⁴²³ Dan Dobbs, *Law of Torts (Hornbook Series)* (West Academic 2008).

Tort law is the segment of law that addresses cases involving civil wrongs. If you have been hurt in some way by someone else's negligence, carelessness, or malice, tort law may allow you to seek justice remedy.

In order to receive financial remedy from an injury, the four elements of a tort must be in place. These elements are:

- The presence of a duty. This may be as simple as the duty to take all reasonable precautions to prevent the injury of someone around you.
- The breach of duty. The defendant must have failed in his or her duty. An example may be a property owner who did not maintain his or her property, or a motorist who failed to drive safely.
- An injury occurred. You received a physical, mental, or emotional injury.
- The breach of duty caused the injury. There must be a causal link between the breach of duty and your injury.

²⁴²⁴ Nicola MCP Jagers and Marie-José van der Heijden, 'Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands' (2007) 33 *Brooklyn Journal of International Law* 833.

²⁴²⁵ *Cabello v Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *Tachiona v Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).

²⁴²⁶ Michael Jones, *Textbook on Torts* (8th edn, Oxford University Press 2002).

²⁴²⁷ William Vaughan Horton Rogers and John Anthony Jolowicz, *Winfield and Jolowicz on Tort* (Sweet & Maxwell 2010).

satisfies the requirement of the present and future needs of the victims. Even though the vast majority of damages awards in tort law are intended to compensate the plaintiff for the loss he/she has suffered, occasionally other forms of the award are also made. This includes 1. nominal damages (where a right has been infringed without the claimant suffering a tangible loss); 2. aggravated damages (where beyond the mere infringement of a free standing actionable right in respect of which ordinary damages be available, the defendant has also affronted the claimant's human dignity); 3. exemplary damages (where exceptionally tort law recognises the suitability of adding a punitive element to the basic compensatory awarded); and 4. contemptuous damages (where the court forms a dim view of the bare legal claim that the claimant advances).²⁴²⁸

The most obvious finding to emerge from the tort law analysis is that the commission of tort that involves the misappropriation of the plaintiff's property might enable the defendant to make a profit at the plaintiff's expense; in such cases, the plaintiff might be in a position to elect between a tort measure of damages and one based on the defendant's unjust enrichment. Equally, there might be occasions when the defendant can be concurrently liable in tort and contract.²⁴²⁹ A possible explanation for this might be that the concept of tort law is to place the victim back to where he/she was before the tort occurred. This may be the reason why the defendant can be concurrently liable in tort and contract. However, the question for the court in human rights violations cases and environmental damages is how to apply the law and principle of damages to remedy the victims. This in practice is very difficult to answer; thus, this doctoral thesis shall resort to the Eggshell Skull Rule to define the parameter for the court to award a remedy for tort in human rights violations and environmental damages.

6.13.2. Eggshell Skull Rule

Even if the extent of the human rights violation or the environmental damage could be a detriment to a person's human rights, such as well-being or physical harm, the law in relation to liability for physical harm that violates the human rights of a person is woefully lacking. Irrespective of the harm sustained by the victim, the frailty and fragility of a plaintiff is no defence in a tort claim; the rule is you are to put your victims back to where you found them. Therefore, the thin skull rule, also known as the "egg-shell rule," is a well-established principle

²⁴²⁸ Christian Witting, *Street on Torts* (Oxford University Press USA 2015).

²⁴²⁹ *Ibid.*

in both English tort and criminal law, which can provide an effective remedy to victims whose rights have been violated. In *Owens v Liverpool Corp*, the court held that “it is no answer to a claim for a fractured skull that the owner had an unusually fragile one”.²⁴³⁰ This “almost universal”²⁴³¹ rule is used by the court to determine whether a defendant is liable for all injuries he causes a plaintiff irrespective of foreseeability.²⁴³²

In the case of *Reaney v University Hospital of North Staffordshire NHS Trust*,²⁴³³ the court applied the rule to the case and has raised a number of questions about causation and the quantification of damages in cases where a claimant has a pre-existing injury before the tort was committed. The question for the court in *Reaney*²⁴³⁴ was to consider the extent to which the negligent conduct made the plaintiff’s conditions worse than it would have been but for their development. On the point of causation, the court found that the defendants’ negligence had made Mrs Reaney’s position materially and significantly worse than it would have been but for that negligence and that she would not have required the significant care package that she then required but for the negligence. Hence, “the defendant need not put the plaintiff in a

²⁴³⁰ *Owens v Liverpool Corp* [1939] 1KB 394.

²⁴³¹ *A. A. v New York*, 252 N.Y.S.2d 800, 810 (Ct. Cl. 1964).

²⁴³² Page Keeton, *Prosser and Keeton on The Law of Torts* (West Publishing Company 1984).

²⁴³³ *Reaney v University Hospital of North Staffordshire NHS Trust* [2014] EWHC 3016.

²⁴³⁴ *Ibid.* Mrs Reaney was admitted to the North Staffordshire Royal Infirmary in December 2008 with an illness that caused her to become permanently paralysed below the mid-thoracic level. It was common ground that this was not caused by negligence. She would have had some care requirements and other needs in any event as a result of her condition. During an extended period of hospitalisation, she developed a number of grade 4 pressure sores with severe sequelae that significantly affected her physical wellbeing. It was undisputed that, following the development of the pressure sores, she would have far greater future care and other needs than she would otherwise have had. The Defendants admitted liability in relation to the pressure sores and the only live issues in the litigation were the extent of causation and the quantification of damages.

High Court. A key issue at trial was whether the Defendants should be said to have caused:

1. all of Mrs Reaney’s care needs following the development of the pressure sores and their consequences, or
2. those needs less the care needs that she would have had in any event, but for the negligence.

Foskett J held that the Defendants had caused all of Mrs Reaney’s future care needs, notwithstanding that she would have required some care in any event. He accepted the Defendants’ submissions that in law a defendant may only be liable to compensate a claimant for the damage it has caused to him or to which it has materially contributed. However, he said that he saw the case as a reflection of the principle that a tortfeasor must take his victim as he finds him and “if that involves making the victim’s current damaged condition worse, then he (the tortfeasor) must make full compensation for that worsened condition”.

The Court of Appeal further rejected Foskett J’s finding that even if “but for” causation could not be made out, then causation on a “material contribution” basis could be. The Court noted that the principles in *Bailey v MOD* [2009] 1 WLR 1052 are applicable where medical science cannot establish the probability that “but for” an act of negligence the injury would not have happened, but can establish that the contribution of the negligent cause was more than negligible. In the present case there was no doubt about Mrs Reaney’s medical condition before the negligence occurred or about the injuries that she suffered as a result of the negligence. There was therefore no need to invoke the principle applied in *Bailey*.

position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effect of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage”.²⁴³⁵ Although courts uniformly apply the eggshell skull plaintiff rule to physical injuries,²⁴³⁶ the rule has never been applied to corporate human rights violations and environmental damages cases. It can be suggested that regardless of the lack of regulation or remedy at the national level, the courts should have the capacity to award remedy that is based on the eggshell skull rule. This remedy should have the ability to restore the victims back to their original place.

A simple excuse of exploring weaker human rights regulation countries should not suffice in court, in tort law and environment damage cases. The eggshell skull is incorporated in tort law to define the substance of the tort and to determine the actor who is liable to suit. Individuals and corporations, irrespective of their geographical location are not exempt from tort liability, if it is establish that a duty of care exist. In general, therefore, it seems that the victims of corporate human rights violations may be able to “pierce the corporate veil” under the eggshell skull rule by demonstrating that the parent company should be liable for the acts of the subsidiary because the legal separation is not in accordance with the corporate operation or because the corporate form has been abused by the parent company.

6.13.3. Deciding Remedy for Victims of Human Right Abuse

The most difficult problem for courts is to decide whether a plaintiff sustains human rights abuses and, if so, whether the defendant caused, aided, or abetted the abuse. If the defendant caused the plaintiff injury or damaged the environment, then the courts must determine if the defendant caused all injury or environmental damage and whether the business operation activated a latent condition of the victim, or aggravated a pre-existing environmental condition. This distinction is vital. If a plaintiff had a latent injury and the defendant activated it, (this in relation to a corporation exploring weak countries with human rights standards to maximise their business profit) then the defendant is liable for all of the plaintiff’s harm.²⁴³⁷

²⁴³⁵ *Ibid.*

²⁴³⁶ *Ibid.*

²⁴³⁷ *Salas v United States*, 974 F. Supp. 202, 209 (W.D.N.Y. 1997) (explaining that a defendant “may be liable for damages for aggravation of a pre-existing illness or for precipitation of a latent condition”); *Calcagno v Kuebel*, Fuchs P’ship, 01-691 (La. App. 5 Cir. 11/14/01); 802 So. 2d 746, 752 (holding the defendant liable for all of the plaintiff’s mental harm because the physical injury activated age-related changes in

On the other hand, if a plaintiff had a pre-existing injury condition, then the defendant is only liable for any aggravation of the condition (in a context of a national government violating the human rights of its own people).²⁴³⁸

From the explanation above, it is recommended that the court take a three-step approach to determine liability for corporate human rights violations and environmental damages that cause physical injury to the victims. Using the presumed eggshell plaintiff rule, it is suggested that the courts should determine liability by examining whether:

- 1 the victim (or the environment) was in a healthy state before the human rights violation or the environmental damage occurred;
- 2 the injury and the environmental condition manifested itself shortly after the human rights violations; and
- 3 the human rights violations evidence indicates a reasonable causal connection between the injury caused to the victims and the environmental condition.²⁴³⁹

If these conditions are satisfied, then the court shall award remedy that is capable of putting the victims back to where they were before the violation happened, regardless of any intervening act by a third party, such as state or the subsidiary. The court should, therefore, be under the moral and legal obligation to award a remedy that is not a detriment to the future and well-being of the defendant and the environment. The following section shall highlight the remedy which should be adopted by the court for awarding damages for corporate human rights violations and environmental damages.

6.13.4 Judicial Remedy for Corporation Human Right Abuses

As indicated in the above section there are six types of damages 1. contemptuous damages, 2. nominal damages, 3. compensatory damages, 4. exemplary damages 5. aggravated damages and 6. gain-based damages. It is possible for more than one of these kinds of damages

the plaintiff's brain that were asymptomatic before the injury); *LaSalle v Benson Car Co.*, 00-1459 (La. App. 5 Cir. 1/30/01); 783 So. 2d 404, 408-09 (holding the defendant liable for all of the plaintiff's mental harm because the plaintiff had no psychological problems before the physical injury, but required treatment in a psychiatric hospital after the injury).

²⁴³⁸ *Touchard v Slemco Electric Found*, 99- 3577, 1 (La. 10/17/00); 769 So. 2d 1200, 1202 (explaining that because the plaintiff had preexisting mental injuries, the jury must decide whether the defendant aggravated them).

²⁴³⁹ *Calcagno*, 01-691, 802 So. 2d at 752; *LaSalle*, 00-1459, 783 So. 2d at 408.

to be made in a single case of human rights violations and environmental damages. However, certain combinations are not possible, such as nominal and compensatory damages.²⁴⁴⁰ This study shall only focus on aggravated and exemplary damages²⁴⁴¹ as the method for the court to award damages in cases of corporate human rights violations and environmental damages.²⁴⁴² This is because exemplary and aggravated damages are an exception to this rule as they are intended to punish the defendant for the wrongful act.²⁴⁴³ A possible explanation for this might be in the *Fidler v Sun Life Assurance Company*²⁴⁴⁴ of Canada, where the court indicated that, with respect to aggravated damages, there is a distinction between two different types of aggravated damage cases. The first is “true aggravated damages”, which arises out of aggravating circumstances. This type of aggravated damages requires a plaintiff to establish mental distress as a result of the breach of an independent cause of action in order to recover. The award of damages in these types of cases arises from the separate cause of action. It does not arise out of the contractual breach itself.²⁴⁴⁵ In this judgement, the Supreme Court affirmed that, while aggravated damages are compensatory in nature, punitive damages are designed to address the purposes of retribution, deterrence, and denunciation. To attract punitive damages, the impugned conduct must depart markedly.

Another recent and important punitive damages decision is *Keays v Honda Canada Inc.*²⁴⁴⁶ At trial, Keays was awarded \$500,000 in punitive damages against his employer, Honda, for wrongful dismissal. The trial judge awarded compensatory damages in lieu of 24 months’ notice, and also awarded the plaintiff \$610,000 in substantial indemnity costs, which was inclusive of a 25% premium on account of the significant financial risk taken by the

²⁴⁴⁰ Christian Witting (n 2398).

²⁴⁴¹ *Ibid.*

²⁴⁴² Allan Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 (1) *Oxford Journal of Legal Studies* 87, 110

²⁴⁴³ James J Edelman, ‘Unjust Enrichment, Restitution, and Wrongs’ (2000) 79 *Texas Law Review* 1869.

²⁴⁴⁴ *Fidler v Sun Life Assurance Company of Canada* [2006] SCC 30.

²⁴⁴⁵ The Supreme Court indicated that disability policies give rise to the potential for mental distress damages as part and parcel of “peace of mind” insurance contracts. The Court stated that peace of mind cases are an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract. Disability insurance contracts contemplate a bargain wherein in return for a premium, an insured is to be paid benefits in the case of disability, but also is to be afforded the security of knowing that there is income stability in the event of disability. The Supreme Court held that in these cases, the Court must be satisfied: (1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation. In this case, the Court concluded that both elements were met and upheld the trial judge’s award of \$20,000 for aggravated damages. The Court felt the damage award was reasonable, given the fact that the plaintiff suffered a substantial loss over a five-year period and that she sustained significant additional distress and discomfort arising out of the loss of the disability coverage.

²⁴⁴⁶ *Keays v Honda Canada Inc.*, [2006] O.J. No. 3891 (C.A.), leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 470 [Keays].

plaintiff and his counsel in proceeding to trial. Furthermore, the most interesting recent case dealing with both punitive and aggravated damages is *McIntyre v Grigg*,²⁴⁴⁷ an unintentional tort case involving drunk driving. The plaintiff, McIntyre, was severely injured when the defendant, Grigg, hit her with his car as she was walking home from a pub. Grigg, who was a player for the Hamilton Tiger-Cats, had been drinking at the same pub as the plaintiff just prior to the accident. After the accident, Grigg was arrested and administered a breathalyser, which revealed a blood alcohol level well in excess of the legal limit. Unfortunately, the police neglected to advise Grigg of his right to counsel before the breathalyser. As a result, the Crown had no choice but to drop the charges of drunk driving and driving in a manner dangerous to the public causing bodily harm. Instead, Grigg pled guilty to careless driving and received a \$500 fine with no licence suspension.²⁴⁴⁸

It can thus be suggested that the general object of an award of damages in tort is normally to compensate the plaintiff for what he has lost or suffered as a result of the tort. Nonetheless, an award of damages may sometimes take into account the motives and conduct of the defendant where they combine to cause the claimant to suffer an affront to his dignity. Such damages are traditionally called aggravated damages and they are often available where arrogant or high-handed conduct on the part of the defendant causes outrage or anger to the plaintiff.²⁴⁴⁹ However, they should, in theory, be less available to the infantile mentally incapacitated who are incapable of forming such a feelings of outrage or anger. In short, an affront to human dignity is not contingent on sentience.²⁴⁵⁰ Nevertheless, they are not available

²⁴⁴⁷ *McIntyre v Grigg*, [2006] O.J. No. 4420.

²⁴⁴⁸ McIntyre sued Grigg for negligence, claiming both aggravated and punitive damages. She also sued the pub for over-serving Grigg. In addition to an award of \$250,000 in general damages (of which 70% was payable by Grigg and of which 30% was payable by the pub), the jury awarded \$100,000 in aggravated damages and \$100,000 in punitive damages, the entirety of which awards were payable by Grigg. McIntyre suffered both physical and psychological injuries as a result of the accident. The primary physical injury was a serious fracture of her right femur. Before the accident, McIntyre was a very athletic person and participated in a variety of sports. The effect of her injuries was therefore devastating and caused her to experience depression and attempt suicide on two occasions.

The trial judge found that the award of aggravated damages could be anchored on the notion that the plaintiff's psychological harm was increased because Grigg was impaired at the time of the accident. The Ontario Court of Appeal disagreed. Aggravated damages are awarded because of the nature of the defendant's conduct. They are designed to compensate the plaintiff specifically for the additional harm that the defendant's reprehensible or outrageous conduct caused the plaintiff. They are awarded when the reprehensible or outrageous nature of the defendant's conduct causes a loss of dignity, humiliation, additional psychological injury, or harm to the plaintiff's feelings. The court of appeal found that the expert medical evidence was insufficient to establish that McIntyre's psychological harm was increased because Grigg was impaired at the time of the accident.

²⁴⁴⁹ *Horsford v Bird & Ors* (Antigua and Barbuda) [2006] UKPC 3, Lord Scott spoke of high-handed, insulting or oppressive conduct.

²⁴⁵⁰ John Murphy, 'The Nature and Domain of Aggravated Damages' (2010) 69 (02) *Cambridge Law Journal* 353, 377.

to companies because of their incomplete inability to subjectively experience hurt feeling; however, they are, strictly speaking, available to humans to remedy the harm caused to them.

6.13.5. Compensatory Damages

There has been considerable disagreement about the true nature of aggravated damages. Most legal scholars currently consider them as a form of compensation (although opinion varies on just what it is that they compensate). There is certainly support in case law for the view that they are compensatory.²⁴⁵¹ For instance, Birmghan MR once said that the aggravated damages in defamation cases are not an exception to the idea that damages in tort serve a compensatory (as opposed to punitive) function “since the injury to the plaintiff’s feelings and self-esteem is an important part of the damage for which compensation is awarded”.²⁴⁵² However, there is support for the idea that it serves a punitive function (in that the court will often seem to be attending to the deliberate, arrogant conduct of the defendant).²⁴⁵³ Yet, even in such case, it appears incorrect to regard aggravated damages as a form of punishment. It is simply by highlighting conduct of this kind that one can see beyond the tangible injury to the claimant and identify, further, an infringement of his human dignity. Thus, for instance, even though the level of physical injury may be the same in both cases there is a very real difference between having one's trodden on by mistake and having them stamped upon deliberately. The affront that accompanies the stamping is what aggravated damage addresses.

6.13.6. The Application of Remedy

The range of tort for which aggravated can be awarded is broad. It includes trespass to the person²⁴⁵⁴ and to land,²⁴⁵⁵ deformation,²⁴⁵⁶ other torts based on deliberate falsehoods,²⁴⁵⁷ and private nuisance.²⁴⁵⁸ The question whether such damages should be available in negligence was considered by the Court of Appeal in *AB v South West Water*

²⁴⁵¹ Stephen GA Pitel, Jason W Neyers and Erika Chamberlain, eds. *Tort Law: Challenging Orthodoxy* (Bloomsbury Publishing 2013).

²⁴⁵² *AB v South West Water Services* [1993] QB 507, at 532.

²⁴⁵³ *KD v Chief Constable of Hampshire* [2005] EWHC 2550.

²⁴⁵⁴ *Thompson v Commissioner of Police of Metropolis* [1998] QB 498.

²⁴⁵⁵ *Drane v Evangelou* [1978] 1 WLR455.

²⁴⁵⁶ *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153.

²⁴⁵⁷ *Khodaparast v Shad* [2000] 1 All ER 545 (malicious falsehood), *Archer v Brown* [1984] QB 401 (deceit).

²⁴⁵⁸ *Thompson v Hill* [1870] LR 5 CP564.

Service Ltd,²⁴⁵⁹ which decided that they should not be available. However, before such damages can be ruled out for this tort, it must be remembered that negligence liability ultimately rests on a failure to meet the standard of care of the reasonable person. There is no absolute requirement that there should be inadvertence on part of the defendant. Deliberate conduct falling short of this standard can be relied upon in negligence action. That being said, it is hard to disagree with Lord Neuberger's comment that; "I cannot see why damages should not logically be recoverable in some categories of negligence".²⁴⁶⁰

The findings of this section confirmed that when corporations deliberately engage in an act that violates human rights and environmental damage, with the foresight or the knowledge that their conduct may have a significant effect on community and the environment, then awarding simple damages to the victim is not enough to put the victims back to where they should have been had the tort not been committed. This is because the corporation's action could be seen as what caused the victim to suffer an affront to his/her dignity. Therefore, in deciding the judgement, the court must first take into consideration what caused the victims to suffer an affront to his/her dignity; thus, if these elements are satisfied then it is perfectly adequate to award aggravated damages in the tort of negligence.

6.14. Exemplary Damages

6.14.1. Object

Exemplary damages have a distinctive function. In theory, they turn upon conduct that outrages the court and award to punish and deter future tort. What this means in practice is that a corporate conduct that outrages the court or a deliberate act of the corporate to violate human rights or damage the environment for any business objectives should result in the court awarding exemplary damages for the victims. Essentially, what is being advocated here is the intentional act of the corporation, the malicious conduct of the corporation or the deliberated act of the company is what give rise to exemplary damages. This is because, under a duty of care, the corporation will be seen as having the knowledge or knowing engaged in the human rights violation.

²⁴⁵⁹ *AB v South West Water Services*, (n 2388).

²⁴⁶⁰ *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 96.

6.14.2. The Applications of Exemplary Damages

Exemplary damages are seen by many as an anomaly in the law of torts.²⁴⁶¹ Until relatively recently, the preponderance of opinion was that exemplary damages should be abolished, for their continued existence, it has been objected, confuses the function of the civil and criminal law.²⁴⁶² Furthermore, since the standard of proof is lower in a tort case than in a criminal law case, it is suggested that a defendant can end up being punished in tort without the safeguard of the higher standard proof that is obtained in criminal proceedings. Finally, such damages have also been opposed on the basis that they bestow upon a claimant an unwarranted windfall. However, this thesis supported the concept of exemplary damages and argued that, in terms of corporate human rights abuses and environmental damages, the court should apply the principle of exemplary damages to punish and deter future corporate human rights violations. A possibility explanation for this is that a deliberate conduct of corporation that resulted in a high economic benefits should be liable for a heavy sanction. What this means is that the deliberate act or an intentional act of the corporation should marry the gravity of the economic benefits the company gain from the misconduct.

6.14.3. The Deterrence Element of Exemplary Damages

The latter argument only holds so long as one accepts that the law of tort is exclusively concerned with securing compensation for harm caused.²⁴⁶³ Yet many do not accept this. Tort, for instance, can be shown to possess a deterrent function in certain circumstances. For example, organisations with managerial control might be prompted into taking the extra step to prevent an employee from behaving in ways that might generate such award.²⁴⁶⁴

Thus, leaving such argument to one side, it might be clear from the decision of the House of Lord in *Kudus v Chief Constable of Leicestershire*,²⁴⁶⁵ that, nowadays, exemplary damages can be obtained in connection with virtually any tort.²⁴⁶⁶ In sweeping away the previous approach which limited their availability in specific tort that needs no longer concern, the House of Lord rendered the argument about rights and wrongs of exemplary damages with

²⁴⁶¹ *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122. “Lord Hutton discussed *Rookes v Barnard* saying”.

²⁴⁶² *Cassell and Co Ltd v Broome and Another* [1972] AC 102. “Lord Hailsham considered the role of guidance on levels of damages from the court of appeal”.

²⁴⁶³ This was the point made forcefully by Lord Willberforce in *Cassell & Col Ltd and Another* [1972] AC 102.

²⁴⁶⁴ *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065.

²⁴⁶⁵ *Kudus v Chief Constable of Leicestershire* [2002] 2 AC 122.

²⁴⁶⁶ *Rowlands v Chief Constable of Merseyside Police* (n 2400).

tort a largely academic one. All that really is a concern in this thesis is the examination of the bases upon which such damages should be awarded. Before applying the exemplary damages to corporate human rights violations, the study will give a brief analysis of it in case law.

6.14.3. *Rooks v Barnard Categories*

The starting point is *Rook v Barnard*,²⁴⁶⁷ in which Lord Devlin limited exemplary damages awards to three categories of case.

1. When the Plaintiff Has the Victim of Oppressive, Arbitrary, or Unconventional Action by Servant of Government.

It has been established that the phrase oppressive, arbitrary, or unconstitutional is to be understood disjunctively so that it is enough if the action was very oppressive, or arbitrary, or unconstitutional. That being so, if unlawful conduct by a police officer can be proved, it is not necessary to show that it was also arbitrary and oppressive.²⁴⁶⁸ With regard to those who constitute servants of the government, it has been held that the notion embraces central and local government officers and includes also police officers,²⁴⁶⁹ and prison officers guilty of misfeasance in public office²⁴⁷⁰ or false imprisonment.²⁴⁷¹ Public utilities, such as electricity and water companies, fall outside the category, as do other privatised monopoly suppliers, for even though they are endowed with statutory powers, they are not exercising executive functions.²⁴⁷²

One question for the future is whether the English courts will follow the lead of the Privy Council in a series of Commonwealth cases involving breaches of constitutional rights

²⁴⁶⁷ *Rookes v Barnard* [1964] AC 1129. “A corollary to the main issue in the case, but of greater lasting importance, was Lord Devlin's pronouncements on when punitive damages are applied. The only three situations in which damages are allowed to be punitive, i.e. with the purpose of punishing the wrongdoer rather than aiming simply to compensate the claimant, are in cases of, Oppressive, arbitrary or unconstitutional actions by the servants of government. Where the defendant's conduct was “calculated” to make a profit for himself. Where a statute expressly authorises the same”.

²⁴⁶⁸ *Holden v Chief Constable of Lancashire* [1987] QB 380. “Purchas LJ said: “If full effect is to be given to the word ‘or’ in the category ‘oppressive, arbitrary or unconstitutional action’ “by government servants, wrongful arrest falls within the category without any of the added qualifications suggested by the judge, in which case the question whether or not to award exemplary damages should have been left to the jury with appropriate directions as to what special features of the case they might in their discretion take into account in deciding whether or not to award such damages, and, if so, how much”.

²⁴⁶⁹ *Cassell and Co Ltd v Broome and Another* [1972] AC 102.

²⁴⁷⁰ *Racz v Home Office* [1993] 2 WLR 23.

not give rise to a cause of action for either false imprisonment or breach of statutory duty”.

²⁴⁷¹ *Muuse v Secretary of State for The Home Department* [2010] EWCA Civ 453.

²⁴⁷² *AB v South West Water Services Ltd* [1993] 1 All ER 609.

and rename such damage, vindictory damages.²⁴⁷³ The English counterpart to such infringements of constitutional rights would, presumably, be the state's infringement of a citizen's Convention rights. However, the best guidance so far available suggests that if there is any scope for the award of vindictory damages where exemplary damages are not appropriate, it must be limited. Such an award could only be justified where the declaration that a claimant's rights have been infringed provides insufficiently emphatic recognition of the seriousness of the defendant misconduct.²⁴⁷⁴

2. Where the defendant's Conduct Has Been Calculated By Him To Make a Profit for Himself Which Might Exceed the Compensation Payable to the Plaintiff

Within this category fall those such as publishers who, as in *Cassell & Co Ltd v Broome*,²⁴⁷⁵ calculate that a libel might help sell so many copies of a publication that they will still profit despite having to pay compensatory damages to the victim.²⁴⁷⁶ The idea is that they should learn that tort does not pay.²⁴⁷⁷ In this context, it is important to stress that "carelessness alone, however extreme, not enough is unless the inference can be drawn that the publisher had no honest belief in the truth of what he published".²⁴⁷⁸ However, the category is not limited to cases of deformation; it can equally well be invoked where conspirators falsely imprison the claimant, corporate human rights violations, environmental damages, fraud and forced prostitution,²⁴⁷⁹ where trespassers deliberately expropriate part of a neighbour's property,²⁴⁸⁰ or where landlords commit torts against tenants by driving them out of their property in order to profit by renting it to someone else at a higher price.²⁴⁸¹

²⁴⁷³ *A-G Trindade and Tobago v Ramanoop* [2006] 1 AC 328, *Innis v A-G St Christopher and Nevis* [2008] UKPC 38, *Takitota v A-G* [2009] 26 BHRC578.

²⁴⁷⁴ *R (on the application of WL Congo) v Secretary of state for Home Dept* [2011] 2 WLR 671.

²⁴⁷⁵ [1972] AC 1027.

²⁴⁷⁶ *Borders (UK) Ltd v MPC* [2005] EWCA Civ 197. "An application for compensation was made at his trial. Compensatory and exemplary damages were sought, but the court had to consider how to estimate the losses and unlawful gains. The defendant argued that since he had been imprisoned, exemplary damages were inappropriate. The question was whether there was a risk of double jeopardy, paying both damages and compensation. Held: The assessment of damages was difficult, but the situation fell with the second limb of *Rookes v Barnard* so as to allow exemplary damages. Even after such an award it was likely that the full benefit taken by the defendant was not accounted for. Appeal dismissed".

²⁴⁷⁷ *AB v South West Water Services Ltd* [1993] (n 2442).

²⁴⁷⁸ *John v MGN Ltd* [1996] 1 All 35, at 57.

²⁴⁷⁹ *AT v Gavril Dulhieu* [2009] EWHC 225.

²⁴⁸⁰ *Ramzan v Brookwide* [2012] 2 All ER 903.

²⁴⁸¹ *Drane v Evangelou* [1978] 2 All ER 437.

3. *Where Authorised by Statute*

There are very few examples of this final, and least important, a category in which the statute expressly permits the claimant to sue for exemplary damages. A typical example is in the UK, where exemplary damages were developed under the common law. A court can only award exemplary damages where the facts fall into one of the two “categories” of wrongful act where they are available, unless exemplary damages are provided for by statute.²⁴⁸²

The two categories are;

- Oppressive, arbitrary or unconstitutional action by a public servant; and
- Or where the defendant's wrongful conduct was calculated to make a profit which might well exceed the compensation payable to the claimant.²⁴⁸³

Nonetheless, exemplary damages are controversial. Critics say that their punitive function does not belong in the civil courts and that matters of punishment and deterrence should be the concern of the criminal justice system.²⁴⁸⁴ In 1997, the Law Commission examined the issue and concluded that exemplary damages formed an effective deterrence against wrong-doing and that deterrence was a valid aim of the civil courts, separate from the role of the criminal justice system.²⁴⁸⁵ Removing the profit of wrongdoing from the wrongdoer was, the Commission concluded, a particular deterrence.²⁴⁸⁶ The Commission recommended the extension of exemplary damages for these reasons.²⁴⁸⁷

In November 1999 in the UK, the government accepted other recommendations from the Law Commission report but rejected the proposals on exemplary damages on the grounds that: “The purpose of the civil law on damages is to provide compensation for loss, and not to punish. The function of exemplary damages is more appropriate to the criminal law, and their availability in civil proceedings blurs the distinctions between the civil and criminal law. The Government does not intend any further statutory extension of their availability”.²⁴⁸⁸ Indeed,

²⁴⁸² *Cf Merest v Harvey* [1814] 5 Taunt 442, 128 ER 761. quoted in Aggravated, Exemplary and Restitutionary Damages Back.

²⁴⁸³ *Rookes v Barnard* [1964] AC 1129 Back.

²⁴⁸⁴ David G Owen, ‘Aggravating Punitive Damages’ (2009) 158 *University of Pennsylvania Law Review* 181.

²⁴⁸⁵ Peter Jaffey, ‘The Law Commission Report on Aggravated, Exemplary and Eestitutionary Damages’ (1998) 61 *Modern Law Review* 860.

²⁴⁸⁶ Jeff Berryman, ‘The Case for Restitutionary Damages over Punitive damages: Teaching The Wrongdoer That Tort Does not Pay’ (1994) 73 *Canadian Bar Review* 32.

²⁴⁸⁷ Peter Jaffey (n 2455).

²⁴⁸⁸ *Ibid.*

in The Law on Damages consultation, it proposed repealing the one provision in the statute allowing exemplary damages, and replaced it with a power to award aggravated damages. Section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 provides that various civil judgments cannot be enforced against a member of the armed forces without the permission of a court.²⁴⁸⁹

In a successful claim against someone who has acted without the court's permission, exemplary damages may be awarded. The Government believes this provision has seldom “if ever” been used.²⁴⁹⁰ The Law on Damages consultation did not receive many responses to this proposal. The only objections recorded were that the concepts of exemplary and aggravated damages were fundamentally different and replacing one with the other would confuse rather than clarify. The implication of this means that the affected victims of tort conduct will be worse off. Thus, just because no cases had arisen under the 1951 Act didn't mean that the victims will not be worse off, and that legislation should not be amended just for the sake of tidiness [and] that the existing common law categories for exemplary damages would not catch some competition law claims (e.g for abuse of a dominant position). What is clear from this illustration is that exemplary remedy should be extended to tort liability, regardless of the legal rule established in the Act.²⁴⁹¹ This study supports the Law Commission report and argues further that the purpose of tort law is evidenced in exemplary damages; therefore, evoking it in court in a civilian case does satisfy the requirement of tort law. Also, this study contends that providing exemplary damages as a “last resort” remedy are subject to significant limitations, and provides that the availability and assessment of exemplary damages are determined by judges and not juries. Exemplary damages are a legitimate way of meeting that practical need of corporate accountability for human rights violations and environmental damages. Lastly, this research favoured the retention of exemplary damages and expansion, rather than abolition and recommended that court apply the rule in remedy for corporate human rights abuse and environmental damages cases.

²⁴⁸⁹ Eva Boolieris, ‘To Punish or not Punish: a Comparative Analysis of The Legislative Treatment of Exemplary Damages in Commonwealth Jurisdictions’ (2013).

²⁴⁹⁰ *Ibid.*

²⁴⁹¹ *Ibid.*

4. *Three Further Consideration*

As well as establishing that tort in question falls into one of the three categories outlined in *Rooke v Barnard*, it also seems that three further requirements must be obtained. First, the plaintiff must be able to show that he himself was the victim of the tort.²⁴⁹² This requirement is certain, and also means relatives invested with a cause of action upon the victims' death do not possess the right to sue for exemplary damages. Second, it must be shown that exemplary damages are necessary to effect proper punishment of the defendant. This requirement is also certain²⁴⁹³ and means that, if the defendant that has been prosecuted for the equivalent crime, no award of exemplary damages will normally be made,²⁴⁹⁴ (although the fact that the defendant has been fined will not be absolutely determinative in every case,²⁴⁹⁵ and confiscation of crime proceeds may not necessarily run risk of duplication by an award of exemplary damages).²⁴⁹⁶ Finally, but slightly less certainly, it was established by a bare majority in *Av Bottril*,²⁴⁹⁷ that, when an award of exemplary damages is under consideration, a third fundamental consideration is whether the defendant's behaviour met the criterion of outrageous conduct warranting condemnations.

6.14.4. A Summary of Exemplary Damages

It can, therefore, be assumed that remedy is crucial, and it should compensate the victims in circumstances such as the Commodities giant *Trafigura* toxic waste dumped in Abidjan, Côte d'Ivoire, ten years ago.²⁴⁹⁸ This research has also shown that a corporation that had knowledge of the effect a toxic gas will have on the victim and the environment, but, yet embarks on the despicable conduct, thus abandoning the victims to suffer a toxic legacy,²⁴⁹⁹ should be liable for aggravated damage. Thus, unjust enrichment (unjust enrichment is a legal concept referring to situations in which one person is enriched at the expense of another in circumstances which the law treats as unjust) is not accepted under moral principle and law of

²⁴⁹² *Rookes v Barnard* [1964] AC 1129, at 1227, 8.

²⁴⁹³ *Watkins v Secretary of State for The Home Dept* [2006] 2 WLR 807.

²⁴⁹⁴ *Acher v Brown* [1985] QB 401 (no exemplary damages where D imprisoned for offence).

²⁴⁹⁵ *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 239.

²⁴⁹⁶ *Borders (UK) Ltd v MPC* [2005] EWCA Civ 197.

²⁴⁹⁷ *A v Bottrill* [2002] UKPC 44.

²⁴⁹⁸ Olanrewaju A Fagbohun, 'The Regulation of Transboundary Shipments of Hazardous Waste: A Case Study of The Dumping of Toxic Waste in Abidjan, Cote d'Ivoire' (2007) 37 *Hong Kong Law Journal* 831.

²⁴⁹⁹ Sarah A Moore, 'Global Garbage: Waste, Trash Trading, and Local Garbage Politics' (2011) *Global Political Ecology*, Herausgeber: Peet, R., Robbins, P. und Watts, M 133, 143.

tort. Hence, in this situation, it will be better for the court to award exemplary damages, regardless of the consequences it may have on the *Trafigura* business.

This would seek to punish and deter *Trafigura* and future environmental violations by corporations, as well as compensating the present and future loss of the victims.²⁵⁰⁰ The legal reasoning behind this is that exemplary damages are awarded for the most outrageous conduct of the defendant where he or she acts with a reckless disregard of the plaintiff's rights²⁵⁰¹ and where his or her behaviour is so unacceptable or even shocking that the court must show its disapproval of it.²⁵⁰² It is also important to note that, in order to award exemplary damages, there are at least another four restrictions that need to be fulfilled. Consequently, not only must the defendant's conduct fall within one of Lord Devlin's three categories, it must also be a case where the total sum awarded in compensatory and aggravated damages is not adequate to punish the defendant.²⁵⁰³ In other words, it is insufficient to teach the defendant that tort does not pay.²⁵⁰⁴

For instance, in the case of *Watkins v Home Office* and others,²⁵⁰⁵ the House of Lords refused to award exemplary damages where the claimant had not suffered any damage. The House of Lords argued that it is impossible to establish whether or not compensation payable to the plaintiff is insufficient to punish the defendant if there are no compensatory damages at all. Likewise, the plaintiff must be the victim of the wrongful conduct,²⁵⁰⁶ so, in *Ashley v Chief Constable of Sussex Police*,²⁵⁰⁷ the House of Lords refused to award any extra-compensatory damages (including exemplary damages) to the plaintiffs who were relatives of the victim.²⁵⁰⁸ Similarly, given that a civil proceeding does not protect the defendant with the same procedural safeguards as the criminal justice system, a total sum awarded in exemplary damages should not exceed possible punishment for similar criminal conduct.²⁵⁰⁹

Thus, it is suggested in this thesis that when determining exemplary damages, the court must be cautious and never abuse its powers. In this sense, there is a clear guidance for the

²⁵⁰⁰ *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 803, 821; *Drane v Evangelou and Others* [1978] 2 All ER 437, 438.

²⁵⁰¹ *Rookes v Barnard* [1964] AC 1129, 1228; *Cassell & Co Ltd v Broome and Another* [1971] 2 All ER 187, 198.

²⁵⁰² Gerhard Wagner, 'Punitive Damages in European Private Law' (2011).

²⁵⁰³ *AB v South-West Water Services Ltd* [1993] 1 All ER 60.

²⁵⁰⁴ *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 826, 874, 875.

²⁵⁰⁵ *Watkins v Home Office* and Others [2006] UKHL 17.

²⁵⁰⁶ *Rookes v Barnard* [1964] AC 1129, 1221, 1226, 1227, 1229.

²⁵⁰⁷ *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25.

²⁵⁰⁸ *Ibid.*

²⁵⁰⁹ *Rookes v Barnard, House of Lords* [1964] AC 1129 and [1964] 1 All ER 367.

assessment of exemplary damages, at least for the first of Lord Devlin’s categories in the case of *Thompson v Commissioner of Police of the Metropolis*²⁵¹⁰ that makes these awards more predictable and therefore helps to prevent the defendant from any arbitrariness. Finally, according to the fourth important consideration, unlike in compensatory damages, a wealth of the defendant plays a fundamental role here. As Lord Devlin puts it, “[e]verything which aggravates or mitigates the defendant's conduct is relevant”.²⁵¹¹ In accordance with this principle only £1,000 damages were awarded in an unlawful eviction case where the defendant was a natural person,²⁵¹² whereas in case of commercial law, the defendant, a corporate legal entity was punished by £60,000 in exemplary damages.²⁵¹³ What this means is that if the court had correctly awarded exemplary damages in *Trafigura*, then the remedy for the victims would be proportional to the commercial profit of the company. This would deter the corporation from engaging in future environmental misconduct or any criminal activities that are related to the environment and human rights.

The evidence from this study suggests that the corporation was acting with intention and knowledge of the aftermath of its conduct.²⁵¹⁴ Likewise, in Ghana, exemplary damage should have been awarded to the victims of the environmental pollution in Tema and the fire at the steel factory.²⁵¹⁵ This study shall argue in light of the evidence presented here that exemplary damages should be awarded where there is evidence of summary executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly, environmental damage, forced labour, torture, unfair trial, aiding and abetting domestic government to violate rights, damages to livelihood, complicity in the commission of torture, extrajudicial killing, as well as all the fundamental rights enshrined in International Covenant on Economic, Social and Cultural Rights,²⁵¹⁶ specifically;

- Forcibly evicting people from their homes (the right to adequate housing);²⁵¹⁷

²⁵¹⁰ *Thompson v Commissioner of Police of The Metropolis* [1997] 2 All ER 762, 763, 776.

²⁵¹¹ *Rookes v Barnard, House of Lords* [1964] AC 1129, 1228.

²⁵¹² *Drane v Evangelou and others* [1978] 2 All ER 437. There was no separate figure for compensatory damages so it could be argued that exemplary damages were even less than £1,000.

²⁵¹³ *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19.

²⁵¹⁴ Lieselot Bisschop and Gudrun Vande Walle, *Environmental Victimisation and Conflict Resolution: A case Study of E-Waste’ Emerging Issues in Green Criminology* (Palgrave Macmillan UK 2013) 34, 54.

²⁵¹⁵ Kwabena Adu Koranteng, ‘Ghana: Injustice at Tema Steel Company’ (2014).

<<https://www.newsghana.com.gh/ghana-injustice-tema-steel-company/>> accessed 22 January 2017.

²⁵¹⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 24 September 2016.

²⁵¹⁷ The obligation of States to refrain from, and protect against, forced evictions from home(s) and land arises

- Contaminating water, for example, with waste from State-owned facilities (the right to health),²⁵¹⁸ and
- Minimum wage (rights at work).²⁵¹⁹
- Failure to prevent employers from discriminating in recruitment (based on sex, disability, race, political opinion, social origin, HIV status, etc.) (The right to work)²⁵²⁰

from several international legal instruments including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (art. 11, para. 1), the Convention on the Rights of the Child (art. 27, para. 3), the non-discrimination provisions found in article 14, paragraph 2 (h), of the Convention on the Elimination of All Forms of Discrimination against Women, and article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. In its resolution 1993/77, the Commission on Human Rights stated that the "practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing". In 1977, the Committee on Economic, Social and Cultural Rights issued its General Comment n°7 on forced evictions. Forced evictions constitute gross violations of a range of internationally recognised human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, freedom from cruel, inhuman and degrading treatment, and freedom of movement. Forced evictions are often linked to the absence of legally secure tenure, which constitutes an essential element of the right to adequate housing. Forced evictions share many consequences similar to those resulting from arbitrary displacement, including population transfer, mass expulsions, mass exodus, ethnic cleansing and other practices involving the coerced and involuntary displacement of people from their lands and communities.

²⁵¹⁸ Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), UN Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 105 (2003). Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights. The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water. The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States parties have to adopt effective measures to realise, without discrimination, the right to water, as set out in the general comment. Article 11(1), paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living "including adequate food, clothing and housing. The use of the word "including indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognised that water is a human right contained in Article 11(1), paragraph 1, (General Comment No. 6 (1995)).

²⁵¹⁹ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27. Article 6, 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

²⁵²⁰ The International Labour Organization (ILO) and the World Health Organization (WHO) spearheaded the international recognition of economic and social rights. ILO recognised a range of workers' rights in its Declaration of Philadelphia (1944), affirming that "all human being have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity". Similarly, just after the Second World War, the Constitution of WHO (1946) declared that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being".

- Destroying or contaminating food and its source, such as arable land and water (the right to food)²⁵²¹
- Failure to provide for a reasonable limitation of working hours (rights at work)²⁵²²
- Banning the use of minority or indigenous languages (the right to participate in cultural life)²⁵²³

Article 6, 1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

²⁵²¹ International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27

Article 11, 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need

²⁵²² International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27

Article 7, The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with:

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being 17 guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

²⁵²³ United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295) was adopted by the General Assembly on Thursday, 13 September 2007.

Article 1. Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

- Arbitrary and illegal disconnection of water for personal and domestic use (the right to water).²⁵²⁴

6.15. Overview of Remedy (Part II)

The findings of this research complement those of earlier studies of when a corporation violated human rights and damage the environment with a foresight.²⁵²⁵ What is clear so far in this research is that, corporation intentionally knows or should have known that if they do

Article 11. 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

3. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 13.1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means. ICCPR which is legally binding and focuses on the rights of minorities. Article 27 of the International Covenant on Civil and Political Rights asserts: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Logically, this article aims to protect members of minorities from any sort of discrimination and also recognises that they have rights under international law. However, this instrument also draws a distinction between minorities and indigenous people when it used the wording rights of persons belonging to minorities which indicates an individualistic approach.

Ballantyne, Davidson, McIntyre v Canada Communications Nos. 359/1989 and 385/1989, John Ballantyne and Elizabeth Davidson, and *Gordon McIntyre v Canada* (views adopted on 31st March 1993, forty-seventh session)

²⁵²⁴ The Human Right to Water and Sanitation (HRWS) was recognised as a human right by the United Nations (UN) General Assembly on 28 July 2010. On 28 July 2010, through Resolution 64/292, the United Nations General Assembly explicitly recognised the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights.. Resolution A/RES/64/292. United Nations General Assembly, July 2010 General Comment No. 15. The right to water. UN Committee on Economic, Social and Cultural Rights, November 2002. In November 2002, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 on the right to water. Article I.1 states that "The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights". Comment No. 15 also defined the right to water as the right of everyone to sufficient, safe, acceptable and physically accessible and affordable water for personal and domestic uses, also see, Adele J Kirschner, 'The Human Right to Water and Sanitation' (2011) 15 *Max Planck Yearb UN Law* 445-487.

²⁵²⁵ Beth Stephens, 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal International Law* 45, Eric Engle, 'Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations' (2004) 40 *Willamette Law Review* 103, MaceElizabeth Erin, 'Scratching The Corporate Back: Why Corporations Have No Incentive to Define Human Rights' (2002) 11 *Minnesota Journal of Global Trade* 101 and Michael A Santoro, *Profits and Principles: Global Capitalism and Human Rights in China* (Cornell University Press 2000).

engage or aid and abet governments to oppress its citizens' rights, or fail to conduct a vigorous environmental damage assessment, this shall result in substantial human rights violations and environmental damages. This study has identified that the foresight of corporate conduct under legal principles does not exempt them from aggravated or exemplary liability.

In addition, the corporation does engage in human rights violation to maximise profits at the expense of innocent victims and the environment.²⁵²⁶ Thus, this constitutes an unjust enrichment because the corporation made the profit at the expense of the victims and the environment.²⁵²⁷ Under the law of tort, it is prohibited that the defendant should benefit from a tort of negligence; therefore, unjust enrichment is used as a tool to impose liability on the defendant.²⁵²⁸ This concept illustrates that tort does not pay or allow the corporation to enjoy unjust enrichment.²⁵²⁹ The findings of this study have a number of practical implications: 1. the court, after assessing the circumstance surrounding corporate conduct, should be in a mandatory legal position to award either aggravated or exemplary damage for human rights violations; 2. it is recommended that aggravated or exemplary damages should be award if it is proven that the corporation has violated a human rights or damaged the environment in any of the following circumstances:

- Cases where corporations and their managers and staff have been accused of being directly responsible for acts amounting to gross human rights abuses;
- Cases where governments and state authorities have engaged corporations to provide goods, technology, services or other resources which are then used in abusive or repressive ways,;
- Cases where companies have been accused of providing information, or logistical or financial assistance, to human rights abusers that have, “caused” or “facilitated” or exacerbated the abuse. This group of cases frequently (though not always) arises out of situations where state security services have been called in to assist with the resolution of some dispute or conflict surrounding the business activities; and

²⁵²⁶ Kimberly Gregalis Granatino, ‘Corporate Responsibility Now: Profit at The Expense of Human Rights with Exemption from Liability’ (1999) 23 *Suffolk Transnational Law Review* 191.

²⁵²⁷ David N Fagan, ‘Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations’ (2001) 76 *New York University Law Review* 626.

²⁵²⁸ Emily Sherwin, ‘Reparations and Unjust Enrichment’ (2004) 84 *Boston Law Review* 1443.

²⁵²⁹ Donald C Langevoort, ‘On Leaving Corporate Executives Naked, Homeless and Without Wheels: Corporate Fraud, Equitable Remedies, and the Debate Over Entity versus Individual Liability’ (2007) 42 *Wake Forest Law Review* 627.

- Cases where companies have been accused of being “complicit” in human rights abuses by virtue of having made investments in projects or joint ventures or regimes with poor human rights records or with connections to known abusers.

Lastly, the findings of this study have a number of important implications for future practice: 1. where it is established that a corporation owes or should owe a duty of care; 2 applying case law from the UK and few other jurisdictions²⁵³⁰ where the judiciary have applied the legal concept of duty of care to corporations, which could be extended to other jurisdiction; 3. other judicial systems should recognise a duty of care as part of corporate business activities; 4. countries with a weak implementation of human rights law should apply the duty of care to corporation business operation; and 5. A country should apply the neighbourhood principles under tort law to human rights violations conducted in its jurisdiction, specifically in a situation where the corporations and the government are partially or indirectly connected.

The gap in corporate accountability, which have been highlighted throughout this research show that to resolve the issue of corporate liability and the irregularities that existed in the interpretation of international human rights law in some jurisdiction, it is inevitable to resort to the corporate duty of care to establish legal responsibility for corporate human rights violations. It shall be recommended that it will be appropriate for the international legal system to create a court specifically for corporations. The corporation court²⁵³¹ will have the ability to facilitate the application of international human rights law through the concept of duty of care, specifically in situations where state judicial system has failed to apply the law properly. This approach will provide an avenue for the victims of human rights violations to channel their concern to the appropriate authorities, as well as giving them the opportunity to have their cases heard and tried in court. However, it is advised that one should not accept this recommendation as a conclusion, but rather as opening the floodgate for a detailed examination of the development of a transnational corporation court and the principle of corporate duty of care.

6.16. Enforcement of Remedy for Human Rights Violations and Environmental Damages

Tort and civil law remedy can be used as an effective and appropriate penalty²⁵³² for corporate human rights violations and environmental damages under the following conditions:

²⁵³⁰ Charles Wild and Stuart Weinstein, *Smith and Keenan's Company Law* (Pearson Education 2013).

²⁵³¹ See the below sub-chapter for a further discussion on the concept of corporate court.

²⁵³² This is because taking the relevant social problem to be the problem of costly accidents, economic analysts

(1) if remedy is very high (relative to the global annual revenue of the company concerned) so as to prevent a commoditising of human rights, because the costs outweigh the benefits for the corporation under a classical cost-benefit analysis²⁵³³ as the major premise of modern-day business decision making,²⁵³⁴ and (2) if tort and civil law remedy are joined with other non-monetary sanctions as principal penalties under international law and human rights law.²⁵³⁵ However, it should be acknowledged that the latter requires some innovative thinking by the court with regard to corporate perpetrators because corporations, unlike human beings, cannot be imprisoned *per se*.

Also, under French law, there are nine deprivations of corporation rights as enforceable sanctions.²⁵³⁶ These sanctions include dissolution of the corporation, judicial surveillance, public display and distribution of the sentence, confiscation of assets, permanent or temporary exclusion from invitations for tenders offered by public authorities, and permanent or temporary closure of the corporation's establishments engaged in the commission of the crimes.²⁵³⁷ In regards to the significance of corporate human rights violations under international law and human rights law, the closure of implicated corporate units, general confiscation of all of the company's assets (rather than only those assets associated with the human rights violations and environmental damages),²⁵³⁸ and even the extreme measure of dissolving the corporation "the corporate death penalty"²⁵³⁹ may be suitable sanctions in the

deem the paradigmatic tort to be that of negligence. The law holds a person to be negligent when she imposes an unreasonable risk of injury on another. Imposing an unreasonable risk of injury is in turn a matter of failing to take precautions that a reasonable person would take. Economists offer the following answer for this approach in this thesis: a precaution is reasonable when it is rational; a precaution is rational when it is cost-justified; and a precaution is cost-justified when the cost of the precaution is less than the expected injury (the latter being the cost of the anticipated injury discounted by the probability of the injury's occurrence).

²⁵³³ "A cost-benefit analysis is a process by which business decisions are analysed. The benefits of a given situation or business-related action are summed, and then the costs associated with taking that action are subtracted. Some consultants or analysts also build the model to put a dollar value on intangible items, such as the benefits and costs associated with living in a certain town, and most analysts will also factor opportunity cost into such equations". Richard A Posner, 'Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers' (2000) 29 (S2) *Journal of Legal Studies* 1153, 1177 and Joseph S Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417, 427.

²⁵³⁴ Iris Bohnet, Bruno S Frey and Steffen Huck, 'More Order with Less Law: On Contract Enforcement, Trust, and Crowding' (2001) 95 (1) *American Political Science Review* 131, 144.

²⁵³⁵ Bruno Frey, 'Motivation Crowding Theory-a New Approach to Behaviour' (2008) *Behavioural Economics and Public Policy: Roundtable Proceedings. Australian Government Productivity Commission*.

²⁵³⁶ Andrew Kirsch, 'Criminal Liability for Corporate Bodies in French Law' (1998) 9 *European Business Law Review* 38.

²⁵³⁷ *Ibid.*

²⁵³⁸ Code Penal [C. PEN] [Penal Code] art. 213.3 (Fr.) [hereinafter French Code Panel]

²⁵³⁹ The usual explanation is that a criminal conviction should putting the corporation out of business. Grossman,

context of extreme corporate human rights violations and environmental damages because it can be argued that the corporations have acted reckless without any consideration to the rights of the victims. Thus, this negligent behaviour or the international element of the corporate misconduct should give rise to extreme liability and legal remedy.²⁵⁴⁰ From a comparative legal perspective in this study, it seems that countries providing corporate liability for human rights violations and environmental abuses may share a similar standard for when dissolution of the company is an eligible penalty for grievous corporate misconduct.;

For example, the French²⁵⁴¹ and Belgian²⁵⁴² legal systems permit the winding-up of the legal person provided the legal person was criminal in character in criminal proceeding (however, this could differ in other states, but this study is focusing on only these two states here), that is, if it commits the crimes, or was intentionally misused for criminal purposes contrary to the original purpose of the corporation. In an effort to avoid complementarity problems, an in-depth multi-country analysis of the different standard requirements for corporate capital punishment may be required to inform the way forward in the global enforcement of remedy for human rights violations and environmental damages.

Furthermore, the measures of closure of business premises, confiscation of assets, fines, or (in the most severe cases) dissolution of the company, judicial scrutiny and transparency inventiveness will be required to enforce effective retribution and future deterrence for corporate human rights and environmental damages. Overall, this evidence presented here supported the view that close cooperation with signatory states is necessary in order to enforce corporate accountability against the business that violate human rights and damage the environment. This is because there is a need of a companion domestic law that can render enforceable judgement by the court, such sanctions imposed by the international court or tribunal. This is particularly true at the enforcement level when seizing a company's assets. There are many legal, political, and practical issues that will have to be addressed at the enforcement level as modern-day multinational corporations consist of complex structures of

Isler Drew, 'Would a Corporate Death Penalty Be Cruel and Unusual Punishment' (2015) 25 *Cornell Journal of Law and Public Policy* 697 and Gabriel Markoff, 'Arthur Andersen and the Myth of The Corporate Death Penalty: Corporate Criminal Convictions in The Twenty-First Century' (2012).

²⁵⁴⁰ Jonathan Clough, 'Punishing The Parent: Corporate Criminal Complicity in Human Rights Abuses' (2007) 33 *Brooklyn Journal of International Law* 899.

²⁵⁴¹ French Code Penal, arts. 131–39.

²⁵⁴² Code Penal/Strafwetboek [C.PEN'. /SW.] art. 35 (Belg.).

parent company, supply chain, subsidiaries, branches, and joint ventures across multiple jurisdictions world-wide.²⁵⁴³

Also, in the context of enforcement of human rights remedy, an independent monitor²⁵⁴⁴ could be required as a condition for a deferred remedy agreement, settlement, or plea bargain for the corporation in question.²⁵⁴⁵ The use of monitorship has been common practice within the FCPA²⁵⁴⁶ regime as enforced by the United States Department of Justice (DOJ), and it could well be used beyond the realm of contractual agreements with the court, such as being incorporated into the relevant enforcement and remedy guidelines for both international and domestic court (domestic court in this context is referring to where the human rights abuses and environmental damages occurred). That would make it another option for a non-monetary form of penalty which the court could impose on the corporation for violating human rights and environmental damages. It should be bear in mind that this is not to say that there should be no individual liability imposed for corporate wrongdoing. Instead, it is important in relation to any kind of corporate responsibility, to make sure that sanctions address both the individual and corporate level of liabilities.

Several lines of evidence suggest that the appointment of monitors by the prosecution in FCPA enforcement proceedings²⁵⁴⁷ has become an effective option to change the culture of non-compliance within the targeted corporation, a process that involves great attention to the shortcomings in compliance procedures and systems within the corporation.²⁵⁴⁸ Corporations that retained an independent monitor as a condition for settling FCPA charges include such major brands as Siemens,²⁵⁴⁹ Daimler²⁵⁵⁰ and Eni.²⁵⁵¹ The DOJ has also established the

²⁵⁴³ Nitin Nohria and Sumantra Ghoshal, *The Differentiated Network: Organizing Multinational Corporations for Value Creation* (Jossey-Bass Publishers 1997).

²⁵⁴⁴ It means monitoring by an external party. Technically, if a company were working to on the project then the government would count as an external party, but the use of “independent” would usually be taken to mean another private entity, one without ties to the participants. It would not be used to refer to self-monitoring or internal monitoring.

²⁵⁴⁵ Cristie Ford and David Hess, ‘Can Corporate Monitorships Improve Corporate Compliance’ (2008) 34 *Journal of Corporation Law* 679.

²⁵⁴⁶ The Foreign Corrupt Practices Act of 1977 (FCPA) (15 USC. § 78dd-1, et seq.). Noting that as of 2009, “[t]he DOJ has imposed at least [fortyfour] monitorships as part of settlements agreements with corporations”).

²⁵⁴⁷ Drury D Stevenson and Nicholas J Wagoner, ‘FCPA Sanctions: Too Big to Debar?’ (2011).

²⁵⁴⁸ Vikramaditya Khanna and Timothy L Dickinson, ‘The Corporate Monitor: The New Corporate Czar’ (2006) *Michigan Law Review* 105, 1713. “Few penalties imposed on a corporate criminal offender cause as much consternation as do compliance monitors”.

²⁵⁴⁹ Complaint, *SEC v Siemens Aktiengesellschaft*, No. 1:08-cv-02167 (D.D.C. 2008).

²⁵⁵⁰ Deferred Prosecution Agreement, *United States v Daimler AG*, No. 1:10-cr- 00063-RJL (D.D.C. 2010)

²⁵⁵¹ Snamprogetti Richard Cassin, ‘ENI in \$365 Million Settlement’ THE FCPA BLOG (July 27, 2010). <<http://www.fcpablog.com/blog/2010/7/7/snamprogetti-eni-in-365-million-settlement.html> [<https://perma.cc/CC8B-UD4T>] >. Accessed 16 September 2012.

precedent of imposing monitorships for purposes other than FCPA enforcement.²⁵⁵² One of the conditions imposed by the DOJ to settle the BP case related to the Deepwater Horizon oil spill was the appointment of two independent corporate monitors: a process safety monitor and an ethics monitor.²⁵⁵³ Monitorship could offer a possible sanction option that has previously been applied in another context of corporate accountability, namely anti-corruption enforcement.²⁵⁵⁴

Monitors typically perform an independent review of a firm's compliance policies²⁵⁵⁵ and procedures.²⁵⁵⁶ There are different methodologies for the court for the selection of monitors: the court can designate a specific monitor, or the selection of the monitor may be made in cooperation with the respective government, typically by granting relevant government agencies veto power over the selection.²⁵⁵⁷ The monitors' primary task is to develop a robust compliance system and to recommend measures that would strengthen future compliance.²⁵⁵⁸ Nonetheless, it is important to bear in mind that no attorney-client privilege

²⁵⁵² Vikramaditya Khanna and Timothy L Dickinson (n 2518) at 1719,20 (finding that enforcement R authorities have imposed monitors in a "wide range of cases, including securities fraud, tax fraud, and cases involving charges under the Foreign Corrupt Practices Act").

²⁵⁵³ BP Statement on Deepwater Horizon Settlement with US, WALL ST. J. (Nov. 15, 2012). <<http://blogs.wsj.com/law/2012/11/15/bp-statement-on-deepwater-horizon-settlement-with-u-s/> [<https://perma.cc/AVF9-3J9S>]> accessed 15 July 2017

²⁵⁵⁴ While the nature of the infringements are substantially very different in cases involving corruption and those involving atrocity crimes, the appointment of an independent monitor can effectively change a corporate culture of non-compliance and help develop a robust compliance system within the company. Monitorships can function as a vehicle for organisational change from within the company to promote a culture of integrity. While the experiences with FCPA monitorships provide valuable lessons, some adjustments will be required when monitors are used in the context of violations of human rights and environmental law. In these cases, monitorships likely would not be a matter of contract law (in the form of an agreement with the prosecution), as with FCPA cases.

²⁵⁵⁵ Alexander G Hughes, 'Drawing Sensible Borders for The Definition of Foreign Official under The FCPA' (2012) 40 *American Journal of Criminal Law* 253.

²⁵⁵⁶ The decision to impose a compliance monitor depends on the specific facts of the case. According to the Resource Guide to the US Foreign Corrupt Practices Act (FCPA) by the US Department of Justice (DOJ) and US Securities and Exchange Commission (SEC), the following factors determine whether a monitor is appropriate, namely: "seriousness of the offense[;] duration of the misconduct[;] pervasiveness of the misconduct, including whether the conduct cuts across geographic and / or product lines[;] nature and size of the company[;] quality of the company's compliance program at the time of the misconduct[;] subsequent remediation efforts". DEP'T OF JUSTICE, CRIM. DIV., & SEC, ENF'T DIV., A RESOURCE GUIDE TO THE US FOREIGN CORRUPT PRACTICES ACT, at 71 (2012) [hereinafter DOJ & SEC RESOURCE GUIDE]. <<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [<https://perma.cc/WYC2-PP78>]> accessed 15 July 2017.

²⁵⁵⁷ Internal guidance documents by the DOJ dictate the process to select monitors. Lanny A Breuer, Assistant Attorney General, US Dep't of Just., Memorandum to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters (June 24, 2009). <<http://www.justice.gov/criminal/fraud/fcpa/docs/response3-suppx-3.pdf> [<https://perma.cc/NLV5-BFZX>]> accessed 5 July 2017, Craig S Morford, Acting Deputy Attorney General, US Dep't of Just., Memorandum to the Heads of Department Components and United States Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (2008). <<https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf> [<https://perma.cc/ECK4-8A88>]> accessed 15 July 2017.

²⁵⁵⁸ *Ibid.*

exists between the corporation and the monitor in these situations.²⁵⁵⁹ This is due to the fact that, by its very nature, the attorney-client relationship affords a distinct, invaluable right to have communications protected from compelled disclosure to any third party, including business associates and competitors, government agencies, and even criminal justice authorities.²⁵⁶⁰ The monitor can perform many critical tasks, including the investigation of specific allegations on behalf of the court and the victims of corporate human rights violations and environmental damages.²⁵⁶¹ Therefore, they also wield influence over the management of the corporation by virtue of their reports to the government.²⁵⁶² The court monitor should deliver such a report annually during the appointed term, which must last three years after the enforcement.²⁵⁶³

Monitorship as part of remedial action in tort and civil law remedy does not merely serve the purpose of deterrence, but can also be a driving factor for the corporation toward behavioural change.²⁵⁶⁴ As mentioned here, the DOJ understands the government's role in corporate prosecution "to be a force for positive change of corporate culture [and] alert corporate behaviour".²⁵⁶⁵ Therefore, monitorship can serve [both] as a reform measure and as a deterrent for corporate human rights violations.²⁵⁶⁶ In addition, a corporate monitorship has the potential to facilitate such a mindset shift within business operations.²⁵⁶⁷ This would require a so-called "growth mindset".²⁵⁶⁸ There are several possible explanations for this, as

²⁵⁵⁹ Joseph F Warin, Michael S Diamant and Veronica Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better' (2011).

²⁵⁶⁰ Grace M Giesel, 'The Legal Advice Requirement of The Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations' (1996) 48 *Mercer Law Review* 1169.

²⁵⁶¹ Rachel Louise Ensign, 'How Daimler Got "A Very Good Report Card' (2013). *Risk & Compliance Journal*. <<https://blogs.wsj.com/riskandcompliance/2013/05/29/how-daimler-got-a-very-good-report-card/>> accessed 15 July 2017.

²⁵⁶² Vikramaditya Khanna and Timothy L Dickinson, (n 2518).

²⁵⁶³ Joseph F Warin, Michael S Diamant and Veronica Root (n 2529).

²⁵⁶⁴ Due to the extensive nature of its scope, a monitorship can require significant resources and subject the corporation to high costs associated with staff who are allocated to the needs of the monitor and to implement compliance measures. All this makes the appointment of an independent monitor highly punitive and thus likely to move corporate behaviour towards compliance.

²⁵⁶⁵ Paul J McNulty, Deputy Attorney General, US Dep't. of Just., Memorandum to the Heads of Department Components and US Attorneys on Principles of Federal Prosecution of Business Organizations, 2 (Dec. 12, 2006). <https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf><<https://perma.cc/9VNVW583>> accessed 15 July 2017.

²⁵⁶⁶ Cristie Ford and David Hess (n 2270).

²⁵⁶⁷ Vikramaditya Khanna and Timothy L Dickinson (n 2518).

²⁵⁶⁸ Mary C Murphy and Carol S Dweck, 'Mindsets Shape Consumer Behaviour' (2016) 26 (1) *Journal of Consumer Psychology* 127, 136. Mindset theory in psychology literature can be helpful in understanding the change function of organisational mindsets and thus inform the design of effective penalties for corporate wrongdoers. Research has shown that mindsets can either be "fixed" with regard to the belief that certain human attributes are stable and cannot be changed, or they can be premised on a growth

monitorships serve two purposes: 1. to create an effective compliance system; and 2. to promote a mindset of integrity in the business operations²⁵⁶⁹ Thus, integrity management has long been considered a central component of enlightened business culture and practice.²⁵⁷⁰

This concept is evident in the practice of the auto manufacturers Daimler and Volkswagen, both of which have made integrity concerns a core part of their legal affairs and compliance programs and created a corresponding director position on their respective boards of management.²⁵⁷¹ This observation may support the hypothesis that enforcement of remedy for human rights violations and environmental damages may have two dimensions. The first is the strict approach of applying the death penalty theory to corporate grievous human rights violations and environmental damages, and the second is applying the monitoring principle adopted by the DOJ of the US to enforce liability against corporations, which will force the corporation to change its policy and comply with human rights law and environmental law.²⁵⁷²

It is also suggested here that the court must explicitly amend its judgement in order to force the corporation compliance to monitors as enforcement measures for corporate human rights violations and environmental damages. To achieve this, parties must look to some normalisation at the international level to understand the scope of how monitors can be defined and used to ensure “correction” of corporate behaviour, particularly as it might pertain to commission of or complicity in human rights violations and environmental damage. Likewise, what is important in the enforcement of remedy against the corporation, as well as monitoring corporate adherence to human rights duty of care, the host state, domestic legal system and the

mentality grounded in the belief that people can substantially change. Cultivating and communicating a growth mindset (both internally and externally) has important implications, such that it increases trust as well as cultural sensitivity. These are important elements of a culture of compliance and integrity. A growth mindset can therefore be considered imperative to render corporate monitorships effective in behavioural terms.

²⁵⁶⁹ Joseph F Warin, Michael S Diamant and Veronica Root (n 2529).

²⁵⁷⁰ Lynn Sharp Paine, ‘Managing for Organizational Integrity’ (1994) 72 (2) *Harvard Business Review* 106, 117.

²⁵⁷¹ Doron Levin, Daimler Lends VW a Hand to Manage Scandal Clean up, *FORTUNE* (Oct. 20, 2015).

<http://fortune.com/2015/10/20/vw-daimler-board-scandal/> [<https://perma.cc/U4NX-EYAF>] accessed 15 July 2017. This direct line to the board on issues of compliance and integrity signals an important change in corporate structures that implements a mindset shift. The appointment of a monitor can facilitate systemic change at the organizational level and contribute to changing the corporate mindset and culture.

²⁵⁷² The quest for an effective and appropriate tort and civil law remedy structure for legal persons goes to the heart of the nature of corporations as organisational fictions under the law with no mind, soul, and body of their own. Behavioural law and economics studies provide important insights in this regard that should inform the related regulatory design questions. As suggested by the existing literature in this field, joint liability of the implicated corporate officers, as well as the corporation itself, would be most effective in terms of deterrence and retribution for corporate human rights abuses and environmental damages. While individual officer liability is an important starting point towards corporate criminal accountability, it would not account for the organisational dimension of corporate wrongdoing.

international community should allow the courts judgement and recommendation be applied in any suitable jurisdictions. What is essentially being said here is that, the home state of the corporation should bear the duty to enforce human rights against the corporation, if 50% of the parent corporation asset is located in that jurisdiction.

Chapter VII

7. Aims and Objectives

The possibility of establishing an international court for business and human rights is one of the elements discussed in the current debate over the adoption of an international legally binding instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights in the United Nations Human Rights Council.²⁵⁷³ Even though the existence of a world institution such as corporate court could bring important benefits for the development of international law and protect victims of human rights abuses by corporations, it is also necessary to draw up an inventory of different factors that could interfere in the design of an instrument of binding nature on business operations. There is also evidence that the entity conception of the corporation, which at one time was indeed a fit for economic life (MNCs), protection and growth, is now outmoded and a misfit for contemporary social issues confronting the corporation, victims of human rights abuses and environmental damages. One of the major social and human rights issues confronting the multinational corporations is human rights violations in its business supply chains, subsidiaries and how to minimise the cost of engaging in business conduct with a subsidiary whose conduct is linked with human rights abuses or environmental damages²⁵⁷⁴

The global nature of business has given rise to complex network modes of business organisation and supply chains which, in addition to the traditional parent subsidiary relationship, could include other forms of non-equity modes of investment, such as contract manufacturing and farming, service outsourcing, franchising and licensing.²⁵⁷⁵ Lastly, as parent corporations ordinarily keep “distance by design” from their subsidiaries, it is almost impossible for victims to hold parent companies accountable for corporate human rights violations. The legal idea of separate corporate personality, thus, does not really match with

²⁵⁷³ Surya Deva, *Building a Treaty on Business and Human Rights* (University of Johannesburg South Africa eds. Published 2017).

Resolution A/HRC/RES/26/9 was adopted during the 26th ordinary session of the United Nations Human Rights Council on June 2014 and provided for the establishment of 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. UN General Assembly, Human Rights Council, Resolution A/HRC/RES/26/9, Elaboration of an Internationally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (July 14, 2014.)

²⁵⁷⁴ Adaeze Okoye, ‘Corporate Enterprise Principles and UK Regulation of Modern Slavery in Supply Chains’ (2017) 28 (5) 1 *International Company and Commercial Law Review* 96, 205.

²⁵⁷⁵ UNCTAD, World Investment Report, Non-Equity Modes of Production and Development (New York/Geneva UN 2011).

the economic reality of multinational corporations (MNCs) or the social perception about them. Consequently, creating a *lacuna* in the legal principle of corporate accountability, this means that the legal system (either domestic or international) must find a way to minimise the misuse of the two legal doctrine of corporate law as a matter of routine in order to provide victims of corporate human rights abuses access to effective remedies. This section will continue the debate on corporate accountability by moving on to recommend a theoretical mechanism for corporate accountability that has the potential to effectively interpret the concept of corporate duty of care under tort law. The chapter will start by looking at the purpose of the **Hybrid International Transnational Corporation Claim Court (HITNCCC)**, the Court Authority, the Jurisdiction, the Substantive Law, the Court Procedure, Judgement and Enforcement.

This suggestion is partly based on Kozma, Nowak and Scheinin recommendation of creating a world court for human rights law.²⁵⁷⁶ The court would not include new substantive human rights norms. Instead, the jurisdiction of the corporate court would be based on the existing normative catalogue of human rights treaties,²⁵⁷⁷ interpreted on the basis of the principle of interdependence and indivisibility of all human rights and drawing inspiration from customary international law and general principles of law. The United Nations Human Rights Council (UNHRC) will remain as the leader of International Transnational Corporation Claim Court (HITNCCC), supported by the Office of the UNHRC. Therefore, the corporate court will have its own secretariat, the Registry. The two institutions will be linked through a new function of the UNHRC, namely her or his power to seek an Opinion from the court, in respect of any human rights complaint and any state or other entity as respondent, provided that the court will not have legally binding jurisdiction in the matter.

This procedure for Opinions complements the binding jurisdiction of the court makes it literally into a court, (i.e. a court that when the need arises can provide an authoritative legal opinion on an alleged human rights violation by corporation anywhere in the world and committed by whomsoever). The UNHRC is best placed to trigger the Opinions function of the court. She is independent from states and of the political organs of the U.N. She is a recognised professional with experience, expertise and judgment. She is supported by staff capable of assisting her in the formulation of a request for an Opinion. The corporate court will have discretion to accept or not to accept the UNHRC Opinion. Likewise, the power of the

²⁵⁷⁶ Julia Kozma, Manfred Nowak and Martin Scheinin, *A World Court of Human Rights: Consolidated Statute and Commentary* (Neuer Wissenschaftlicher Verlag 2010).

²⁵⁷⁷ Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford University Press USA 2008).

UNHRC to request an Opinion from the court will be only one of the channels through which the court can be seized and invited to deal with an alleged human rights violation by corporations.

This channel will be a complement to the more direct and regular methods of bringing a case before the court. Complaints by individuals, or groups of individuals, will be the main channel for taking cases before the court. Such complaints can be submitted by persons claiming to be a victim of a human rights violation by the respondent which can be a corporation or other entity. Also, states can initiate cases, by alleging that another state, or an entity, has committed a human rights violation in its jurisdiction.

7.1. Hybrid International Transnational Corporation Claim Court (HITNCCC)

The central idea of human rights law, protecting the individual against states, including and even primarily his or her own state, has not systematically permeated the framework of public international law.²⁵⁷⁸ International law is still primarily law between nations, i.e. law created by states and for states.²⁵⁷⁹ For example, consent by a state is still a precondition for legally binding human rights treaty obligations.²⁵⁸⁰ True, the evolution in the understanding of customary international law, and within it the category of peremptory norms (*jus cogens*), renders the requirement of consent less absolute.²⁵⁸¹ Though, there are various ways in which states may try to resist their commitment to human rights by denying their consent, including by not ratifying a treaty, by entering extensive reservations or by not accepting optional monitoring mechanisms, such as a procedure for individual complaints under a specific human rights treaty.²⁵⁸²

Also, in times of emergency, states may also derogate from some of their otherwise legally binding human rights obligations.²⁵⁸³ Even where states have given their consent to be

²⁵⁷⁸ Stephen James, *Human Rights* (John Wiley & Sons Ltd 2008).

²⁵⁷⁹ Paul Sieghart, *The International Law of Human Rights* (Oxford University Press 1983).

²⁵⁸⁰ Louis Henkin, 'Human Rights and State Sovereignty' (1995) 25 *Georgia Journal of International & Comparative Law* 31.

²⁵⁸¹ Nina HB Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press 2000).

²⁵⁸² Louis Henkin, 'US Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 (2) *American Journal of International Law* 341, 350.

²⁵⁸³ Joan F Hartman, 'Derogation from Human Rights Treaties in Public Emergencies A Critique of Implementation by The European Commission and Court of Human Rights and The Human Rights Committee of The United Nations' (1981) 22 *Harvard International Law Journal* 1.

bound by a human rights treaty, there are failures in compliance.²⁵⁸⁴ Under United Nations human rights treaties periodic reporting by states and the consideration of these reports by independent expert bodies (the treaty bodies) is the only mandatory monitoring mechanism.²⁵⁸⁵ Many states are seriously in delay in submitting their periodic reports. Even where the reporting does occur, or a state has accepted optional procedures of individual complaint, there are all too many cases of noncompliance with the findings by the treaty bodies.²⁵⁸⁶ This is largely because such findings have no legally binding authority of their own. Instead, their authority is derived from the powers of the treaty body to interpret the treaty in question, including as to whether the state violated the treaty and is under an obligation to provide an effective remedy. Also, the findings by treaty bodies are authoritative and persuasive but strictly speaking not legally binding. Thus, some states take the liberty of refusing their implementation on such grounds, ignoring the fact that the treaty provisions subject to the interpretive function of the treaty body are legally binding.

Non-enforcement is a major failure of the United Nations human rights treaty system.²⁵⁸⁷ The treaty bodies themselves are usually left with the task of overseeing the implementation of their own findings. This situation is in stark contrast with the unconditional binding force of judicial decisions in national jurisdictions, or with the role of intergovernmental organs in the non-selective supervision of the implementation of rulings by regional human rights courts, such as the European Court of Human Rights within the Council of Europe framework. A further shortcoming of the current status of human rights law within the broader framework of public international law is the exclusive focus of human rights treaties and their monitoring mechanisms upon states as the duty bearers. This no longer corresponds to the realities of our globalised world where other actors besides states, such as international financial institutions and other intergovernmental organisations, transnational corporations and other non-state actors enjoy increasing powers that affect the lives of individuals irrespective of national borders, and therefore possess also the capacity to affect or even deny the enjoyment of human rights by people.

²⁵⁸⁴ Louis Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 68 *Fordham Law Review* 1.

²⁵⁸⁵ Navanethem Pillay, 'Strengthening The United Nations Human Rights Treaty Body System' (2012) *New York: UN Office of The High Commissioner for Human Rights*.

²⁵⁸⁶ Jasper Krommendijk, 'The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of The UN Human Rights Treaty Bodies' (2015) 10 (4) *Review of International Organizations* 489, 512.

²⁵⁸⁷ Schachter Oscar, *International Law in Theory and Practice* (Vol. 13. Martinus Nijhoff Publishers 1991).

The main recommendation of this study here is to suggest the creation of a new international corporate court, similar to the International Criminal Court, with jurisdiction over human rights and international environmental law violations. Such a court could act as a universal human rights court for corporations, something that is lacking today with respect to both human rights (with its derogation systems) and international human rights law (jurisdiction over core human rights violations and environmental damages). Various UN bodies already report on violations of both human rights and environmental law by natural persons, including non-state actors and corporations, but, none have yielded a fruitful solution for human rights abuses by non-state actors.

In this new proposed *ad hoc* jurisdiction, judges could identify human rights and environmental law violations, and pronounce an appropriate judgment accordingly, going a step beyond the report phase, by imposing duty of care on the corporation. They could also provide the possibility for victims to claim remedy, while international justice could be attained, as well as ensuring the enforcement of judicial remedy. However, not many states would be willing to finance the new international corporate court being proposed here, access to the court, or legal representative of the victims; nor would they surrender their legal sovereignty to the newly proposed corporate court (this could be an obstacle for the proposed court).²⁵⁸⁸ Similarly, it is possible to argue that some countries will seek to protect the interest of their corporations against international law suits.²⁵⁸⁹ These difficulties could serve as an impediment to the creation of a new corporation court that will have the potential to exercise international jurisdiction over transnational corporate conduct.²⁵⁹⁰ Nonetheless, till this day, the past doctrine has not fully seized the opportunity opened by the Nuremberg trials; the main focus remains on individuals, business leaders, or states, leaving aside legal persons like corporations. Their role and implication in international human rights violations and environmental damages is significant and it should not go unresolved without accountability. International human rights and environmental law remains the best option for holding corporation accountable for human rights violations and environmental damages.

²⁵⁸⁸ Michael Akehurst 'Jurisdiction in International Law' (1972) 46 *British Year Book of International Law* 145.

²⁵⁸⁹ Herman Walker, 'Treaties for The Encouragement and Protection of Foreign Investment: Present United States Practice' (1956) *American Journal of Comparative Law* 229, 247

²⁵⁹⁰ René Blattmann and Kirsten Bowman, 'Achievements and Problems of The International Criminal Court: A View from Within' (2008) 6 (4) *Journal of International Criminal Justice* 711, 730.

One of the major scholars arguing against the creation of an international court for human right today is Alston.²⁵⁹¹ The author based his argumentation on the draft proposal established by Nowak, Scheinin and Kozma.²⁵⁹² There are also two different types of arguments noted in this research, arguments of a fundamental nature and arguments related to more practical obstacles, which that are more practical in nature. Also, the issue of legality, raise the possibility that;

“Courts do not function in a vacuum. To be seen as legitimate and to aspire to effectiveness they must be an integral part of a broader and deeper system of values, expectations, mobilisations, and institutions. They do not float above the societies that they seek to shape, and they cannot meaningfully be imposed from on high and be expected to work.”²⁵⁹³

Alston reject the idea of international human right court on the fundamental basis of critique on legalism in international human rights law. Legalism as defined by Shklar as an “ethical attitude that holds moral conduct to be a matter of rule following”²⁵⁹⁴ or “the preference for case-by-case treatment of all social issues, the structuring of all possible human relations into the form of claims and counter-claims under established rules, and the belief that the rules are ‘there’.”²⁵⁹⁵ Other scholars also rejected the view that a global human rights regime will not solve the problem of implementation at its roots.²⁵⁹⁶ Alston claims may have some merit, and rightly so, that the establishment of an international court must be preceded by the general acceptance of values and expectations. The author also discards the idea that there is a general understanding that every “right” should be met with a right to claim its enforcement before a Court.²⁵⁹⁷ This research argued that even though there is some merit in Alston argument, the author has failed to establish a conclusive reason why the world is not ready for a new international court. The base of the author argument is superficial, and his notion of legalism does not give an adequate explanation of how the gap of the remedy of human rights violation can be resolve in a world dominate by a multinational corporation. Furthermore, it is

²⁵⁹¹ Philip Alston, ‘Against a World Court for Human Rights’ (2014) *Ethics & International Affairs* 28

²⁵⁹² Julia Kozma, Manfred Nowak and Martin Scheinin, ‘A World Court of Human Rights Consolidated Draft Statute and Commentary’ (2010).

²⁵⁹³ Philip Alston, ‘A World Court for Human Rights is Not A Good Idea’ (2013).

www.justsecurity.org/2796/world-court-human-rights-good-idea/ > accessed 29 December 2017.

²⁵⁹⁴ Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1964).

²⁵⁹⁵ *Ibid.*

²⁵⁹⁶ Jack Snyder and Leslie Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice’ (2004) 28 (3) *International security* 5, 44.

²⁵⁹⁷ Philip Alston (n 2561).

unclear how the author envisages human rights accountability in the rapid development of today's world.

Relating this argument to the lack of effective remedy for corporate human rights abuses. Alston fears that a new international court would vest and undue amount of power in the hands of a select group of people, the judges. Some scholars believe that international law and *a fortiori*, international human rights law do not require centralised enforcement to perform its functions and influence behaviour. As Benhabib observed, “many critics of cosmopolitanism view the new international legal order as if it were a smooth “command structure,” and they ignore the *jurisgenerative* power of cosmopolitan norms.”²⁵⁹⁸ In a critical analysis, the power of human rights law lies in advocacy and campaigning that defy crusted government networks.²⁵⁹⁹ Alston argues that the vesting of so much power in one single global court “defies any understandings of systemic pluralism, diversity, or separation of powers.”²⁶⁰⁰ However, this argument is rejected here, due to the fact that human rights law exists to protect the rights of a human beings rather than strengthen the power of a single global court. Though it is true that the international court cannot exist in the void, therefore, the principle of complementarity is of the outmost importance in the establishment of the corporate court being advocated in this thesis. This means that the corporate court will work “in tandem” with national and regional mechanisms.²⁶⁰¹ In this wisdom, the corporate court does not aim to take away from the responsibility of states, but rather offer support and an appropriate, specialised and detailed interpretation of the existing rules and at the same time serve as winds in the sails of evolution.

The proposal is the creation of a corporate court for human rights violations cases. Instead of an “international court,” the corporate court is an expression that would reflect the consent-based and inter-state oriented nature of human rights law so far, the notion of a corporate court signals the capacity of the thesis to respond to contemporary challenges in the globalised economy world. The court would exercise jurisdiction not only in respect of states but also in respect of a wide range of other actors, jointly referred to as “entities” in the exercise of legal obligation. They would include intergovernmental organisations, transnational

²⁵⁹⁸ Seyla Benhabib, ‘Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty’ (2009) 103 (4) *American Political Science Review* 691, 704.

²⁵⁹⁹ Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 2014).

²⁶⁰⁰ Philip Alston (n 2561).

²⁶⁰¹ International commission of Jurists, ‘Towards A World Court Of Human Rights: Questions And Answers’, Supporting Paper to the 2011 Report of the Panel on Human Dignity, p. 9.

corporations, and other non-state actors. Consent in the form of respecting human rights duty or judgment by the court, or the general acceptance of the court's jurisdiction by an entity would not be an absolute limit to the court's jurisdiction.

All types of duty bearers would have the possibility also to accept the court's jurisdiction in respect of a single case (ad hoc). What is more important is that complaints against states and entities could be submitted even in the absence of such ad hoc acceptance. However, the court could entertain these complaints in the absence of a consent only on the basis of a request from the UNHRC. In such cases not based on consent by the respondent, the court would issue authoritative Opinions instead of legally binding Judgments. The court would have the power to determine the permissibility of reservations entered by states to human rights treaties, and to declare a case admissible even when its subject matter would be covered by an impermissible reservation. The judgments by the court, as well as its orders for interim measures of protection, would be binding as a matter of international law. The UNHRC would be entrusted with a task to supervise the implementation of the court's findings. Lastly, this research argued that, the time has come for the international legal community to move toward the creation of corporate court that will have the capacity to facilitate corporate human rights violations in the global economy.

7.2. The legitimacy of the Hybrid International Transnational Corporation Claim Court (HITNCCC)

Legitimacy is a complex concept and its use serves different purposes in moral, legal and political language. Despite the fact that it is complex and even elusive to some, it is also a very important yardstick for assessing institutions legality, actions, or actors.²⁶⁰² This is because legitimacy assessments are about the quality of the authoritativeness of an institution, action or actor. When an institution is deemed legitimate, this implies that the decisions of that institution ought to be respected, followed and honoured. Conversely, when an institution is thought to be illegitimate this opens up a range of concerns and questions about the authority of its decisions and the correlating duty to follow them. Legitimacy, therefore, is fundamentally different from 'liking' an institution or thinking that the institution is useful. In this thesis, legitimacy consists of beliefs among the mass public that a corporate court has the right to

²⁶⁰² Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Vol. 1. University of California Press 1978).

exercise authority in a certain international legal domain.²⁶⁰³ What this means is that if publics strongly support such authority, it may be more difficult for (democratically elected) governments to undermine a corporate court that takes controversial decisions on human rights. However, early studies found that while a majority of the public trusts international courts, this was based on weak attitudes derivative from more general legal values and support for the international institutions.²⁶⁰⁴

Hence, two alternative explanations of legitimacy tend to be distinguished within this context. The first is widely referred to as empirical or “sociological legitimacy”,²⁶⁰⁵ which draws from the work of Weber and recognises legitimacy as synonymous with socially-perceived legitimacy.²⁶⁰⁶ The other is labelled both “procedural legitimacy”²⁶⁰⁷ and “normative legitimacy”.²⁶⁰⁸ Though the two terms are used interchangeably with “procedural legitimacy, for example, normative legitimacy”²⁶⁰⁹ it will be argued that conflating both stances overlooks important theoretical distinctions. Drawing on this, the corporate court proposed in this thesis, the legitimacy of the court can be explored through three dimensions procedural, normative

²⁶⁰³ Erik Voeten, ‘Public Opinion and the Legitimacy of International Courts’ (2013) 14 (2) *Theoretical Inquiries in Law* 411, 436.

²⁶⁰⁴ Allen E Buchanan, *Justice, Legitimacy, and Self-Determination: Moral foundations for International Law* (Oxford University Press on Demand 2007).

²⁶⁰⁵ Sergey Vasiliev, ‘Between International Criminal Justice and Injustice: Theorising Legitimacy’ (2015) *Browser Download This Paper*. Sociological legitimacy, or “popular legitimacy”, differs fundamentally in premise from procedural and normative accounts. As summarised by Grossman, “sociological legitimacy is subjective, agent-relative, and dynamic”. This renders the sociological understanding the most unpredictable and complex legitimising factor to measure. Ontologically, the approach becomes individual at least at a collective level and the epistemological focus is internal or “psychological”, seeking to understand how an institution is viewed and judged. The core idea centres on those implicated in violations of international criminal law, or the “stakeholders”, having greater say in how they define their own needs.

²⁶⁰⁶ *Ibid.*

²⁶⁰⁷ Hitomi Takemura, ‘Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court’ (2012) 4 *Amsterdam LF* 3. According to Takemura, current debate surrounding the legitimacy of the Court (as well as international criminal law more widely) has been “dominated by the procedural aspects of the ICC”. Interpreted strictly, procedural legitimacy embodies Weber’s idea of rational (legal) authority, i.e. whether an institution, rule or decision is legitimate depends solely on whether it is made in via the “prescribed routines” for legitimacy.

²⁶⁰⁸ Marlies Glasius, ‘Do international Criminal Courts Require Democratic Legitimacy?’ (2012) 23 (1) *European Journal of International Law* 43, 66. A second understanding of legitimacy, and one incorporated by several authors into wider conceptions of procedural legitimacy, is normative legitimacy. Here the focus is not procedural technicalities, but rather a “moral search”. For some authors, looking beyond procedural standards constitutes a “breaking of the mold”. Yet, it is right that moral considerations are made in determining the legitimacy of the Court. In addition to ensuring accountability, Court interventions advance “particular values” and keep “states within a particular normative community”. International criminal law delineates moral thresholds, and thus judgements of morality are inherent in Court’s work.

²⁶⁰⁹ Max Weber, ‘Legitimate Authority and Bureaucracy’ (1947) *Theory of Social and Economic Organisation* 328, 340.

and sociological–multidisciplinary as well as ontologically and epistemologically varying lenses and, crucially, their interrelation and implications on one another.

Measuring legitimacy through this empirical lens first requires identification of who the stakeholders of international justice are. Takemura explains that as International Court is a treaty-based organisation, its stakeholders comprise the States party to the Court’s founding Statute.²⁶¹⁰ Yet while technically correct, confining relevant stakeholders to states misses the intended focus of ‘popular legitimacy’. It is important to also consider that the corporate court in this thesis is an international court dealing with the acts of none-actor and individuals. Thus, ‘none-actor’ and ‘individuals’ requires further specification. At the heart of the Court’s investigations and prosecutions are those accused of committing the human rights violations falling within its jurisdiction, as well as their victims. Yet as a result of the nature of international crimes, whole communities or populations within a situation area can be ‘affected’ or “afflicted”²⁶¹¹ by their commission. A notable example within Libya would be the approximately 30,000 Tawerghans forcibly displaced by militias in Misrata in August 2011, and the treatment of whom several authors have argued amounts to ethnic cleansing, or even genocide.²⁶¹²

After the Court’s stakeholders, the next question asks what are the relevant perspectives that implicate, and in turn (de-)construct, the Court’s legitimacy? As a minimum preliminary within the societies affected by the court interventions, the Court in The Hague was regarded as both a relevant and accessible institution. This makes sense, as “those lacking information do not have enough grounds to evaluate the activities of the ICC in the first place”.²⁶¹³ Uninformed societies create “a danger that sociological legitimacy will become slanted”.²⁶¹⁴ The Court, of course, carries the primary responsibility in communicating its functions to those concerned by them (as well as more broadly). It is the core task of the ICC’s Public Information and Documentation Section (PIDS), one branch of the Court’s Outreach efforts, to disperse “accurate and timely information about the principles, objectives and activities of the Court to the public at large.

²⁶¹⁰ Hitomi Takemura (n 2577).

²⁶¹¹ Kevin Jon Heller, ‘The International Commission of Inquiry on Libya: a Critical Analysis’ (2012) *Browser*
Download This Paper.

²⁶¹² *Ibid*.

²⁶¹³ Hitomi Takemura (n 2577).

²⁶¹⁴ *Ibid*.

Following the empirical analysis of the legitimacy here, two further perspectives are central to sociological legitimacy. First, whether or not affected communities regard the court to have acted in accordance with its own (procedural and normative) limitations and goals. On a sociological view, it is insufficient that the Court adheres to procedures set out in the Statute or acts in accordance with norms, in fact, they must also be perceived as doing so. Accordingly, sociologically normative legitimacy would require “a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially-constructed system of norms, values, beliefs and definitions”.²⁶¹⁵ The way in which the Offices of the Court opt to conduct themselves within situation areas is decisive in “synchronising” the normative and procedural with the sociological.²⁶¹⁶

In contrast, what the Court cannot itself influence is the extent to which its objectives within a situation area resonate with the grievances and expectations anticipated by those on the ground. For example, so long as some within affected communities view those that the Court is attempting to try as criminals as still possessing lawful and/or just authority, the sociological legitimacy of the Court’s investigations and prosecutions is undermined. Moreover, where victim groups seek punishment for crimes beyond the Court’s formal mandate, or punishment harsher than is permitted under the Statute (example the death penalty), the Court cannot satisfactorily respond to empirical demands. Accordingly, the Court’s legitimacy, as viewed through a sociological lens, is heavily dependent upon the volatile political contexts within individual situation areas.

In relations to the establishment and jurisdiction of HITNCCC, any conceptualisation of legitimacy that involves public opinion is subjective rather than objective. In a subjective conception, an institution’s legitimacy resides in the beliefs that actors have.²⁶¹⁷ These beliefs may be influenced by the degree to which institutional behaviour meets normative or positive performance criteria in the international community, but not necessarily so. Even if all legal theorists agree about a court’s legitimacy, the public may deem the institution illegitimate (or vice versa) for reasons that may seem unfair or arbitrary to normative theorists. For the purposes of the establishment of the HITNCCC in this thesis, it matters not what governments

²⁶¹⁵ Mark C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 (3) *Academy of Management Review* 571, 610.

²⁶¹⁶ CH Brants, Kees Brants and LM Gould’ Communicating the ICC: Imagery and Image Building in Uganda’ *Transitional Justice Images and Memories* (Routledge 2013).

²⁶¹⁷ Eyal Benvensiti and George W Downs ‘Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance’ (2013) 46 *New York University Journal of International Law and Politics* 741.

and citizens should think, but what they do think about the role the court will play in protecting human rights and the environment. What is essentially being said here is that legal institutions with greater stocks of legitimacy receive greater compliance is a hypothesis rather than an assumption. This opinion is consistent with other studies of international court legitimacy²⁶¹⁸ and national court legitimacy.²⁶¹⁹ Legitimacy builds on the impression that court needs “diffuse support,” meaning support that is not contingent on short-term satisfaction with policy outputs.²⁶²⁰ Therefore, the politicians may well disagree with individual court decisions while continuing to believe that the court has the right to make these decisions and that its decisions should be authoritative.

Hypothetically, legitimacy may reduce the extent to which courts have to worry about the repercussions from unpopular decisions. This claim warrants some unpacking. The relationship between an international court and governments and the general public cannot be described by a simple notion of legitimacy in which politicians make demands and judges deliver. There is no basis for such a direct input and output of international legal rules. There is no electoral connection through which politicians can punish or reward international judges. Politicians do not objectively observe whether a court’s decisions are rightful exercises of authority or transgressions. Thus, legitimacy depends on trust, which is a coping device for dealing with the freedom of others.²⁶²¹ In this view, it is adequate to argue that decisions of a trusted court are perhaps more likely to be accepted without a challenge than the decisions of a court that is less trusted. For example, a government confronted with an unfavourable opinion from a trusted international court may fear that it would be accused of undermining the rule of law if it were to reject implementing the ruling. By contrast, a government that faces a ruling from a less trusted court may have an easier time motivating its decision not to accept the consequences of a judgment. What is clear from the above is that state and public will respect the jurisdiction and authority of the court if the court observes the rule of law and the application of human rights in its decision. If this is achieved, then the argument of political obstacle and infringement of the sovereign right of a state will be irrelevant here.

²⁶¹⁸ Gregory A Caldeira and James L Gibson, ‘The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support’ (1995) 89 (2) *American Political Science Review* 356, 376.

²⁶¹⁹ James L Gibson, Gregory A Caldeira and Vanessa A Baird, ‘On the Legitimacy of National High Courts’ (1998) 92 (2) *American Political Science Review* 343, 358.

²⁶²⁰ David Easton, ‘A Systems Analysis of Political Life’ (1965).

²⁶²¹ Diego Gambetta, *Can We Trust? In Trust in Trust: Making and Breaking Cooperative Relations* (Diego Gambetta ed 2000)

Caldeira and Gibson, therefore, predict that decisions that create more public controversy may lead to “problems of acceptance and compliance.”²⁶²² Thus, the high trust that people express for international courts in surveys may be misleading, as it is not based on extensive experience and can thus quickly be updated when new and less favourable information comes in. A possible implication of this is that this argument can be generalised to other courts. It suggests three observable implications. First, perceptions about international courts are correlated with perceptions about the international organisations with which these courts are associated. Second, individuals who trust national courts are also more likely to trust international courts. Third, support for international courts drops precipitously in the face of politician and public controversy over unpopular decisions. The first hypothesis is probably the most obvious, although it has important implications. In combination with the third claim, it implies that international courts should not worry on a daily basis about the general politicians other than avoiding decisions that lead to public injustice and outcries, although these may not be perfectly predictable.²⁶²³

Instead, the courts should focus their legitimising behaviour on other compliance constituencies, such as MNCs and nongovernmental organisations (NGOs). Also, they may use their authority to strengthen the international institutions that they are associated with. It also implies that international corporate courts may suffer if the organisations they are associated with enter a legitimacy crisis (UN). Example, the European crisis may well have consequences for the CJEU and even the ECtHR regardless of whether these institutions carry any responsibility for the crisis. For the corporate court, legitimacy is a very important aspect of the exercise of its jurisdictions, however, this can be ratified through the interpretation of human rights law in the conceptual parameter of fairness, justice and equality before the law (in the principle of the rule of law). What this means is that international legality and legitimacy is understood as the consent of states to be bound by the jurisdiction of the court, thus endowing it with “legitimacy”. It points to the voluntary nature of the obligations domestic actors have taken on in respect of this court and recognises the participation of domestic authorities in international decision-making as a legitimacy standard. In international law, legality and moral rule is a standard yardstick for the legitimacy of international institutions, and the rule of law constitutive legitimacy of the court existence.

²⁶²² Gregory A Caldeira and James L Gibson (n 2588).

²⁶²³ Yonatan Lupu, ‘International Judicial Legitimacy: Lessons from National Courts’ (2013) 14 (2) *Theoretical Inquiries in Law* 437, 454.

Also, political-normative standards refer to perceptions that understand the court's constitutive legitimacy by way of political aspirations and normative expectations vested in it. That is, actors, see a general need for an institution upholding a set of values without making an assessment of the degree to which the court delivers on these expectations. In general, the corporate court takes the cue from the weaknesses and the pitfalls of the domestic political system in protecting human rights, in the view that the universalistic aspiration that human rights standards should be applied equally to all individuals (rule of law). Therefore, there is no reason why court enforcing human rights standard could be seen as illegitimate in the international arena.

Finally, the legitimacy of the corporate court can be achieved through the expression that would reflect the consent-based and inter-state oriented nature of human rights law so far. The corporate court would exercise jurisdiction not only in respect of states but also in respect of a wide range of other actors, which reflects the legal needs of the globalised world. They would include intergovernmental organisations, transnational corporations, and other non-state actors. Consent in the form of ratification of the Statute by a state or the general acceptance of the court's jurisdiction by an entity will strengthen the legitimacy of the court and would not be an absolute limit to the court's jurisdiction.

Thus, all types of duty-bearers would have the possibility also to accept the court's jurisdiction in respect of a single case (ad hoc). What is more important is that complaints against states and entities could be submitted even in the absence of such ad hoc acceptance to ensure fair and equality before the law. However, the court could entertain these complaints in the absence of a consent only on the basis of a request from the United Nations High Commissioner for Human Rights. In such cases not based on consent by the respondent, the court would issue authoritative Opinions instead of legally binding Judgments. The court would have the power to determine the permissibility of reservations entered by States to human rights treaties, and to declare a case admissible even when its subject matter would be covered by an impermissible reservation, this approach will defuse the political tension that may be created by the court decision. Thus, the judgments by the court, as well as its orders for interim measures of protection, would be binding as a matter of international law. The United Nations Human Rights Council would be entrusted with a task to supervise the implementation of the Court's findings. Thus, these legal procedures at the international level will ensure free and fair justice to all, therefore, legitimising the court standing and decision making.

7.3. International Court of Justice

The International Court of Justice (ICJ) was established as the primary judicial organ of the United Nations at the time of its inception.²⁶²⁴ It is entrusted with resolving inter-state disputes. Accordingly, individuals have no standing before the International Court of Justice. Dealing with human rights issues is not excluded from the court's jurisdiction. However, some international human rights treaties specifically hold a provision with reference to the International Court of Justice for the settlement of disputes after the exhaustion of the pre-condition to resort to the treaty specific dispute settlement procedure, which is the case for instance in article 22 CERD,²⁶²⁵ Article 29 CEDAW, article 92 Migrant worker convention. Where other treaties foresee an optional complaints procedure to the relevant committee, other recourses to dispute settlement are of course not excluded, such include recourse to the International Court of Justice.²⁶²⁶ Also, states are rather reluctant to put these issues before the ICJ.²⁶²⁷ This in line with states' reluctance to make use of inter-state complaint mechanisms of the UN Human Rights Treaty Bodies.²⁶²⁸

The ICJ has nevertheless had the opportunity to address human rights issues and has done so on numerous occasions. For example, the ICJ lifted the concept self-determination from a political claim to the level of a legal right through its pronouncements in the *South West Africa, Namibia and Western Sahara cases*.²⁶²⁹ The court observed that the principle of non-discrimination was already methodically discussed in the case law of the ICJ's predecessor, the Permanent Court of International Justice (PCIJ) in many cases amongst which the *Polish Upper*

²⁶²⁴ United Nations, *Charter of The United Nations*, 24 October 1945, 1 UNTS XVI.

<<http://www.refworld.org/docid/3ae6b3930.html>> accessed 29 December 2017. Article 1.

²⁶²⁵ Article 22 International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660

UNTS 195, which states: "Any dispute between two or more States parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement." See ICJ (Preliminary Objections) 1 April 2011, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*.

²⁶²⁶ Rosalyn Higgins, *The International Court of Justice and Human Rights* in K Wellens (ed.), *International Law: Theory and Practice* (The Hague Martinus Nijhoff Publishers 1998).

²⁶²⁷ Jonas Grimheden, 'The International Court of Justice Monitoring Human Rights' in G Alfredsson, J Grimheden, BG Ramcharan and A de Zayas (eds.), *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller* (2nd ed Leiden Martinus Nijhoff Publishers 2009).

²⁶²⁸ Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 (1) *Human Rights Law Review* 27, 52.

²⁶²⁹ ICJ (Judgment, Second Phase) 18 July 1966, *South West Africa (Liberia v South Africa)*; ICJ (Advisory Opinion) 21 June 1971, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*; ICJ (Advisory Opinion) 16 October 1975, *Western Sahara*.

Silesia case.²⁶³⁰ In this judgement, the court “insisted that what the minority was entitled to was equality in fact as well as in law; and that, while the claim to be a member of a national minority should be based on fact, self-identification was the only acceptable method of association”.²⁶³¹ The approach adopted by the ICJ has lasting relevance in human rights law,²⁶³² proof of which may be found in the fact that the Human Rights Committee General comment 18 has its roots in the jurisprudence of the PCIJ.²⁶³³ There is also an increasing trend of co-dependency between human rights treaty bodies and the jurisprudence of the ICJ,²⁶³⁴ which could be an example of the universality and certainty of international law, of which human rights law has become an intrinsic part. Additionally the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,²⁶³⁵ the ICJ made reference to the work of the Human Rights Committee in its evaluation of restrictions on the right of freedom of movement provided for under Article 12(3) of the ICCPR, agreeing with the opinion that restrictions “must conform to the principle of proportionality” and “must be the least intrusive instrument amongst those which might achieve the desired result.”²⁶³⁶

This analysis indicate that human rights and humanitarian law also formed the centre of three recent cases before the ICJ: *the Advisory Opinion on the Palestine Wall, Congo v Uganda*,²⁶³⁷ 332 and *Bosnia and Herzegovina v Serbia and Montenegro*.²⁶³⁸ Hence, the ICJ has had sufficient opportunity to contribute to the development of the international law of human rights in such diverse fields as: genocide, race discrimination, self- determination, immunities of experts, consular access, belligerent occupation and nuclear weapons. At the very least is the trend of increased application of human rights standards by the ICJ, which is proof of human rights law taking centre stage in international law.²⁶³⁹

²⁶³⁰ Certain German Interests in *Polish Upper Silesia (Germany v Poland)*, PCIJ Rep. Series A No. 7.

²⁶³¹ Rosalyn Higgins, ‘Human Rights in The International Court of Justice’ (2007) 20 (2) *Leiden Journal of International Law* 745, 751.

²⁶³² *Ibid.*

²⁶³³ HRC (General Comment No. 18: Non-discrimination) 10 November 1989. U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)

²⁶³⁴ ICJ (Judgment) 30 November 2010, *Ahmadou Sadio Diallo (Guinea v Democratic Republic of The Congo)*

²⁶³⁵ 9 ICJ (Advisory Opinion) 9 July 2004, *Legal Consequences of The Construction of a Wall in The Occupied Palestinian Territory*.

²⁶³⁶ HRC (General Comment No. 27: Freedom of movement) 2 November 1999, UN Doc. CCPR/C/21/Rev.1/Add.9, para. 1.

²⁶³⁷ ICJ (Judgment) 19 December 2005, *Armed Activities on The Territory of The Congo (Democratic Republic of The Congo v Rwanda)*.

²⁶³⁸ ICJ (Judgment) 11 July 1996, *Application of The Convention on The Prevention and Punishment of The Crime of Genocide (Bosnia-Herzegovina v Yugoslavia)*.

²⁶³⁹ Tanaka’s Dissenting Opinion in ICJ (Judgment, Second Phase) 18 July 1966, *South West Africa (Liberia v South Africa)* p. 297.

Other cases before the ICJ have specifically involved rights of individuals invoked by state by means of the principle of diplomatic protection, a principle confirmed by the ICJ in the *Mavrommatis Palestine Concessions case*: “It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from which they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, a state is in reality asserting its own rights, rights to ensure, in the person of its subjects, respect for the rules of international law.”²⁶⁴⁰ In the *LaGrand and Avena cases*, both cases concerning capital punishment in the United States, the ICJ availed itself from rendering judgment on whether or not violations of the Vienna Convention on consular relations amounted to an infringement of the human rights of the individuals concerned, since this was not a necessary consideration in order to decide in the context of the case.²⁶⁴¹ Also, the principle of diplomatic protection is also employed in favour of corporations such as in the *Barcelona Traction case*.²⁶⁴²

In a recent case relating to human rights protection before the ICJ is the *Ahmadou Sadio Diallo case*, a revolutionary judgment.²⁶⁴³ It is observed in this research that the ICJ is not a “human rights court” as such. Though, the *Diallo case* stands out because “as the arguments developed, it is clear that they centred on the rights of Mr Diallo as an individual and that the case became transformed in substance into a human rights protection case instead of one involving the diplomatic protection of a national under the law of state responsibility for the treatment of aliens.”²⁶⁴⁴ Furthermore, the ICJ established a progressive explanation of diplomatic protection of article 1 ILC Draft Articles on Diplomatic Protection.²⁶⁴⁵ In paragraph 39 the ICJ noted that “diplomatic protection consists of the invocation by a State, through diplomatic action of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”²⁶⁴⁶ The ICJ affirmed

²⁶⁴⁰ PCIJ (Judgment No. 2) 1924, *Mavrommatis Palestine Concessions*, Series A 2, 12.

²⁶⁴¹ ICJ (Judgment) 27 June 2001, *LaGrand (Germany v United States of America)*, para. 494; ICJ (Judgment) 31 March 2004, *Avena and Other Mexican Nationals (Mexico v United States of America)* para. 61.

²⁶⁴² ICJ (Judgment) 5 February 1970, *Barcelona Traction Light and Power Company Limited (Belgium v Spain)*. Para 70.

²⁶⁴³ ICJ (Judgment) 30 November 2010, *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)*.

²⁶⁴⁴ Sandy Ghandhi, ‘Human Rights and The International Court of Justice The Ahmadou Sadio Diallo Case’ (2011) 11 (3) *Human Rights Law Review* 527, 555.

²⁶⁴⁵ International Law Commission Draft Articles on Diplomatic Protection, in Yearbook of the International Law Commission, 2006, vol. II, Part Two, UN Doc A/61/10 (2006).

²⁶⁴⁶ Kirsten Schmalenbach, ‘Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the

the direct legal status of individuals under international law, as well as that of corporations.²⁶⁴⁷ An implication of this is that, it can be said that the ICJ has a role to play in the sphere of international human rights law, at least by virtue of human rights law forming an indivisible part of international law generally. Conversely, a comprehensive mandate and jurisdiction in accordance to article 38 of its statute, though, the ICJ does face some limitations when it comes to effective enforcement of international human rights. The ICJ is limited in its jurisdiction *ratione personae*,²⁶⁴⁸ as it is unable to accept complaints by individuals and is solely aimed at disputes between states.²⁶⁴⁹ Its jurisdiction is moreover not compulsory, meaning that it is optional and voluntary. This trend follows Crook opinion, the author stated that “only about a third of U.N. members accept compulsory jurisdiction based on Article 36(2) of the Statute. Many of these have significantly conditioned their acceptances. Even some States usually seen as law-abiding paragons have limited their acceptances of jurisdiction.”²⁶⁵⁰

Additionally, the established principle of diplomatic protection is limited, when it comes to the protection of human rights of individuals precisely, the individual does not have a right of recourse to the ICJ, it remains a privilege of the state. If and when a state wishes to exercise this right, the human rights enforcement is only of an indirect nature. “The discretionary nature of diplomatic protection rests uneasily with the principles underlying the international law of human rights, which create directly enforceable rights by the individual against his or her own state. Accordingly, the conceptual foundations of diplomatic protection are anachronistic and redolent of an age where the state was the sole subject of international law.”²⁶⁵¹ In this examination, it is important to stress that the ICJ as an international court is also limited and cannot serve as an instrument for corporate accountability.

Congo)’ (2010), in R. Wolfrum, (ed) *Max Planck Encyclopedia of International Law* (OUP 2015). <opil.oup.com/home/EPIL> accessed 29 December. 2017

²⁶⁴⁷ ICJ Statute, art. 34(1).

²⁶⁴⁸ Jurisdiction *Ratione Personae* refers to a court's power to bring a person into its adjudicative process. It is the jurisdiction over a defendant's personal rights, rather than merely over property interests. *Ratione Personae* is a Latin term which means by reason of his person. Also see, Guénaël Mettraux, *International Crimes and The Ad hoc Tribunals* (Oxford University Press on Demand 2005).

²⁶⁴⁹ Kirsten Schmalenbach (n 2616).

²⁶⁵⁰ John R Crook, ‘The International Court of Justice and Human Rights’ (2004) 1 (1) *North-western Journal of Human Rights* 1.

²⁶⁵¹ Sandy Ghandhi (n 2614).

7.4. Importance of an International Forum (International Court for Corporation)

In regards to corporate accountability and international court for corporations, it is, therefore, likely that moving to tort law and civil law might release the home state of the difficulties of holding the corporation accountable for human rights abuses committed outside its jurisdiction. It shall also help it to address the issues of seeking an appropriate forum for human rights abuses cases, where the interest of the corporation will be protected abroad. This will allow the corporation to benefit from the opportunity to have its case tried in a neutral international court.²⁶⁵² It is also important to recognise that an effective international legal framework on business and human rights as an essential step towards protecting victims' access to remedies for corporate wrongdoings.

An international, legally binding court could clarify the obligations of corporations to respect human rights and guarantee the rights of victims in the face of corporate-related human rights abuses, and enable them to access remedies. In the case of businesses, it could level the playing field for the international operation of corporations because the instrument will establish authoritative means to resolve conflicts arising from the law in different jurisdictions. It would also create a mechanism to respond to corporate abuses in a “concerted fashion,”²⁶⁵³ thus eliminating unfair competitive advantages for corporations around the world. This “concerted” approach for the access to remedies and legal standards on business and human rights will not undermine states' obligation to oversee the conduct of corporations. Likewise, it would operate under the international principle of subsidiarity, by which international institutions may exercise jurisdiction in cases where national legal systems are unwilling or unable to fulfil their primary obligation to protect human rights and redress human rights violations within its jurisdiction. Also, it could enhance domestic efforts to protect human rights through international cooperation and legal coherence, as it will impose common international standards on human rights and the environment.²⁶⁵⁴

There are at least four reasons why states will respect the jurisdiction of the corporate court. Firstly, many states wish to demonstrate their unwavering commitment to human rights, and elevating the global protection of human rights to a qualitatively new level by establishing the court will be an important way to demonstrate that commitment. Secondly, many states

²⁶⁵² Seymour J Rubin, ‘Developments in the Law and Institutions of International Economic Relations’ (1974) 68 (3) *American Journal of International Law* 475, 488.

²⁶⁵³ Luis Gallegos and Daniel Uribe, ‘The Next Step against Corporate Impunity: A World Court on Business and Human Rights?’ (2016) *Harvard International Law Journal*.

²⁶⁵⁴ *Ibid.*

wish to see more consistency in the application of human rights law. Bringing all United Nations human rights treaties within the jurisdiction of a single corporate court that will simultaneously apply all treaties accepted by the state in question, and in so doing, where necessary, resolve any tensions between the various human rights treaties, will greatly enhance the coherence and consistency in the application of human rights treaties. Thirdly, this will improve foreseeability and legal certainty, as the court will be a fully judicial institution with highly qualified full-time judges. And fourthly, states should welcome the initiative of expanding the binding force of human rights norms beyond states only, to cover also international organisations, transnational corporations and other entities subject to the jurisdiction of the Court.

Furthermore, the feasibility of creating a corporate court on business and human rights could be examined in light of previous attempts. The anti-slavery courts of the nineteenth century are an important precedent for the OEIWG, mostly because they challenged the dominant economic model at that time.²⁶⁵⁵ The slave trade was believed to be essential for the viability of colonial economies and it was unthinkable at that time to impose restrictions to this profitable enterprise.²⁶⁵⁶ These courts also introduced an institutional framework based on mixed commissions formed by judges belonging to the state parties to the treaty, who were assisted by a local registrar of the place where the court was seated for the collection of evidence and other administrative tasks.²⁶⁵⁷ Such a framework could serve as a model for the design of the corporate court of business and human rights because it will bridge the gap between domestic court, corporate human rights violation and international court.²⁶⁵⁸ The establishment of these courts as an enforcement mechanism of international treaties, in cooperation with other domestic legislative efforts, was the cornerstone for the effective suppression of the transatlantic slave trade.²⁶⁵⁹

In addition, even though the Nuremberg Trials limited themselves to judging individuals for the crime of “membership” to a criminal organisation with the sole purpose of easing the avenue for the prosecution of a large number of persons through more expeditious

²⁶⁵⁵ William E Nelson, ‘The Impact of The Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America’ (1974) *Harvard Law Review* 513, 566.

²⁶⁵⁶ Leslie Bethell, ‘The Mixed Commissions for The Suppression of The Transatlantic Slave Trade in The Nineteenth century’ (1966) 7 (1) *Journal of African History* 79, 93.

²⁶⁵⁷ Robert M Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press 1975).

²⁶⁵⁸ Paul Finkelman, ‘Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision’ (1979) 25 91 *Civil War History* 5, 35.

²⁶⁵⁹ Jenny S Martinez, ‘Antislavery Courts and The Dawn of International Human Rights Law’ (2007) 117 *Yale Law Journal* 550.

trials,²⁶⁶⁰ this approach was not the only option. Pomerantz, Chief Counsel at the Nuremberg Trials, intended to prosecute business entities on the basis of corporate liability.²⁶⁶¹ The approach suggested by Pomerantz could also be a guideline for the feasibility of a corporate court if such an element is argued. Pomerantz suggested that crimes committed by corporations in the Second World War complied with the common law test of liability because the acts were (1) within the scope of the business; (2) committed or ordered by a superior agent (senior manager or owner); and (3) constituted crimes for which the punishments included fines and forfeitures of property.²⁶⁶² Regrettably, Pomerantz's position was not followed for the indictments of industrialists in the subsequent Nuremberg trials, due to the economic and political interests in reconstructing post-war Europe.²⁶⁶³ Taken together, these examples underline the common interest of the international community in addressing a systematic and evolving approach for the provision of more effective mechanisms aimed at the protection of human rights and coping with the always dynamic and flexible domain of the liberalised market and the world of large-scale trans-boundary operations of corporations.

Additionally, international corporate court will present opportunities for the victims and corporations to find an appropriate forum to hear their case, with the confidence of fair trial. Thus, the debate of the feasibility of a corporate court on business and human rights should consider different elements that would ensure its efficiency and effectiveness, including legal representation and assistance for victims, the role of states in proceedings, as well as other administrative and procedural issues, such as recollection of evidence and enforcement of judgments through international cooperation. The lessons learned from the past international criminal court and ad hoc tribunals could guide these proposals in this thesis with the purpose of advancing towards a fairer and more equal business world.²⁶⁶⁴

Finally, stakeholders could use these lessons to propose avenues to ensure that the international framework for the protection of human rights is best suited to the task, while not delaying the adoption of an international legally binding instrument on business and human

²⁶⁶⁰ International Law Commission, *The Charter and Judgment of The Nürnberg Tribunal – History and Analysis* (United Nations 1949), Memorandum submitted by The Secretary-General A/CN.4/5, 75.

²⁶⁶¹ Doreen Lustig, 'The Nature of The Nazi State and The Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials' (2010) 43 *New York University Journal of International Law and Politics* 965.

²⁶⁶² Jonathan A Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) *Columbia Law Review* 1094, 1262.

²⁶⁶³ *Ibid.*

²⁶⁶⁴ Kevin T Jackson, 'A Cosmopolitan Court for Transnational Corporate Wrongdoing: Why Its Time Has Come' (1998) 17 (7) *Journal of Business Ethics* 757, 783.

rights. According to these, the only way to provide a fair and legitimate process for both victims and corporations is to create an international court for corporations.²⁶⁶⁵

On April 20, 2010, BP's Deepwater Horizon oil rig caught fire and poured millions of barrels of oil into the Gulf of Mexico.²⁶⁶⁶ Within weeks, BP, a foreign corporation, announced a \$20 billion trust that backed an uncapped commitment and an administrative program to fully compensate all victims as well as the federal, state, and local governments and tribal trustees.²⁶⁶⁷ By its second month of operation, the program had paid an average of more than \$27 million a day, for a total of \$840 million, in emergency advance payments. By the end of its one-and-a-half-year tenure, it had processed more than a million claims and paid more than \$6.2 billion to individuals and businesses.²⁶⁶⁸ Conversely, an attempt by a class of Ecuadorians to obtain compensation from Chevron for the devastation its predecessor, Texaco, wreaked on the Ecuadorian rainforest has been ongoing for over twenty years, and compensation is nowhere in sight, even though an Ecuadorian court issued a judgment in excess of \$8.6 billion (plus punitive damages) against Chevron in 2011.²⁶⁶⁹ It is noteworthy that, a decade earlier, it had represented to the very same court that Ecuador's judiciary was an adequate forum and specifically denied the suggestion that the Ecuadorian judiciary was corrupt.²⁶⁷⁰ Maria Aguinda, the original plaintiff in the class action against Texaco, was in her late teens when Texaco began its operations in the Oriente. She is now sixty-four years old,²⁶⁷¹ and compensation in her lifetime is unlikely.²⁶⁷²

There are a number of causes for the disparity, including some which this thesis cannot fix in the real world. The United States is powerful, and Ecuador is not; the Ecuadorian government was to some extent complicit in the practices that led to the devastation, and the US government was not. Nonetheless, there is no theory of justice that can justify the discrepancy between the instant compensation of American victims of cross-border mass torts and the twenty-year losing battle to compensate the Ecuadorian victims of similar

²⁶⁶⁵ Maya Steinitz, 'The Case for an International Court of Civil Justice' (2014).

²⁶⁶⁶ Hari M Osofsky, Kate Baxter-Kauf, Bradley Hammer and Ann Mailander, 'Environmental Justice and The BP Deepwater Horizon Oil Spill' (2012) 20 *New York University Environmental Law Journal* 99.

²⁶⁶⁷ Samuel Issacharoff and Theodore D Rave, 'The BP Oil Spill Settlement and The Paradox of Public Litigation' (2013) 74 *Louisiana Law Review* 397.

²⁶⁶⁸ *Ibid.*

²⁶⁶⁹ Maya Steinitz (n 2635).

²⁶⁷⁰ *Aguinda v Texaco, Inc.*, 303 F.3d 470, 478, 480 (2d Cir. 2002) (dismissing original class action on grounds of forum non conveniens).

²⁶⁷¹ Maya Steinitz (n 2635).

²⁶⁷² Valeria Pacheco, 'Indigenous Ecuadoran Woman Humbles US Oil Giant, ChevronToxico' (2011). <<http://chevrontoxico.com/news-and-multimedia/2011/0222-indigenous-ecuadoran-woman-humbles-us-oil-giant>> access 20 September 2017.

wrongdoings. The problem is the missing forum, and it relates to the fact that in today's world, and especially after the Supreme Court's decision in *Kiobel v Royal Dutch Petroleum Co*,²⁶⁷³ there is no forum that can issue a *de facto* enforceable judgment in favour of the residents of the Ecuadorian Oriente. Of course, an obvious reaction to the idea of an international corporation court is that this is merely an idealistic dream. However, it should be noted that Sir William Randal Cremer, the lead architect of the Permanent Court of Arbitration: "Thirty-four years ago, when [we] formulated a plan for the establishment of a "High Court of Nations," we were laughed to scorn as mere theorists and utopians, the scoffers emphatically declaring that no two countries in the world would ever agree to take part in the establishment of such a court. Today we proudly point to the fact that The Hague Tribunal has been established; and notwithstanding the unfortunate blow it received in the early stages of its existence by the Boer War, and the attempt on the part of some nations to boycott it, there is now a general consensus of opinion that it has come to stay".²⁶⁷⁴

It is possible that many legal scholars will criticise the theory of international corporate court as superficial, however, this methodology has important implications for developing state intervention in foreign investment-related disputes and has the potential to improve the inter-state relationship, hence adding to international law's accomplishment of its underlying objective of avoiding conflict and maintaining peace and stability,²⁶⁷⁵ as indicated in the objectives of the Preamble of the Charter of United Nations.²⁶⁷⁶ It can, therefore, be assumed that MNCs operating in their own interest might be willing to allow an international forum to settle disputes and human rights abuses that are related to their business practice without going through government almost all the time in order to solve a dispute between other bodies or persons.²⁶⁷⁷

It can, therefore, be given a reputable presumption that there is a significant possibility of MNCs will benefit from such a process before an international corporation court for human rights violations. Also, this could set the condition for acceptance of direct human rights duties

²⁶⁷³ 133 S. Ct. 1659 (2013).

²⁶⁷⁴ Randal Cremer, Nobel Lecture: The Progress and Advantages of International Arbitration (1905). <http://www.nobelprize.org/nobel_prizes/peace/laureates/1903/cremer-lecture.html> accessed 20 September 2017.

²⁶⁷⁵ Rosalyn DBE Higgins, 'International Law in a Changing International System' (1999) 58 (1) *The Cambridge Law Journal* 78, 95.

²⁶⁷⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. <<http://www.refworld.org/docid/3ae6b3930.html>> accessed 30 August 2016.

²⁶⁷⁷ Frederick Sherwood Dunn, 'International Law and Private Property Rights'. (1928) 28 *Columbia Law Review* 166.

on the corporation, which is based on its capability to appear before the international forum as direct applicants.²⁶⁷⁸ Contrarily, MNCs may not be willing to seek the benefit of international human rights protection if they are to pay a heavy price for obligations to ensure the protection and respect of the rights of others because the most of the human rights are aspirational in nature and very expensive to realise. On the other hand, if MNCs do not accept any such conditions, it is likely that international corporate court may emerge anyway as a natural consequence of the imposition of international corporate duties of care,²⁶⁷⁹ in decades to come.

Similarly, jurisdiction could be complementary as it is at the International Criminal Court. Namely, if the home jurisdiction of the multinational corporation being sued is willing to hear the case and offer the plaintiffs their day in court, the international corporation court will not hear the case.²⁶⁸⁰ Nevertheless, the corporation court can be designed to do more than increase efficiency. The corporation court subject matter jurisdiction can include claims that corporations wish to pursue but currently find difficult to enforce. Perhaps the best example of such subject matter is the law of anticorruption. American corporations are likely to be keen on seeing anticorruption measures enforced because corruption represents a major inefficiency and distorts market forces. Additionally, strict enforcement of the American Foreign Corrupt Practices Act, coupled with little or no enforcement of anticorruption laws in other developed countries puts American corporations at a competitive disadvantage.²⁶⁸¹ However, worldwide enforcement is likely to happen in a robust way outside the United States only if adjudication is internationalised.²⁶⁸²

Certainly, while the focus herein has been on American corporations, of course corporations from all member states will be subject to the corporation court jurisdiction, benefiting American individuals and business as well as plaintiffs throughout the world seeking redress from non-American multinational corporations. Imagine, for example, that a catastrophe like the BP oil spill had befallen Americans due to the negligence of a foreign corporation operating in a different industry, thus not triggering the unique Oil Pollution

²⁶⁷⁸ Stephen G Wood and Brett G Scharffs, 'Applicability of Human Rights Standards to Private Corporations: An American Perspective' (2002) 50 *American Journal of Comparative Law* 531, 566.

²⁶⁷⁹ Patrick Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (Brill Academic Publishers 2005) 7 (4) *International Law Forum du Droit International*.

²⁶⁸⁰ Rome Statute of the International Criminal Court art. 20, July 17, 1998, 2187 UNT.S. 90.

²⁶⁸¹ 37 USC. § 78dd-1 to -3 (2013).

²⁶⁸² Mark L Wolf Brookings Inst, 'The Case for An International Anti-Corruption Court' (2014), <<http://www.brookings.edu/~media/research/files/papers/2014/07/international%20anti%20corruption%20court%20wolf/anticorruptioncourtwolffinal.pdf>> accessed 20 September 2017.

Act,²⁶⁸³ which requires the polluter to set up a procedure for expeditiously paying claims and that the damage, while massive, was not enough to trigger presidential intervention. Instead of receiving massive pay-outs like those received by the individuals and businesses affected by the BP oil spill,²⁶⁸⁴ they could be facing a fate more similar to the Ecuadorian residents of the Oriente.

The Hybrid International Transnational Corporation Claim Court (HITNCCC) needs to resolve weighty problems of justice and inefficiency on a global scale. Definitely, a corporate court with complementary jurisdiction, allowing defendants to be sued “at home,” is a moral imperative unless one actually believes mass torts require no compensation, which in a practical legal world, could be invalid argument, as every rights must have remedy. A corporate court is feasible since it can address the concerns of a wide range of global players including those such as corporations, foreign governments, nongovernmental organisations, and indigenous peoples who often find themselves on opposite sides of policy issues.²⁶⁸⁵ Having said that, for the corporate court to become a reality, scholars and policymakers representative of the world’s regions and legal traditions would need to come together and work out the optimal institutional design for the court while also thinking through, among other things, the changes that might be necessary to domestic law in order to accommodate the new institution and its underlying legal regime.

7.5. Remedy and Enforcement of Human Right at the Regional Level

In addition to the argument set out in this thesis for the establishment of the corporate court, it is acknowledge that there are three regional human rights instruments tasked with monitoring compliance with a human rights convention: “The African Court for Human and Peoples‘ Rights (ACHPR) overseeing the African Charter on Human and Peoples‘ Rights,”²⁶⁸⁶

²⁶⁸³ 33 USC. §§ 2712-2713 (2013).

²⁶⁸⁴ BDO Consulting, ‘Independent Evaluation of The Gulf Coast Claims Facility: Executive Summary 3’ (2012). <http://media.nola.com/2010_gulf_oil_spill/oth> accessed 20 September 2017.

²⁶⁸⁵ Cf. Karen J. ‘Alter, *The New Terrain of International Law: Courts, Politics, Rights*’ (2014) 5 “Describing how international courts come into being through social movements that allow broad “constituencies of support” to come together, “linking communities that care about the larger policy domain with supporters of the rule of law with self-interested litigants pursuing personal agendas and with the legal community of lawyers, judges, and scholars”.

²⁶⁸⁶ Olufemi Amao, *Corporate Social Responsibility, Human Rights and The Law: Multinational Corporations in Developing Countries* (Taylor & Francis 2011), also see, African Charter on Human and Peoples' Rights, Art. 34(6); Protocol on The Statute of The African Court of Justice and Human Rights (1 July 2008) 48 ILM 314, Art. 8(3); Statute of The African Court of Justice and Human Rights, Art. 30(f).

“the Inter-American Court for Human Rights (IACtHR) protecting human rights under the American Convention on Human Rights”²⁶⁸⁷ and “the European Court for Human Rights (ECtHR)”²⁶⁸⁸ enforcing human rights under the European Convention for Human Rights (ECHR). However, the limits of regional courts become obvious when their jurisdiction only pertains to the rights contained in the corresponding regional treaties, which are more limited than the wide scope of international corporate human rights.²⁶⁸⁹

Also, the African system is restrictive in the sense that it is only open to individuals when the state has made a specific declaration accept the court’s competence to hear individuals.²⁶⁹⁰ A similar limits is also noted in the IACtHR and ECtHR both do accept individual complaints.²⁶⁹¹ No single court of these systems provide for options to hold other actors than states accountable. Lastly, the jurisdiction of regional courts is limited in territorial application. For instance, the ECtHR applies the ECHR extraterritorially in limited situations only, where the “effective control” of the state is apparent, such as in the case of military occupation.²⁶⁹² Possible home state responsibility for corporate actions outside the territory of member states can thus not be addressed by these three regional courts.

Though, the ECtHR must be applauded for its great success, similarly, it is probably the most thriving system for human rights protection and implementation across the globe. This success is represented by the great number of cases but also and most importantly by a functioning implementation system entrusted in the Committee of Ministers, which is lacking in the other regional courts. Creditable trends in ECtHR judgments also aid to better implementation and effective remedy since they increasingly included specific recommendations for reparation.²⁶⁹³ This has resulted in the “pilot judgment procedure”²⁶⁹⁴

²⁶⁸⁷ Jo M Pasqualucci, *The Practice and Procedure of The Inter-American Court of Human Rights* (Cambridge University Press 2012).

²⁶⁸⁸ Brian Walsh, ‘The European Court of Human Rights’ (1986) 2 *Connecticut Journal of International Law* 271, also see, ECtHR (Grand Chamber), 12 December 2001, *Bankovic et al. v Belgium and 16 other States*, App. No. 55207/99.

²⁶⁸⁹ Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law* (NYU School of Law Press 2005).

²⁶⁹⁰ Union, African. ‘Protocol on the Statute of the African Court of Justice and Human Rights’ *Sharm El-Sheikh Egypt*, July 1 (2008).

²⁶⁹¹ Sophie Schiettekatte, ‘Do We Need a World Court of Human Rights? Filling The Gap for TNC Responsibility’ (2016).

²⁶⁹² Erik Roxstrom, Mark Gibney and Terje Einarsen, ‘The NATO Bombing Case (Bankovic et al. v. Belgium et al.) and The Limits of Western Human Rights Protection’ (2005) 23 *Boston University International Law Journal* 55.

²⁶⁹³ Loukis G Loucaides, ‘Reparation for Violations of Human Rights under The European Convention and Restitutio in Integrum’ (2008) 2 *European Human Rights Law Review* 182.

²⁶⁹⁴ European Court of Human Rights Registrar, *The Pilot-Judgment Procedure* (2009).

aimed at addressing several cases which are founded in the same structural problems. What is also clear is that the purpose of the procedure is to:

“Identify the dysfunction under national law that is at the root of the violation, give clear indications to the Government as to how it can eliminate this dysfunction, bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the court awaiting the pilot judgment), or at least to bring about the settlement of all such cases pending before the Court.”²⁶⁹⁵

What is clear in corporate human rights accountability point of view is that on a positive note, the evolution of human rights protection mechanism matches the theoretical trend towards individual justice but none have resulted in an effective remedy for victims of corporate human rights abuses. Likewise, there are several avenues for individuals to file complaints about human rights violations, but none provide them with effective reparation and justice. These mechanisms, however, have also faced several structural issues and lack an effective implementation system, and the regional courts are not exempt from these structural issues. Exception from the regional courts, there is no body at the international level capable of hearing individual complaints to which it can respond with a binding and effective decision. This entails that although individuals can be heard, violations of their rights are not met with an effective remedy. Therefore, it is clear that there is no international recourse for human rights violations by transnational corporations at the regional level as well. In summary, the current human rights legal framework lacks meaningful and effective remedy. Therefore, the solution for this impasse should be considered in the form of an international corporate court as an effective means of ensuring the implementation of human rights in all levels of society and for all the actors involved.²⁶⁹⁶

<http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf> accessed 29 December 2017.

²⁶⁹⁵ *Ibid.*

²⁶⁹⁶ Jesse Kirkpatrick, ‘A Modest Proposal: A Global Court of Human Rights’ (2014) 13 (2) *Journal of Human Rights* 230, 248.

7.5. Hybrid International Transnational Corporation Claim Court (HITNCCC)

7.5.1. Purpose of the HITNCCC

The creation by the United Nations Security Council of two international criminal tribunals (for former Yugoslavia and Rwanda) and ultimately the determination of States to establish a standing International Criminal Court (ICC) were major revolutions in international law in the 1990s. Subject to the fairly complicated conditions for the exercise of the ICC's jurisdiction, individuals including soldiers, civilians or political leaders can now be held to account, prosecuted and tried, convicted and sentenced, directly at the level of international law, for the gravest international crimes. The jurisdiction of the ICC is (for the time being) restricted to three categories of core crimes, i.e. genocide, war crimes and crimes against humanity. The ICC does not directly address the question whether there was a human rights violation, or order remedies for such violations, but, of course grave international crimes will invariably entail violations of the human rights of the victims of those crimes.

Prosecuting and punishing, through the means of criminal law, the individuals who perpetrated those crimes will constitute an important element also in remedying the human rights violation. Still, the overlap with human rights adjudication is only partial. The possibility of individual criminal responsibility does not eliminate the need for mechanisms of corporate accountability for attributing the action to a state or other entity for the assessment whether it is to be held responsible for a human rights violation, which usually is broader in scope, both in substantive and personal coverage, than the international crime committed within the broader context. Therefore, the establishment of the ICC, or the advances within the broader framework of international criminal law, have not done away with the need for a corporate court for human rights violations and environmental damages.

The International Court of Justice, in turn, has legally binding jurisdiction only in respect of states, only when seized by states, and only in respect of rights and obligations of states vis-a-vis each other. The individual and her human rights are not in focus. It is true that the procedure for advisory opinions by the ICJ opens a broader room for actors and issues, so that (primarily) the United Nations General Assembly can ask for an advisory opinion in any issue of international law. Some of the advisory opinions have, in fact, addressed human rights issues, such as an advisory opinion on the legality of the use of nuclear weapons, and another on the lawfulness of the Israeli separation barrier (or Wall) built within the occupied Palestinian territory. Even so, the ICJ is primarily a court for disputes between states, and only in that role

it has legally binding jurisdiction. It cannot decide, even upon the initiative of a state, a case against an international organisation, a transnational corporation or some other entity. And individuals have no power to initiate the advisory opinion procedure. Therefore, the proposal made in this thesis is the establishment of a totally new institution for corporate accountability, which will fill the gap in the international legal liability for individual human rights.

However, it should be mentioned that also another option was considered. Most human rights treaties include a clause according to which a dispute concerning the application or interpretation of the treaty can be submitted to the ICJ. Even in the case of treaties that do not include such a clause, the same outcome results from the ICJ Statute and the power of states to take any dispute related to international law including an issue of interpretation under a human rights treaty to the ICJ. Also, the advisory opinion procedure could be utilised by the General Assembly to submit selected legal issues of controversy under existing human rights treaties to the ICJ. The current findings emerging in this study so far in relations to corporate accountability, illustrate that there is a need of a reasonable approach to tackling this issue of corporate accountability. Thus, it could be that the international community and the global economic institutions will be best equipped to address corporate human rights violation through an international forum such as international corporation court. The corporation court doctrine should be based on the principle of a duty of care under tort law and civil law, which should enhance the application and interpretation of corporate duty of care in the domestic judicial system. This recommendation is not a supplement to the national judicial system, but an aid to help the national court to apply international human rights law in the concept of duty of care effectively.

Why this recommendation? Firstly, the elaboration of human rights duties requires an extensive exercise and the interpretation of human rights standards, which the current domestic courts of many developing countries affected by corporate misconduct do not have. Also, they do not have the legal expertise and knowledge to deal with a corporation's human rights violations within their jurisdiction, or the funds to finance the legal cost of the court proceedings. Secondly, creating an international court will allow an effective interpretation of all binding human rights law and treaties on states, in particular those that are considered to be customary international law. Thirdly, the court will serve as a mechanism to interpret current and future human rights treaties that are addressed to corporations but require states to implement them. Fourthly, corporate accountability requires an independent international court

that is free from the jurisdiction of both host and home state, and is free from political interference.

Creating a corporations court based on this principle will allow a better interpretation of human rights law at the national level and a universal application of international human rights standards across the global economy by applying the neighbourhood principles on corporate operations. The international corporation court will provide a framework for the exploration of fair treatment for both corporations and victims, as the court will be independent of both entities. It will allow greater access to justice and effective implementation of sanctions. The evidence from this study suggests that creating a corporate court will bridge the corporate accountability gap in developing countries and the developed countries, which will also allow a procedure for fairness, effective remedy and enforcement. Under the proposed corporate court, the court would exercise jurisdiction beyond the circle of States Parties to the UDHR 1948, hence responding to the challenges posed by the emergence and evolution of transnational actors that for their capacity to affect the enjoyment of human rights are comparable to states but that so far have not been accountable under existing human rights treaty regimes. Entities other than states would be able to accept the legally binding jurisdiction of the proposed court. Technically, they would not be States Parties to the court, however, cases could be brought against them, and they would be subject to the legally binding jurisdiction of the court, including in the issue of remedies. Intergovernmental organisations, transnational corporations, international nongovernmental organisations, organised opposition movements exercising a degree of factual control over a territory and autonomous communities within one or more states would be the types of entities that could accept the jurisdiction of the Court. Finally, for states that have not yet ratified the UDHR 1948, and for entities that have not yet accepted the general obligation of the UDHR 1948, there would be a possibility of accepting the court's legally binding ad hoc jurisdiction in respect of a specific complaint.

7.5.2. Anatomy of the HITNCCC

The proposed corporate court would not include new substantive human rights norms. Instead, the jurisdiction of the court would be based on the existing normative catalogue of human rights treaties, interpreted on the basis of the principle of interdependence and indivisibility of all human rights and drawing inspiration from customary international law and general principles of law. Primarily, the Court would exercise legally binding jurisdiction in

respect of states that have ratified human rights treaties. In so doing, it would have the powers to issue binding orders on interim measures of protection, to determine the permissibility of reservations to human rights treaties and not to apply impermissible reservations, and to make concrete and binding orders on the remedies to be provided to a victim of a human rights violations and environmental damages.

The corporate court will exercise jurisdiction also in times of emergency or armed conflict. It would need to address the question to what extent the exigencies of a situation of armed conflict provide proper justification for a state derogating from some of its human rights obligations. Further, in cases related to alleged human rights violations in the course of an armed conflict, the court would take into account the norms of international humanitarian law in the interpretation of human rights law, particularly in issues where the norms of humanitarian law are more specific than the rules enshrined in human rights treaties. Such an approach of harmonising interpretation reflects on international law and human rights obligations, according to which the court shall seek inspiration from customary international law when exercising its jurisdiction. The UNHRC, as the main intergovernmental United Nations body dealing with human rights issues, would be mandated to oversee the effective implementation of the judgments by the Court.

This research acknowledge that all these proposals are radical, but they have their basis in the evolution of human rights law until now. The revolutionary proposals are elsewhere, and only they make the proposed corporate duty of care worthy of the name corporate court for human rights liability, rather than just an international court. This research propose that the anatomy of the court should be derived from the doctrine of the Nuremberg Court and International Criminal Tribunal for the former Yugoslavia (ICTY),²⁶⁹⁷ while the complaint mechanism should base on the OECD Guidelines for Multinational Enterprises system.²⁶⁹⁸ Even though it could be seen that the Nuremberg Court and International Criminal Tribunal for the former Yugoslavia (ICTY) have their flaws, the study argues for the corporation court to follow the principles and legal framework of these courts as they set out the interpretation and application of the substantive law of the international community and human rights law. It is recommended that the Hybrid International Transnational Corporation Claim Court (HITNCCC) should include 5 organs; a complaint organ (reporting department), a human rights

²⁶⁹⁷ Telford Taylor, *The Anatomy of The Nuremberg Trials: a Personal Memoir* (Knopf 2012).

²⁶⁹⁸ Ashley L Santner, 'Soft Law Mechanism for Corporate Responsibility: How The Updated OECD Guidelines for Multinational Enterprises Promote Business for The Future' (2011) 43 *George Washington International Law Review* 375.

investigation organ (the investigator/prosecutor), an adjudicative organ (the Chamber), a secretariat (the Registry) and monitoring organ (monitoring organ will ensure compliance to human rights standards and judgements). The complaint organ will serve as the first point of contact for victims of human rights violations to file a corporate human rights abuse claim. The complaint procedures will consist of three stages:

- **Stage 1: preliminary complaint file:** This phase starts when a complaint is submitted to the court. At this stage, the court must conduct an initial assessment to determine if the case merits further examination;
- **Stage 2: facilitation:** this phase starts when the court decides the case merits further examination. At this stage, the court will try to bring the complainants and the company together to resolve the case through a process focused on negotiation and conciliation; and
- **Stage 3: concluding proclamation:** This phase involves the court issuing a final statement about the complaint and mediation process. It will outline the alleged violations and how the investigator/prosecutor will deal with the case through tort and civil law if it should proceed to trial. This stage shall also include any criminal liability in the process if the court can establish the criminal act of the corporation. The concluding proclamation may include recommendations on the appropriate remedy, the implementation of the human rights standards, and the court determination as to whether a violation of human rights has occurred. In cases where either of the parties refuses to participate in the mediation process, if the parties cannot agree on the terms for mediation, or if mediation fails, the court will move the case to the specialist unit (the investigation/prosecution unit) for further investigation before court proceedings. However, cases should only proceed to trial if the investigation/prosecution is satisfied that a violation has occurred and there is a need for effective accountability and remedy for the victims.

The UNHRC will remain as the leader of the UN human rights program, supported by the Office of the High Council. Therefore, the court will have its own secretariat, the Registry. The two institutions will be linked through a new function of the Human Rights Council, namely her or his power to seek an Opinion from the court, in respect of any human rights complaint and any state or other entity as respondent, provided that the court will not have legally binding jurisdiction in the matter. This procedure for Opinions complements the binding jurisdiction of

the court and makes it literally into the corporate court, i.e. a court that when the need arises can provide an authoritative legal opinion on an alleged human rights violation anywhere in the world and committed by whomsoever. The Human Rights Council is best placed to trigger the Opinions function of the Court. She is independent from states and of the political organs of the United Nations. She is a recognised professional with experience, expertise and judgment. She is supported by staff capable of assisting her in the formulation of a request for an Opinion. The court will have discretion to accept or not to accept the Human Rights Council's request for an Opinion.

The power of the Human Rights Council for Human Rights to request an Opinion from the court will be only one of the channels through which the court can be seized and invited to deal with an alleged human rights violation. This channel will be a complement to the more direct and regular methods of bringing a case before the court. Complaints by individuals, or groups of individuals, will be the main channel for taking cases before the court. Such complaints can be submitted by persons claiming to be a victim of a human rights violation by the respondent which can be a state or an entity. Also, states can initiate cases, by alleging that another state, or an entity, has committed a human rights violation.

The United Nations Human Rights Council (UNHRC) should appoint the human investigator/prosecutor, who will have an investigation staff to handle corporate human rights abuses and complaints. The investigation department should also appoint a legal adviser, who will oversee human rights abuses, complaints, and remedy, and advise victims on the relevant point of law.²⁶⁹⁹ The adjudicative organs should consist of five trial chambers, divided into two and three sections each (allowing each chamber to hear several corporate human rights abuse cases simultaneously), and seven Judges in the Appeal Chambers; each trial chamber should have three permanent judges and a number of temporary or *ad litem* judges who sit on the trial bench in a specific court case.²⁷⁰⁰ The UNHRC should elect the human rights judges from a list of candidates, which should be submitted to them by the UN General Assembly.²⁷⁰¹

The Registry Department will provide administrative services to the investigating/prosecuting and adjudicative organs, including the complaint department organs,

²⁶⁹⁹ Antonio Cassese, Paola Gaeta and John RWD Jones, eds. *The Rome Statute of The International Criminal Court: a Commentary* (Vol. 1. Oxford: Oxford University Press 2002).

²⁷⁰⁰ ICTY Statute, Article 12. The total number of permanent judges is 16; nine in the trial chamber and five in the Appeal Chamber, with two of two or more appeal judges drawn from the ICTR.

²⁷⁰¹ ICTY Statute, Article 13 <UN Security Council, *Statute of the International Criminal Tribunal for The Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993. <<http://www.refworld.org/docid/3dda28414.html>> accessed 24 September 2016.

record-keeping, security and translations, filling cases and procedures, gathering evidence, and protecting victims of human rights abuses and witnesses.²⁷⁰² Also, it is recommended that the court should be located in a developing country; however, it may sit and conduct proceedings elsewhere when in the interest of justice,²⁷⁰³ or where there is inadequate resources for victims to bring their case to court, where there is a national government barrier to justices, or where there are difficulties for the victims to travel.²⁷⁰⁴ The court expenses are should be covered by assessing contribution from the UN members, but by the defendant corporation and by voluntary contributions from states, international organisations, and private entities.²⁷⁰⁵

The rationale behind this is to give victims of human rights abuses the opportunity to bring their case to court without any constraint. This approach will also bridge the accountability gap that has existed in the current human rights system and the International Criminal Court. Hence, victims of human rights abuses will be able to bring human rights cases to the court without a need for independent expert advice. Also, the court could receive complaints in respect of states and entities that do not accept its legally binding jurisdiction. However, the court could consider such complaints only upon a request by the UNHRC. Instead of a legally binding judgment, it would in such cases issue an Opinion representing its interpretation of the issues of international human rights law raised by the complaint. Overall, this study strengthens the idea that an international court specifically for corporations will be an effective mechanism to hold corporations liable for the abuses that are connected to their businesses. The next section will look at the jurisdiction and substantive law.

7.5.3. Applicable Law for HITNCCC

The jurisdiction and applicable law for the HITNCCC will be an international treaty, international human rights law, drafted, adopted and ratified by states. Henceforth, ratifying states will be the primary category subject to the jurisdiction of the corporate court. In line with the traditional rules of public international law, no state will become party to the statute and subject to the court's general jurisdiction, without its explicit consent. However, there are three suggestions that extend the jurisdiction of the corporate court beyond this core area that reflects

²⁷⁰² David Tolbert, 'Reflections on the ICTY Registry' (2004) 2 *Journal of International Criminal Justice* 480.

²⁷⁰³ ICTY Statute, Article 31.

²⁷⁰⁴ ICTY Rule 81, also see; Gillian Higgins, 'Fair and Expeditious Pre-trial Proceedings The Future of International Criminal Trials' (2007) 5 (2) *Journal of International Criminal Justice* 394, 401.

²⁷⁰⁵ *Ibid.*

traditional rules of public international law. Firstly, while only states may become parties to the statute as an international treaty, a whole range of other actors besides states will be able to accept, through their own free decision, the legally binding jurisdiction of the court. This proposal transforms the court from a traditional international court into a transnational court, or to a corporate court as its name indicates from the beginning of this chapter. The various actors that, besides states and jointly called “entities,” could accept the jurisdiction of the corporate court, if they include the following:

- International organisations constituted through a treaty between states, or between states and international organisations;
- Transnational corporations, i.e. business corporations that conduct a considerable part of the production or service operations in a country or in countries other than the home state of the corporation as a legal person;
- International non-governmental organisations, i.e. associations or other types of legal persons that are not operating for economic profit and conduct a considerable part of their activities in a country or in countries other than the home state of the organisation as a legal person;
- Organised opposition movements exercising a degree of factual control of a territory, to the effect that they carry out some of the functions that normally are taken care of by the state or other public authorities; and
- Autonomous communities within a state or within a group of states and exercising a degree of public power on the basis of the customary law of the group in question or official delegation of powers by the state or states. Of these categories of entities, the last one is subject to a requirement that the territorial state(s) must give its consent to the declaration by an autonomous community to accept the jurisdiction of the court.

A second extension of the court's jurisdiction is provided for by human rights obligation under international law which allows both states that are not parties to a statute, and entities that have not generally accepted the jurisdiction of the court, to accept that jurisdiction on an ad hoc basis in respect of a particular case (complaint) submitted to the court. This model of ad hoc acceptance of jurisdiction is also applicable when a state or entity has accepted the jurisdiction of the court but excluded a particular human rights treaty, and if a complaint is submitted in respect of an issue not governed by the existing acceptance of jurisdiction. All forms of exercise of jurisdiction described so far result in a legally binding judgment of the court.

In contrast, the third extension of the court's jurisdiction, also applicable both in respect of states and entities, results in an Opinion by the court. The legal nature of such opinions is similar to the present Final Views by the Human Rights Council or other United Nations Human Rights Treaty Bodies. While lacking legally binding force they represent the interpretation of international law by an expert body entrusted by states with such a function and hence carrying considerable weight. As the court will be a fully judicial institution, it is expected that its Opinions will in fact be acknowledged as authorities and definitive, even if lacking legally binding force. The court will proceed to the issuing of an Opinion only through three preceding steps: (a) the receipt of a complaint in respect of a state or entity that has not accepted the general jurisdiction of the court, (b) the refusal of the state or entity to accept the ad hoc jurisdiction of the court in the case, (c) a request by the UNHRC for human rights violation that the court will issue an Opinion. Even then, the court will exercise discretion whether to grant the UNHRC request.

The recommendation in this thesis includes a clause on the power of the corporate court to issue legally binding orders on interim measures of protection. They can be addressed to any state or entity in relation to which the court exercises jurisdiction. This proposal builds upon the practice of the International Court of Justice, regional human rights treaties and the United Nations treaty bodies. The exercise of this power will be in the hands of the three-person Presidency of the Court, a solution that signals the exceptional nature of such an order. As soon as the case is assigned to a Chamber of the Court, the Chamber will also decide on interim measures. The institution will be applicable only in cases where an individual or a group of individuals faces a real risk of death or other grave and irreversible consequence. Lastly, the HITNCCC will have a jurisdiction over all corporate human rights violations brought under tort and civil law/criminal law. These violations are summarised as follows: executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly; environmental damage, forced labour, torture, unfair trial, aiding and abetting domestic government to violate rights, damages to livelihood, complicit in the commission of torture, extrajudicial killing, as well as violation of any of the fundamental

rights enshrined in International Covenant on Economic, Social and Cultural Rights,²⁷⁰⁶ specifically;²⁷⁰⁷ the Universal Declaration of Human Rights 1948.²⁷⁰⁸

Where it is found that the corporation has engaged in any of the kinds of misconduct listed above, then the court should have the mandate to hold the corporation accountable for either direct or indirect violation of the human rights stated above and the basic rights enshrined in the UN Universal Declaration of Human Rights 1948,²⁷⁰⁹ specifically those concerning human dignity.²⁷¹⁰ The court should have the mandate to try all corporations found to have committed such violations. However, the court could extend its mandate to try other human rights violations that are closely connected to the business operation but not covered in its jurisdiction. Stretching the court mandate to most basic wrongdoing under international human rights law, such as the violation of the fundamental human rights that are protected by international law, will allow victims such as indigenous people to be protected by the court. This section has reviewed the key aspects of the jurisdiction and applicable law for the Hybrid International Transnational Corporation Claim Court, and the next section will explain the court procedure.

²⁷⁰⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 24 September 2016

²⁷⁰⁷ Chapter VI.

²⁷⁰⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 18 October 2017

²⁷⁰⁹ *Ibid.*

²⁷¹⁰ The concept of *dignitas hominis* in classical Roman thought largely meant ‘status’. Honour and respect should be accorded to someone who was worthy of that honour and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it *dignitas*. Cancik writes, the term “denotes worthiness, the outer aspect of a person's social role which evokes respect, and embodies the charisma and the esteem presiding in office, rank or personality”.

Hubert Cancik, ‘Dignity of Man “and” Persona’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I 105-107’ (2002) *The Concept of Human Dignity in Human Rights Discourse* 19, 39. Indeed, *dignitas* was not confined to humans and applied to institutions and the state itself. This concept of dignity has long been incorporated in some legal systems in the private law context as the basis for providing protection for dignity in the sense of “status”, “reputation”, and “privileges”. The Bill of Rights (Act) 1689 Cap II (36), Art. II. Compare the Act of Settlement 1701. The English Bill of Rights of 1689, for instance, referred to “the Crown and royal dignity”. In legal systems based on Roman law, dignity was seen as a right of personality and status, and criminal and civil remedies were frequently provided if dignity in this sense was infringed.

Arthur Chaskalson, ‘Human Dignity as a Constitutional Value’ (2002) *The Concept of Human Dignity in Human Rights Discourse* 133, 144. In South Africa, for example, it was recognised in the private-law sphere, deriving from Roman-Dutch law, that “[i]nfringement of a person's *dignitas* constituted a delict and compensation could be claimed with the *actio iniuriarum*”. In the international sphere, this concept of “dignity” was frequently used to refer to the status of sovereign states and, by extension, to the status of ambassadorial and consular staff serving their countries abroad.

Vienna Convention on Diplomatic Relations, 1961, 500 UNTS 95, Arts 22, 29 and Judith Resnik and Julie Chi-hye Suk, ‘Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty’ (2003) *Stanford Law Review* 1921, 196.

7.5.4. HITNCCC Procedure

The HITNCCC will have the mandate to vest in the judges the power to draft, adopt, and amend rules of procedures and evidence.²⁷¹¹ This approach is taken from the current ICTY procedure, 1994, when the ICTY formally adopted Rules and Procedures and Evidence, which the judges have amended no less than 40 times.²⁷¹² This study recommends this approach because the ICTY contributes to the fight against impunity and the establishment of the rule of law by ensuring that the most severe crimes do not go unpunished, and by promoting respect for international law.²⁷¹³ Similarly the approach of the ICTY gives the international legal system a path to global accountability for human rights violation and the respect of international law.²⁷¹⁴ Additionally, the ICTY investigations and prosecutions can prevent crimes like genocide from happening in the future by holding abusers accountable to international crime. This accountability is needed in the world to address global humanitarian crises that are spiralling out of control.²⁷¹⁵ The ICTY responds to the calls of victims of grave crimes, who have said time and again they want justice, either through national judicial systems or through the international court. This is because the court sets justice standards through fair, effective and independent justice. The investigations, trials, and staff set the standard for justice for grave crimes.

Through its governing body, the Assembly of States Parties provides a forum for states to shape the future of international criminal justice and to advocate for reform.²⁷¹⁶ This research argues that even though ICC, ICJ, ICTY and other tribunal have been critiqued for lack of effectiveness, fair and access to justice, unfair selection of criminal causes, it is contest in this research that the criminal principles laid down in these courts and tribunal will be appropriate to adopt and apply in the international corporate court concept. It is also suggested that the court should adopt an inquisitorial system procedure,²⁷¹⁷ which is a familiar characteristic of

²⁷¹¹ Robert Cryer, *Prosecuting International Crimes: Selectivity and The International Criminal Law Regime* (Vol. 41. Cambridge University Press 2005).

²⁷¹² *Ibid.*

²⁷¹³ Stephen Macedo, ed. *Universal Jurisdiction: National Courts and The Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press 2006).

²⁷¹⁴ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Vol. 2. Cambridge University Press 1994).

²⁷¹⁵ Michael Bothe, 'The Protection of The Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to The Prosecutor of The ICTY' (2001) 12 (3) *European Journal of International Law* 531, 536.

²⁷¹⁶ Payam. Akhavan, 'The Lord's Resistance Army Case: Uganda's Submission of The First State Referral to The International Criminal Court' (2005) 99 (2) *American Journal of International Law* 403, 421.

²⁷¹⁷ Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2003) 3 (1) *International Criminal Law Review* 1, 37.

civil law countries. The inquisitorial system²⁷¹⁸ will allow the court or a part of the court to be actively involved in the investigating of corporate human rights violation cases, as opposed to an adversarial system where the role of the court is primarily that of an impartial referee between the investigation/prosecution department and the corporation.²⁷¹⁹ This will give the court the mandate to use civil law mechanisms to expedite proceedings, including relying on written evidence in court and a more active role for judges in preparing cases for trial.²⁷²⁰

The complaint department will refer the case to the investigation/prosecution department, who will initiate and conduct a further investigation into the alleged of corporate human rights violations. The department may request a member state to investigate, arrest corporate officials provisionally and to seize any evidence related to corporate abuse, and also apply to a judge for an order to have such a corporation and officials transferred to the court investigation/prosecution unit.²⁷²¹ If the investigation/prosecution is satisfied that the evidence gathered, provides reasonable grounds for believing that the corporation and its official have violate human rights or damage the environment then the case should proceed to court. The investigation team/prosecution must submit the case to a body composed of the HITNCCC legal adviser, the President, Vice President, and the presiding judges of the three trial chambers. If this body determines that one of the corporation's most senior leaders of the management team is most responsible for the abuses, then he/she must submit to the jurisdiction of the court

Inquisitorial procedure, in law, one of the two methods of exposing evidence in court (the other being the adversary procedure). The inquisitorial system is typical of countries that base their legal systems on civil or Roman law.

Under the inquisitorial procedure, the pretrial hearing for bringing a possible indictment is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favourable or unfavourable to either the prosecution or defense. Witnesses are heard, and the accused, who is represented by counsel, may also be heard, though he is not required to speak and, if he does, he is not put under oath. In Germany the prosecution participates in the investigation; while in France the prosecution presents its recommendations only at the end of the hearing. In both France and Germany the investigating magistrate will recommend a trial only if he is sure that there is sufficient evidence of guilt. The entire dossier of the pretrial proceedings is made available to the defense.

At the trial the judge, once more, assumes a direct role, conducting the examination of witnesses, often basing his questions on the material in the dossier. Neither the prosecution nor the defense has the right to cross-examine, but they can present effective summations. The jury does not consult the dossier, instead relying on the facts brought out in the trial.

²⁷¹⁸ An inquisitorial system is a legal system where the court or a part of the court is actively involved in investigating the facts of the case, as opposed to an adversarial system where the role of the court is primarily that of an impartial referee between the prosecution and the defense.

²⁷¹⁹ Philip L Reichel, *Comparative Criminal Justice Systems: A Topical Approach*. Upper Saddle River (NJ Prentice Hall 2002).

²⁷²⁰ Theodor Meron, 'Procedural Evolution in the ICTY' (2004) 2 *Journal of International Criminal Justice* 520. <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/jicj2&div=63&id=&page=>> accessed 25 September 2016.

²⁷²¹ Michael J Keegan, 'Preparation of Cases for The ICTY' (1997) 7 *Transnational Law & Contemporary Problems* 119.

and the state at question must release the official in a mutual consent with the state at question. If the judge, in turn, agrees with the investigator/prosecutor that a *prima facie* case exists, the judge confirms the summon and may issue any necessary order, including order to arrest corporate officials, surrender, and transfer of evidence and documents to the court.²⁷²² After transferring the case to the court, the corporation must be brought before the judge without delay to enter a plea.²⁷²³

The corporation and the investigator/prosecutor can enter into a plea agreement whereby the corporation may agree to either offer an effective remedy for the victims or plead not responsible. This procedure should result in the case being dropped from the court if the corporation accepts responsibility for the misconduct and a recommendation for the implementation of an effective human rights standards and contingency agreement is concluded. However, the court must be satisfied that the corporate offer of remedy and plead is genuine and effective, not simply a tick in the box exercise. Also, the court may order the detain of corporate officials or seize corporate assets, and may facilitate legal procedures either at the host or home state to carry out these duties on its behalf.

7.6. The Vienna Convention on the Law of Treaties and its Applicability to the HITNCCC and the Rules of Procedure and Evidence

Under general international law, the starting point for the interpretation of international human rights law and international law is the Vienna Convention on the Law of Treaties.²⁷²⁴ The Vienna Convention is a codification of customary international law and provides authoritative rules of treaty interpretation.²⁷²⁵ The general approach to treaty interpretation in international law is embodied in Article 31 of the Vienna Convention on the Law of Treaties. It sets forth that “[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.²⁷²⁶ However, this approach is primarily objective in nature. It focuses on the actual

²⁷²² Michael Bohlander, ed. *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May 2007).

²⁷²³ ICTY Rule 62.

²⁷²⁴ Vienna Convention on the Law of Treaties, signed on 23 May 1969, entered into force on 27 January 1980, UN Doc A/CONF. 39/27; 1155 UNTS 331, <<http://untreaty.un.org/cod/avl/ha/vclt/vclt.html>> accessed 21 September 2017.

²⁷²⁵ Ulf Linderfalk, *On The Interpretation of Treaties: the Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Vol. 83. Springer Science & Business Media 2007).

²⁷²⁶ Vienna Convention on the Law of Treaties, (n 2431).

text of an agreement rather than on the intention of the parties that have adopted it.²⁷²⁷ Nonetheless, Article 31 of Convention alludes to three aspects of interpretation: literal interpretation, systematic or contextual interpretation, and a teleological interpretation that concentrates on the object and purpose of a treaty.²⁷²⁸ Also, it is important to note that none of these three aspects has primacy over the others. Instead, the three approaches are meant to be used by means of “*a single combined operation*”.²⁷²⁹ What this means is that any treaty interpretation will have to take into account all three aspects, the interaction of which will produce the legally relevant interpretative result for international law and human rights law.²⁷³⁰

Furthermore, under Article 32 of the Vienna Convention on the Law of Treaties, legislative history can be used as an auxiliary for interpretation. This includes in particular references to the preparatory work of a treaty.²⁷³¹ The consideration of such supplementary means of interpretation is, however, only permissible where the ordinary meaning of a word remains unclear or where it would lead to a “*manifestly absurd or unreasonable result*”.²⁷³² Also, the fact that the legislative history of a treaty can only be considered subsidiarily is in line with the predominantly objective approach of the Vienna Convention on the Law of Treaties. In general, therefore, it seems that, in principle, the HITNCCC should be subject to the Convention’s rules of treaty interpretation. Unlike the *Ad hoc* tribunals, the HITNCCC should have jurisdiction over international law and human rights law, without question of an international treaty.²⁷³³ At the same time, the specificities of the HITNCCC as a court

²⁷²⁷ Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31 (3)(c) of the Vienna Convention’ (2005) 54 (2) *International & Comparative Law Quarterly* 279, 320.

²⁷²⁸ Malgosia Fitzmaurice, Olufemi A Elias and Panos Merkouris, eds. *Treaty Interpretation and The Vienna Convention on The Law of Treaties: 30 years On* (Vol. 1. Brill 2010).

²⁷²⁹ ILC, ‘Report of The International Law Commission on The Second Part of Its Seventeenth Session and on Its Eighteenth Session’ (1966) II *Yearbook of The International Law Commission* p. 219 et seq <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf > accessed 21 September 2017.

²⁷³⁰ Harold Hongju Koh, ‘How is International Human Rights Law Enforced’ (1998) 74 *Indiana Law Journal* 1397.

²⁷³¹ Mahnoush H Arsanjani and Reisman W Michael, ‘Interpreting Treaties for The Benefit of Third Parties: The “Salvors’ Doctrine” and The Use of Legislative History in Investment Treaties’ (2010) 104 (4) *American Journal of International Law* 597, 604.

²⁷³² Jan Klabbers, ‘International Legal Histories: The Declining Importance of Travaux Préparatoires in Treaty Interpretation?’ (2003) 50 (3) *Netherlands International Law Review* 267, 288.

²⁷³³ *Prosecutor v Lubanga* (Judgment on the Prosecutor’s Application for Extraordinary Review of the Pre-Trial Chambers I’s 31 March Decision Denying Leave to Appeal), ICC (Appeals Chamber), decision of 13 July 2006, para 33; Volker Nerlich 2009, p. 295; Grover 2010, p. 546; Schabas 2010, p. 387. The applicability of the VCLT to the ICTY and ICTR Statutes is more in dispute but has mostly been recognised, see Lister 2005, p. 77 et seq.; it has also been confirmed by both tribunals, see *Prosecutor v Delalic’ et al.*, (Judgment) ICTY (Trial Chamber), decision of 16 November 1998, para 1161 et seq.; *Prosecutor v Bagosara and 28 others* (Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Theoneste Bagosara and 28 Others), ICTR (Appeals Chamber), decision of 8 June 1998, para 28.

interpreting international human rights law must be given due consideration and the mandate needed to trial violations of rights under the Universal Declaration of Human Rights 1948²⁷³⁴ and other related human rights conventions and treaties.²⁷³⁵ Ultimately, the HITNCCC interpretation of international law and human rights law provisions should function as the general duty of human rights law.

In spite of the equal rank of the different methods of interpretation, the general objective approach underlying the Vienna Convention implies that interpretation should start with a literal analysis. This demands the HITNCCC to identify the “ordinary” or plain meaning of the text of the respective international law and human rights law. Thus, the starting point of any interpretation by the HITNCCC would therefore be the wording of Universal Declaration of Human Rights 1948, other international law, and treaties. In order for the court to establish the ordinary meaning of a particular formulation, guidance should be obtained from a systematic approach by assessing the wording in its “context”. The Vienna Convention defines the context of a treaty narrowly. Article 31(2) of the Convention limits the context to intrinsic material such as the treaty text itself, its preamble and annexes, as well as to agreements and instruments concluded in connection with the treaty.²⁷³⁶ As a consequence, a systematic interpretation in proceedings at the court would be restricted to the application of international law and human rights law.

However, there are more difficulties associated with the teleological interpretation. This third aspect of interpretation requires the identification of the purpose of the court and of the impact of this purpose on the interpretation of its proper law on human rights abuse cases. However, teleological considerations will be of major significance for the present court because they will lay down the main purpose of the court and the general preventive mechanism for human rights violations and environmental standards.²⁷³⁷ Finally, it can be added that beyond these three central interpretative aspects, any interpretation of the court provision may have recourse, under Article 32 of the Vienna Convention, to the legislative history of international law and human rights law.²⁷³⁸ This will ensure that the concept for the purpose of the

²⁷³⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).
<<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 21 September 2017

²⁷³⁵ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press 1989).

²⁷³⁶ LC, Summary Records of The Eighteenth Session, *Yearbook of the International Law Commission* (1966) I/2, p. 188. <[http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1966_v1_p2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v1_p2_e.pdf)> accessed 21 September 2017.

²⁷³⁷ Mirjan Damaska, ‘What is The Point of International Criminal Justice’ (2008) 83 *Chicago-Kent Law Review* 329.

²⁷³⁸ The *Preparatory Committee* was Charged by The UN General Assembly in 1995 with The Work on a

HITNCCC is to ensure that the enforcement of international law and human rights in general is fulfilled. It is possible to hypothesise that the source of law for the court should be the UDHR 1948, international law, the International Covenant on Economic, Social and Cultural Rights,²⁷³⁹ and the International Covenant on Civil and Political Rights.²⁷⁴⁰ Of course, this study acknowledges that these sources of law are subject to debate and scrutiny; however, what is being advocated here is the platform for the court to exercise a broad legal jurisdiction over corporate human right abuses and environment damages.

Applying these sources of law, when a corporation or its officials initially appear in court, the parties may make preliminary proceeding or motion to the three chamber judges presiding over the pre-trial proceeding. A judge of the trial chamber oversees trial preparations and enjoys a strong hand in managing such matters as discovery, disclosure, the number of witnesses, and the time for each side's evidence.²⁷⁴¹ The trial chamber may also order the investigator/prosecutor to trim the violations to focus on the charges that best represent the corporate liable conduct.²⁷⁴² Following these explanations, the trial in the court should begin with an optional opening statement followed by the presentation of evidence.

Witnesses are examined by the parties, although judges may also call a witness and pose questions, and the chamber may also invite states, organisations, and another person's to appear.²⁷⁴³ Witness testimony may also be admitted in written form alone, without the defendant's consent if it describes the conduct of the corporation. Even if it does not, it may still be admitted.²⁷⁴⁴ The trial chamber may also have the mandate to order third parties, including states, international organisations, and their officials, to hand over documents or to testify. The investigation/prosecution team must present its case first. After the close of the presented evidence, the corporation may seek the judgment of acquittal on any or all the counts

Draft Statute for The Future ICC. It Held Six Sessions from 1996 to 1998. It is not to be confused with the *Preparatory Commission* that was appointed by the Final Act of the Rome Conference to work on further practical issues that were related to the establishment of the Court.

²⁷³⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. <<http://www.refworld.org/docid/3ae6b36c0.html>> accessed 21 September 2017.

²⁷⁴⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. <<http://www.refworld.org/docid/3ae6b3aa0.html>> accessed 21 September 2017.

²⁷⁴¹ Salvatore Zappalà, 'Prosecutor's Duty to Disclose Exculpatory Materials and The Recent Amendment to Rule 68 ICTY RPE' (2004) 2 *Journal of International Criminal Justice* 620.

²⁷⁴² ICTY Rules 65, *also see*; *Prosecutor v. Šešelj* (Vojislav), Decision On the Financing the Defence of The Accused, Case No IT-03-67-PT, ICL 116 (ICTY 2007), 30th July 2007.

²⁷⁴³ Gideon Boas, *The Milošević Trial: Lessons for The Conduct of Complex International Criminal Proceedings* (Cambridge University Press 2007).

²⁷⁴⁴ ICTY Rule 92.

in the court proceedings, which the trial chamber must grant if there is no evidence capable of supporting the occurrence of violations.²⁷⁴⁵ After the presentation of all the evidence, the parties may each make a closing argument.²⁷⁴⁶

The HITNCCC will have a mandate that requires trial chambers to ensure efficiency, and guarantees the fundamental human rights of the corporate official and corporate international recognised human rights, which should include prosecution derived from Article 14 ICCPR.²⁷⁴⁷ Among the rights guaranteed, the corporate official and the corporation have the rights to presumption of innocence, and to be informed promptly and in detail of any human rights violations claim and criminal liability charges made against them. They also have the right to have adequate time and facilities for the preparation of a defense and to communicate with a counsel of their own choosing, to have a free lawyer if they should require, and the allegation should be trail without delay to the judicial proceeding and the court hearing.

The court may examine witnesses, the human rights abuse in question, against the corporate and its officials, and order disclosure of certain pieces of evidence in relation to the human rights violations and environmental damages.²⁷⁴⁸ The corporation and its officials can also enjoy a near absolute right to self-representation.²⁷⁴⁹ Even though some commentators have critiqued this approach of the ICTY as inadequate, this study argued that the HITNCCC should adopt this approach and seek to develop a mechanism that will provide support and protection for them; the conduct of in-camera proceeding measures could be an effective tool for this.²⁷⁵⁰ Likewise, proceedings of human rights violations should have a wilful interference with the administrations of justice, such as disclosure of confidential information, and several contempt trials could be conducted.²⁷⁵¹

²⁷⁴⁵ *Prosecutor v Šešelj* (Vojislav) (n 2712).

²⁷⁴⁶ ICTY Rule 86.

²⁷⁴⁷ Article 14 ICCPR, *also see*; Gabrielle McIntyre, 'Equality of Arms—Defining Human Rights in The Jurisprudence of The International Criminal Tribunal for The Former Yugoslavia' (2003) 16 (2) *Leiden Journal of International Law* 269, 320.

²⁷⁴⁸ ICTY Rule 42, 66, 68.

²⁷⁴⁹ Gideon Boas (n 2446), *also see*; Nina HB Jorgensen, 'Right of The Accused to Self-Representation before International Criminal Tribunals' (2004) 98 *American Journal of International Law* 711.

²⁷⁵⁰ ICTY Rule 69.

²⁷⁵¹ Goran Sluiter, 'ICTY and Offences Against The Administration of Justice' (2004) 2 *Journal of International Criminal Justice* 631.

7.7. Judgment and Remedy HITNCCC

The judgments by the Court, which will be legally binding, will also include an order for the remedies, the victims of the human rights violation are entitled to. Under the jurisdiction and the court duties, it will, in a judgment that establishes a human rights violation, make an order directly against the respondent specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Similarly, in an Opinion the court may issue a recommendation to the respondent specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the court may in its judgment or opinion order that the award for reparations be made through the Trust Fund provided by the UNHRC during the creation of the corporate court.

It is proposed that UNHRC will address one of the main shortcomings of the current United Nations human rights system. It will establish an intergovernmental mechanism for the implementation of the judgments and opinions by the court by entrusting the UNHRC with the function of supervising such implementation. For this purpose, the UNHRC may appoint subsidiary bodies. The proposal draws inspiration from the monitoring of the European Convention of Human Rights where the unconditional and nonselective duty of the main political body of Council of Europe, the Committee of Ministers, is to supervise the implementation of the judgments by the European Court of Human Rights.²⁷⁵²

The proposed court jurisdiction will include a clause on the power of the corporate court to issue legally binding orders on interim measures of protection. They can be addressed to any corporation or entity in relation to which the court exercises authority. This suggestion builds upon the practice of the International Court of Justice, regional human rights treaties and the United Nations Treaty Bodies. The exercise of this power will be in the hands of the three-person Presidency of the Court, a solution that signals the exceptional nature of such an order. As soon as the case is assigned to a Chamber of the Court, the Chamber will also decide on interim measures. The institution will be applicable only in cases where an individual or a group of individuals faces a real risk of death or other grave and irreversible consequence. The corporate court shall issue judgments in respect of corporation and other entity that violate human rights and the environment. These judgments shall be legally binding: Unless otherwise

²⁷⁵² Rosa Freedman, *Failing to Protect: The UN and the Politicization of Human Rights* (Oxford University Press 2015).

specified in the authority of the court or the UNHRC, or any subsequent notification modifying it, the material jurisdiction of the court shall extend to determining violations of the following human rights treaties, provided the state party is a party to the treaty in question:

- Universal Declaration of Human Rights 1948;
- The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948;
- The International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
- The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
- The International Covenant on Civil and Political Rights of 16 December 1966 and its Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of 15 December 1989;
- The Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;
- The Convention on the Rights of the Child of 20 November 1989 and its two Optional protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, both of 25 May 2000;
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990;
- The Convention on the Rights of Persons with Disabilities of 13 December 2006; and
- The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006.

The verdict of corporate human rights violation cases should require approval by a majority of the trial chambers. The verdicts should accompany by dissenting²⁷⁵³ from the judge

²⁷⁵³ ICTY Rule 98. *Also see; Prosecutor v Miroslav Kvočka et al. (Appeal Judgement)*, IT-98-30/1-

in the chambers, who can also take notice of any previous human rights abuse proceedings.²⁷⁵⁴ Upon finding a duty of care or innocence verdict, the trial chamber may award a remedy in tort and civil law. The court can also order assets of the corporate and its official to be seized if the corporation failed to cooperate or adhere to the court sanction.

Remedy is to take into account aggravating and mitigating circumstances (including cooperation with the investigation/prosecution team) and the general practice of the corporation in question.²⁷⁵⁵ The trial chamber should enjoy broad discretion in awarding remedy and sanctions. The court should also have the discretion to impose server sanction and remedy if the corporation in question has deliberately acted in an unreasonable manner, for example gross misconduct with the intention to violate the fundamental human rights of the people for business purposes.²⁷⁵⁶ Doing this will be consistent with the ICCPR.

The judgment should also be subject to appeal in cases of an error of law invalidating a decision or an error of fact accessioning a miscarriage of justice. In contrast to the standard of common law practice, the investigation/prosecution team should be allowed a right to appeal against the verdict of the court ruling. This is because a right of appeal is a fundamental element of human rights, due process, fair trial and equality before the law. The Appeal Chamber may either affirm, reverse, or revise a trial chamber's judgment.²⁷⁵⁷ The judgment of the Appeal Chambers is final.²⁷⁵⁸ However, the defense, or, if within a year of the judgment, the investigation/prosecution team, should be allowed to make a motion to review a judgment if a new fact is discovered that could not have been uncovered through due diligence. The chamber must review the judgment and, if a majority agrees that the new evidence, if proved, could have been a decisive factor in the court decision, then the judgement should be revise.²⁷⁵⁹

A, International Criminal Tribunal for The Former Yugoslavia (ICTY), 28 February 2005. <<http://www.refworld.org/docid/48ad2b772.html>> accessed 25 September 2016].

²⁷⁵⁴ ICTY Rule 94.

²⁷⁵⁵ *Prosecutor v Tihomir Blaskic (Appeal Judgement)*, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 July 2004. <<http://www.refworld.org/docid/4146f0eb4.html>> accessed 25 September 2016.

²⁷⁵⁶ James Meernik, and Kimi King, 'The Sentencing Determinants of The International Criminal Tribunal for The Former Yugoslavia: An Empirical and Doctrinal Analysis' (2003) 16 (04) *Leiden Journal of International Law* 717, 750. <<https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/the-sentencing-determinants-of-the-international-criminal-tribunal-for-the-former-yugoslavia-an-empirical-and-doctrinal-analysis/6F736144D4226AE6056594718177C8AA>> accessed 25 September 2016.

²⁷⁵⁷ ICTY Rule 117.

²⁷⁵⁸ *Prosecutor v Zlatko Aleksovski (Appeal Judgement)*, IT-95-14/1-A, International Criminal Tribunal For The Former Yugoslavia (ICTY), 24 March 2000.

²⁷⁵⁹ ICTY Rule 119-20.

The HITNCCC will nominate the appropriate state in which the enforcement of the sanction or remedy will be upheld. Possibly, it should be in the home state where the vast majority of the corporate assets are located. However, this should be subjected to the UN General Assembly and the UNHRC approval, not the UNSC,²⁷⁶⁰ as the current climate in the UNSC is politicised and only serves the objectives of the developed world.²⁷⁶¹ This will ensure that the court is free from the UNSC's political agendas, while ensuring that the human rights of the victims are protected and upheld in all cases. Sanctions and Remedy should be awarded according to international law requirements that confirm the current UN notion of reparation of victims of human rights violations.²⁷⁶² It is also suggested that Sanction and Remedy should be subject to the court supervision, though. Also, this study argues that sanction and remedy should be subject to the law of pardon and commutation of the sentence of the state of incarceration. This should be done through the President of the court, and the decision should be made in respect of those matters.²⁷⁶³

²⁷⁶⁰ Ilyana Kuziemko and Eric Werker, 'How Much is A Seat on The Security Council Worth? Foreign Aid and Bribery at The United Nations' (2006) 114 (95) *Journal of political economy* 905, 930. Although the United Nations remains heavily criticised for its complexity and bias towards the 'P5' nations, it's noble origins and ideals embodied in the UN Charter and Universal Declaration of Human Rights emphasises the need for a more democratic, powerful and ultimately more representative UN system that can act as a conduit for international cooperation and the securing of basic human needs. This increase in aid from arguably the most powerful country on the Security Council and from the United Nations itself to a country that is elected to join the body looks like a shrewdly strategic plan. The country vying for a spot has two opportunities to become involved in international politics in a significant way, and to expose their needs to the rest of the world. It is entirely plausible that a prospective member could trade their vote for political and financial favours during their term. For a political body that is supposed to be of the utmost importance, it all sounds rather nefarious. The Security Council is also lopsided in that it no longer represents the balance of power in terms of demographics. The permanent members are from North America, Europe, and Asia. There is no permanent representation for Africa or Latin America. There are many who argue that in order for the Security Council to fully be able to make decisions about what is best of the safety of the world, the entire world needs to be represented. The Security Council is the UN body whose role and power is most overemphasised. Symbolically, the Security Council carries a lot of weight. In reality, it functions like any governing body that is chaired by large egos. The five permanent members have the power to veto any resolution. According to the bylaws of the UN, a vote of "no" by any permanent member is enough to strike down any given resolution. Permanent members most often utilise this power to strike down a resolution that runs contrary to their own interests. The liberal use of the veto has led to permanent members meeting privately to discuss resolutions before presenting them to the full council, effectively circumventing the rest of the Security Council

²⁷⁶¹ Alfred Maizels and Machiko K. Nissanke, 'Motivations for Aid to Developing Countries' (1984) 12 (9) *World Development* 879, 900.

²⁷⁶² Theo Van Boven, 'The United Nations Basic Principles and Guidelines on The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (2010) *United Nations Audiovisual Library of International Law. New York, United Nations*. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

²⁷⁶³ ICTY Rule 103-04, 124-25, *also see; Prosecutor v Dusko Tadic (Appeal Judgement)*, IT-94-1-

The advantages of this approach are that it respects the integrity of regional human rights courts by not subjecting them to an appeal court on the global level, and that it avoids adding a new layer to the delays that often characterise regional human rights systems with a heavy workload. What is of course lost in the proposal is the role of the court to secure overall coherence into the application of human rights across the world and irrespective of regional particularities. Human rights are, and should remain, universal in nature. It is realistic to expect that a satisfactory and gradually close to perfect degree of coherence will be possible to reach through close interaction between the corporate court and regional human rights courts. This interaction may take many forms but real-time exchange of jurisprudence and regular colloquia both on judicial and on registry level will be key elements to success. It is submitted that in the long run the outcome for the coherence and universality of human rights law will be better through the proposed corporate of interaction between parallel 'pillars' of human rights protection, than what hierarchical subordination of regional human rights courts to the corporate court as a higher instance would deliver.

7.8. Court Restriction or Abolish *Forum Non Conveniens*

One of the jurisdictional hurdles resulting from the use of *forum non conveniens* is that the risk for foreign claimants that their legal claim in home states such as Canada, the US, and Australia is rejected on this ground is arguably one of the legal flaws in victim's access to remedy and justice. The proposed duty of care and the principle of the corporate court incorporated the elimination of this doctrine of *forum non conveniens*. Another option is to reformulate the criteria for the application of *forum non conveniens* in cases of alleged corporate human rights abuse and environmental damages. In this view, this research is arguing that a presumption of the applicable forum should be adopted with the burden on the corporate defendant to prove that the forum chosen by the claimant is "clearly inappropriate". An implication of this opinion advocate that courts should only dismiss claims based on *forum non conveniens* in exceptional circumstances, but, not merely a judicial defence for the defendant.

Thus, the corporate court examined in this thesis should be reminded of the exceptional nature of *forum non conveniens*. The codified versions of the doctrine, such as that in the CJPTA,²⁷⁶⁴ should be the judicial principle that this research recommends for the court to

A, International Criminal Tribunal for the Former Yugoslavia (ICTY), 15 July 1999.

²⁷⁶⁴ Uniform Law Conference of Canada, Court Jurisdiction and Proceedings Transfer Act (CJPTA) of 1994.

follow.²⁷⁶⁵ Thus, the responsibility should be on the corporate defendant to prove that the chosen forum is “clearly inappropriate,” not the contrary. This is the approach followed in Australia and it is suggested here that the corporate court should follow this path in deciding the appropriate forum for the victims of corporate human rights abuses.²⁷⁶⁶ Rather than requiring an examination of the adequacy of another state’s courts, the Australian law requires an evaluation of the country’s own courts.²⁷⁶⁷ In doing so, it avoids having to pass judgement about the legal system in another forum as well as any politically sensitive comparisons between two places. In addition, it gives deference to the claimant’s choice of forum, which is important for victims access to remedy and justice in international court.

An exceptionality of *forum non conveniens* is noted in *Garcia v Tahoe Resources*. On 26 January 2017, the British Columbia Court of Appeal in Canada overturned a lower court’s decision in *Garcia v Tahoe Resources* that had dismissed a claim on *forum non conveniens* grounds.²⁷⁶⁸ The claim was brought by a group of Guatemalan men who were injured by Tahoe’s private security personnel while protesting outside the company’s silver mine in Guatemala. The decision of the Court of Appeal emphasised the exceptional character of *forum non conveniens*. It also reiterated prior jurisprudence establishing that the burden of proving that another jurisdiction was “clearly more appropriate” rested on the party seeking the dismissal of the claim.²⁷⁶⁹ However, the Court fell short of following the Australian approach which, as expressed above, would be preferable in transnational tort cases involving alleged human rights abuses. Furthermore, on 6 October 2016, the Supreme Court of British Columbia in Canada also dismissed the *forum non conveniens* application by Nevsun Resources Ltd in a claim for alleged collusion with the Eritrean government in the forced labour and torture of Eritrean refugees while working at the company’s Bisha Mine. On the basis of evidence pointing at systemic and procedural impediments and a lack of integrity of the Eritrean legal

<http://www.ulcc.ca/en/uniformacts-new-order/current-uniform-acts/739-jurisdiction/civil-jurisdiction/1730-court-jurisdiction-proceedings-transfer-act> > accessed 1 December 2017

²⁷⁶⁵ Amnesty International, *Injustice Incorporated Justice & Corporate Accountability Project* (Amnesty International Ltd 2014). <<https://justice-project.org/wp-content/uploads/2017/07/amnesty-remedy-2014-2014en.pdf>> accessed 2 December 2017.

²⁷⁶⁶ Amnesty International, ‘Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse (2017)

²⁷⁶⁷ *Oceanic Sun-Line Special Shipping Co. Inc. v Fay* (1988) 165 C.L.R. 197.

²⁷⁶⁸ *Garcia v Tahoe Resources Inc.* 2017 BCCA 39.

²⁷⁶⁹ *Garcia v Tahoe Resources Inc.* 2017 BCCA 39, paras 54 and 55

system, the court concluded that there was a real risk that the plaintiffs would not be provided with justice in Eritrea.²⁷⁷⁰

What the research found in relation to *forum non conveniens* is that in the case of *Garcia v Tahoe Resources* cited above, the British Columbia Court of Appeal considered a number of facts that would affect the plaintiffs' ability to bring a case in Guatemala including: stalled criminal proceedings in that jurisdiction, limited discovery procedures, the expiration of the limitation period for a civil suit and the real risk that the appellants would not obtain justice in the country. The Court of Appeal found that, in actual fact, Guatemala was not "clearly more appropriate" to hear the case. In a precedent-setting decision, the Court stated there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state. This factor points away from Guatemala as the more appropriate forum.²⁷⁷¹

The decision of the Court of Appeal in *Garcia v Tahoe Resources* signals a welcome departure from the more dogmatic decisions of the past. Considerations of justice ultimately prevailed in its decision. The Court of Appeal noted that it was not necessary to prove, as the lower court had demanded, that "justice could never be done", but that there was a "real risk of an unfair trial process" in the alternative forum. Crucially, it added that this assessment must be done with due consideration to the "broader context". The Court stated in characterising the appellants' claim as a personal injury case, the judge was insufficiently attentive to the context in which the conflict arose. This claim is not akin to a traffic accident. Rather, it arose in a highly politicised environment surrounding the government's permitting of a large foreign-owned mining operation in rural Guatemala. The protest that led to the battery at issue in this case was not an isolated occurrence.²⁷⁷²

Contrary to the lower court's conclusions, the Court of Appeal also found that the limited discovery proceedings available to the claimants in relation to a foreign defendant and the expiration of the limitation period for a civil claim in Guatemala posed significant risks to the ability of claimants to access justice in that country. The Court found that these factors, together with the political context described above, pointed away from Guatemala as an appropriate

²⁷⁷⁰ *Araya v Nevsun Resources Ltd.* 2016 BCSC 1856. <<https://business-humanrights.org/en/nevsun-lawsuit-re-bisha-mineritrea>> accessed 2 December 2012.

²⁷⁷¹ *Garcia v Tahoe Resources Inc.* 2017 BCCA 39, para. 130. <<https://business-humanrights.org/en/tahoe-resources-lawsuitre-guatemala>> accessed 2 December 2017.

²⁷⁷² *Garcia v Tahoe Resources Inc.* 2017 BCCA 39, para. 109.

forum to hear the case. Unlike the lower court, the Court of Appeal took a much closer look at existing barriers to justice, including structural problems affecting the judiciary and the political context of the dispute, and their potential effect on the ability of the claimants to access justice in Guatemala.

Without framing it in human rights terms, the Court of Appeal's approach is genuinely geared toward an understanding of, and concern for, the ability of claimants to access justice in practice. In doing so, it upheld the claimants' right to a remedy. The suggestion here is that the corporate court in this thesis should adopt rights-sensitive approach to assessing *forum non conveniens* claims, including legal interpretations that reflect a fairer and more achievable threshold for claimants to meet in cross-border human rights cases. Adopting or moving closer to the Australian approach should will be appropriate to the corporate court. The court, in deciding the question of whether it or a court outside [enacting province or territory] is clearly the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including:

- the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- the law to be applied to issues in the proceeding;
- the desirability of avoiding multiplicity of legal proceedings;
- the desirability of avoiding conflicting decisions in different courts;
- the enforcement of an eventual judgment;
- the fair and efficient working of the domestic legal system as a whole;
- the interest of the forum in protecting and enforcing international human right law; and
- preventing denials of justice.

Lastly, the thesis stressed that strong agreement should be expressed with the recommendation that the corporate courts should consider whether internationally recognised human rights are at stake in the case implement throughout specifically, if the tort which the plaintiffs allege would also constitute a human rights abuse, there should be a presumption in favour of hearing the case and the victim, when injuries in a law suit are framed as torts, such as assault or battery, rather than human rights violations, the corporate courts should remain particularly attentive to the context in which the causes of action arose and properly characterise the impugned conduct of the corporate defendants. This entails careful consideration of the risk of unfairness in the foreign jurisdiction in light of that forum's human

rights record or social problems such as corruption and impunity. Additionally, the corporate courts may consider the forum's own public interest in dutifully vindicating international human right violations because such conduct not only breaches the standards of international law but also, as a consequence, violates the international law of the forum. To this end, the corporate court should take judicial notice of those international norms that form part of the domestic legal order, of existing enforcement mechanisms, as well as the forum's public policy on the right of victims to a remedy and on the prevention of denials of justice.

7.9. Summary

The present study was designed to determine whether tort and the civil law could provide an appropriate tool for corporate human rights violations. In doing so, the study has dismissed the current mechanism and views on corporate accountability and remedy as ineffective. It lacks liability and enforcement; therefore, to combat this deficiency of corporate accountability and remedy, the study argues that there is a need to create an international court to implement the new notion of corporate accountability and remedy through tort and civil law. The study further argued that an international court purposed for corporate accountability is an appropriate mechanism to address corporate human rights violations through tort and the civil legal system.

8. Conclusion

In conclusion, this research attempted to analyse the concept of accountability in part I by critically examining the literal and legal definition of accountability. It draws on empirical information from a wide range of literal and legal literature on the concept of accountability. It examines the functioning of the literal and legal meaning of accountability, accountability systems, and relevant regimes. Adopting this approach to corporate accountability, it allows the research to lay down a theoretical concept for the study by focusing on the substantive legal and practical issues that have an impact on the effectiveness of accountability and judicial mechanisms in achieving corporate accountability and effective remedy in cases of business-related human rights exploitations, with a particular emphasis on the corporate accountability under tort law.

Elaborating on accountability in this theoretical framework for responsibility consists of liability, effective sanction, and remedy. An implication of this is that the flaws in the current liability for human rights violations, effective sanction, and remedy have presented an opportunity for this study to include both the enforcement of accountability, responsibility, remedy, and enforcement mechanism into corporate human rights obligations under the concept of a duty of care. Adopting this explanation, it was possible to seek to improve the concept of corporate accountability that will be able to enhance the current accountability system, with a notion of effective liability and enforcement (remedy).

The approach this study adopted emphasised a dynamic accountability mechanism that is accessible and can be updated and improved through the concept of rule of law and social changes. Likewise, it is intended to support the victims of human rights violations to enforce their rights and to encourage the corporation to be involved in the sharing and exchange of responsibility on the outcomes of human rights abuse cases. The study concluded that using this concept of accountability with the other overarching objective can ensure victims of human rights violations obtain justice, to which they are entitled, irrespective of who committed the abuse. However, this is very difficult to achieve in practice. Thus, it is suggested that a detailed analysis of the criminal and civil law accountability mechanism is required for further clarification of accountability under tort law. As a result, the study moved on to focus on the alternate form of liability in tort law.

Following the analysis and definition of accountability, the mechanism of accountability, the research extracts the components of accountability through the definition of

the notion of liability, which allow a better understanding of the practical concept of accountability (the practical concept of accountability in this context is referred to as responsibility, answerability, blameworthiness, liability, and sanctions).

Also, the illustration emerging from the research is one which can be subjected to an intense debate about the concept of corporate human rights accountability and what it actually means in practice. The difficulties are the rocky connection between the appropriate procedural rights and the desire to provide an effective remedy for victims of international human rights violations.

In this rationale, international crime law has failed to offer an appropriate system of accountability on both dimensions, namely accountability for the crime and remedy for the victims of human rights abuses. However, on the other hand, one could have thought there would be no reason to balance these two dimensions, as they coexist. Also, in the practical world, it can be argued that there is a trade-off between what constitutes accountability for international crime and remedy for victims of human rights violations. Viewing the international criminal law through these two dimensions of accountability for crime and remedy for human rights violations helps to clarify the process and the mechanism that needs to be implemented to ensure effective accountability, for example, the integration of both criminal and tort elements to ensure effective accountability.

This is because an attempt to restore the dignity of a victim of human rights violations and to provide them, or their relatives, with the appropriate forum, such as Tribunal or Court, to express their pain is, of course, a noble desire. Likewise, it is also significantly useful in reducing human rights violations as it has the potential to prevent future violations. It also gives victims the right to tell their stories in front of a judge, which also helps the judges in the chamber to gain a better understanding of the event on which they are required to pass judgment. Hence, there is no doubt that the international criminal legal system has fulfilled some of these elements. However, one needs to bear in mind that the problem of enforcing human rights has always been a challenge for the international community and legal system. Nonetheless, international criminal law provides some form of access to justice and enhances the effectiveness of bringing a legal proceeding against individuals who have violated human rights. Conversely, it should not be underestimated that international criminal law lacks on many grounds, such as enforcement, compliance, cooperation, effective prosecution

procedures and the lack of financial capacity to investigate and prosecute an individual that is found to violate international law and international human rights law.

For that reason, it will be a flaw in this research to support the notion that international criminal law offers appropriate accountability systems for human right violations and that this should be extended to corporate human rights accountability. Accordingly, it shall be suggested that the system is an indication of criminal justice, but its practical aspect is very difficult to implement due to the failures highlighted in part I of the thesis. In addition, international criminal accountability should consist of both criminal and tort law elements in its concept of accountability. Therefore, to address this gap in accountability, it is imperative to understand what constitutes accountability and human rights duty of care, and how to relate the practical meaning of accountability to human rights obligations. Moving on from the international criminal law accountability, the research addressed the tort element of accountability by examining the Alien Tort Statute.

It also examines the calls for binding obligations for corporations to respect human rights. It assessed the voluntary mechanisms such as the Guiding Principles, the OECD Guidelines, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, SA800 Standards, and now the proposed UN Binding Treaty on Transnational Corporations and other Business Enterprises with Respect to Human Rights. Nonetheless, the duty proposed in this thesis is much narrower. It requires the corporation to only ensure their conduct does not cause harm to those who are in their close proximity; hence, it will only impose an obligation on a corporation whose conduct falls below the reasonable standard.

Additionally, it is claimed that the requirement of proximity would likely limit successful claims of a victim of human rights abuse, as the victims need to establish that the corporation foresaw the harm, the proximity between the victims and the corporation, and whether it is fair, just and reasonable to impose a duty of care. However, it is argued in this research that this requirement should not be mandatory when it is absolutely clear that the corporation knew what it was doing or should have known what it ought to do and what it ought not to do; then the court should find corporate liability through a novel duty of care.

Even so, the study contests that, in the right circumstance, tort law provides an effective remedy for victims who have suffered as a result of corporate negligence and failure to respect human rights standards. It is further argued that the scope of the duty of care should expand

through modification to incorporate the obligation which may arise in the UN Treaty on Transnational Corporations and Human Rights to reflect on the development of tort law and the reality of the global economy, if the treaty ever comes into force. A duty of care could also promote effective supply chain and subsidiary respect to human rights standard in its business operations. Finally, tort law may, therefore, have a significant role to play in promoting the accountability of the corporation for their human rights impact in the global economy.

The indication of this research is that corporations normally violate human rights and damage the environment with some foresight. International corporations know or should have known that if they engage or aid and abet governments to oppress their citizens' rights, or failed to conduct a vigorous environmental damage assessment, which shall result in a substantial human rights violations and environmental damages. Therefore, the foresight of the corporate conduct under legal principles does not exempt them from aggravated or exemplary liability.

Finally, it is suggested that the corporation that engages in human rights violation to maximise profits, at the expense of innocent victims and the environment, constitutes an unjust enrichment. Under the law of tort, it is prohibited that the defendant should benefit from a tort of negligence; therefore, tort does not pay or allow the corporation to enjoy unjust enrichment. Following this indication, it is argued that it is imperative for the court, after assessing the circumstance surrounding corporate conduct, should be in a legal mandatory position to award either aggravated or exemplary damage for human rights violations. It is, therefore, recommended that aggravated or exemplary damages should be award if it is proven that the corporation has violated a human rights or caused damage to the environment in the following circumstances:

- Cases where corporations and their managers and staff have been accused of being directly responsible for acts amounting to gross human rights abuses;
- Cases where governments and state authorities have engaged corporations to provide goods, technology, services or other resources which are then used in abusive or repressive ways;
- Cases where companies have been accused of providing information, or logistical or financial assistance, to human rights abusers that have, "caused" or "facilitated" or exacerbated the abuse; and
- This group of cases frequently (though not always) arises out of situations where state security services have been called in to assist with the resolution of some dispute or

conflict surrounding business activities cases where companies have been accused of being “complicit” in human rights abuses by virtue of having made investments in projects or joint ventures or regimes with poor human rights records or with connections to known abusers.

After a careful consideration of the current findings emerging in these studies so far in relations to corporate accountability, it is concluded that the international community and global economics institutions will be best equipped to address corporate human rights violations through an international forum such as international corporation court, based on the principle of a duty of care under tort law. The present study was designed to determine whether tort and the civil law could provide an appropriate tool for corporate human rights violations. In doing so, the study has dismissed the current mechanism and views on corporate accountability and remedy as ineffective. It lacks liability and enforcement. Therefore, to combat this deficiency of corporate accountability and remedy, the study concluded that there is a need to create an international court to implement a new notion of corporate accountability and remedy through tort and civil law. The study further argued that an international court for the purpose of corporate accountability is an appropriate mechanism to address corporate human rights violations through tort and the civil legal system. Finally, it is recommended that further research is carried out to examine victim’s perception of remedy, with a specific focus on victim centric approach to judicial remedy. Similarly, a further research is required to assess the effect of the ongoing UN Binding Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights and the implications that this may have on national courts in developing countries.

Appendix

Tables

Table 1. The Extent of Accountability

If the following indications can be proven, then there exists an argument that accountability exists:

1. When there is a relationship between the corporation and the host state, where the activity of the corporations touch and concern the host state, there is an economic transactions between the corporation and the government of the host nation, and the corporate supply chain, subsidiaries and corporate business operation has impacted on society in a particular sector of society (environment and factory operations);
2. When the parent corporation business is same as the supply chain and subsidiary or operating in similar business sector;
3. When the corporation has a duty of care to explain and justify its conduct to the national court of the host and home state, as well as an international tribunal or court if appropriate;
4. The national courts of the host state, home state and international forum such as the arbitration or international court should have the authority under international law to investigate²⁷⁷³ and sanction the corporation for its misconduct and contribution to human rights violations through tort and civil law;
5. In this scenario, the national courts of the host state, home state, international tribunal or international court have the legitimate authority to pass judgment and sanction;²⁷⁷⁴
6. The corporation must face sanctions if it is found that it has violated human rights, assisted or aided the host government to violate the rights of its people; and

²⁷⁷³ This is possible because state sovereignty is often thought to be absolute, unlimited. However, there is no such a thing as absolute State sovereignty. Absolute sovereignty is impossible because all sovereignty is necessarily underpinned by its conditions of possibility, example limited sovereignty is the norm, though the nature of the limitations varies. The current concept of state sovereignty embraces the same limitations it had in its ancient form as a non-fully developed conceptual idea. The implications of understanding state sovereignty as limited rather than absolute are several, both directly and indirectly. A main immediate consequence is that sovereign states can cooperate together, limit their sovereignty and still be considered sovereign. Jorge Emilio Núñez, 'About the Impossibility of Absolute State Sovereignty' (2014) 4 (27) *International Journal for the Semiotics of Law-Revue Internationale De Sémiotique Juridique* 645, 664.

²⁷⁷⁴ Under the principle of a duty of care, the defendant can only be punish once. What this means is that only a single remedy shall be awarded against the corporation for a misconduct.

7. If found guilty, the corporation must compensate the victims through effective remedial action without undue delay.

Table. 2

ATCA	TVPA
Jurisdictional	Substantive
Definitions not detailed	Detailed definitions
No exhaustion of remedies requirement	Exhaustion of remedies requirement
No statute of limitations largely unknown legislative history	10-year statute of limitations Detailed legislative history

Table. 3

6.1.3 Civil Liability Treaties Adopted Since 1960²⁷⁷⁵

Treaty	Year of Adoption	Number of Signatures	Number of Ratifications	Ratifications Necessary for Entry into Force	Entry into Force
IAEA Convention on Supplementary Compensation for Nuclear Damage	1997	13	3	5 states with a minimum of 400,000 units of installed nuclear capacity	Not in Force
Convention on Civil Liability for Oil Pollution Damage Resulting From					

²⁷⁷⁵ Convention on Biological Diversity, Montreal, Can., May 25-27 (2005), Status of Third-Party Liability Treaties and Analysis of Difficulties Facing Their Entry Into Force, UN Doc. UNEP/CBD/BS/WG-L&R/1? INF/ (2005). <<https://www.biodiv.org/doc/meetings/bs/bswglr-01-inf-03-en-pdf>> accessed 11 January 2017 [hereinafter Convention on Biological Diversity]. Ratifications for Oil Pollution Damage Treaties Compile from “The International Regime for Compensation for Oil Pollution Damage (2005). <<https://www.iopcfund.org/npdf/genE.pdf>> accessed 30 Decmeber 2017. Information on the number of ratification necessary for entry into force was compile from the treaty texts.

the Exploitation of Seabed Mineral Resources	1977	6	0	4	Not in force
UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigated Vessels	1989	2	1	5	Not in Force
IMO International Convention on Civil Liability for Oil Pollution Damage (Replaced 1969)	1992	10	122	10 states, including 4 states with more than 1million units of gross tonnage	1996
International Convention on the Establishment of an International Fund for Oil Pollution Damage (replaced 1972 Convention). Protocol	1992	10	104	8	1996
	2003	3	21	8	2005
Council of Europe Lugano Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment	1993	9	0		Not in Force

				3 states, including at least 2 Council of Europe states	
IMO Convention on Liability and Compensation in Connection with Carriage of Hazardous and Noxious Substances by Sea	1996	8	8	12 states, including 4 states that have at least two million unit of gross tonnage	
Basel Protocol on Liability and Compensation for Damage Resulting From Transboundary Movements of Hazardous Wastes	1999	13	8	20	Not in Force
IMO International Convention on Civil Liability for Bunker Oil Pollution Damage	2001	3	18	18 states, including 5 states with gross tonnage not less than 1 million units	Not in Force
UNCE Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effect of Industrial Accident on Transboundary Waters	2003	24	1	16	Not in Force

Table 4. The state stands in Connection to Civil Liability Treaty

National Economic Prevalence of the Targeted Business Operation			
Low High			
Human Rights and Environmental Damage exposure to the Target Business Operation	Low	I-Bystanders	II-Strong Opponent
	High	III-Supporters	IV-Likely Operation

Table 5. Signatures and Parties that Choose to be Part of Civil Liability Treaties Since 1989

Treaty Name	Parties	Ratifying or Acceding States
UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (1989) ²⁷⁷⁶	OECD: Germany Non- OECD: Morocco	OCED: None Non-OECD: Liberia
Convention on Liability and Compensation with Carriage Hazardous and Noxious Substance by Sea (1996) ²⁷⁷⁷	OECD: Canada, Denmark, Finland, Germany, Netherlands, Norway, Sweden, United Kingdom Non-OECD – None	OECD: None Non-OECD: Angola, Cyprus, Morocco, Russian Federation, Saint Kitts and Nevis, Samoa, Slovenia and Tonga

²⁷⁷⁶ UNECE Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (1989). https://www.unece.org/trans/danger/publi/crtd/crtd_e.html accessed 20 June 2017

²⁷⁷⁷ HNS Convention. <http://www.hnsconvention.org/en/status.html> accessed 16 January.

Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movement of Hazardous Waste (1999) ²⁷⁷⁸	OECD: Denmark, Finland, France, Hungary, Luxembourg, Sweden, Switzerland and the United Kingdom Non-OECD: Chile, Columbia, Costa Rica, Macedonia, Monaco	OECD-None Non-OECD: Botswana, the Democratic Republic of the Congo, Ethiopia, Ghana, Liberia, Republic of Congo, Syria, Tonga
International Convention on Civil Liability for Bunker Oil Pollution Damage (2001) ²⁷⁷⁹	OECD: Canada, Australia, Denmark, Finland, Germany, Italy, Norway, Sweden, Spain, United Kingdom Non-OECD: Brazil	OECD: Germany, Greece, Spain, Luxembourg, Poland, United Kingdom Non-OECD: Bulgaria, Croatia, Jamaica, Latvia, Lithuania, Samoa, Singapore, Slovenia, Tonga
Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (2003) ²⁷⁸⁰	OECD: Austria, Belgium, Denmark, Finland, Greece, Luxembourg, Norway, Poland, Portugal, Sweden, United Kingdom Non-OECD: Armenia, Bosnia, Bulgaria, Cyprus,	OECD: Hungary Non-OECD: None

²⁷⁷⁸ Basel Convention, Parties to The Basel Liability Protocol. <<http://www.basel.int/ratif/protocol.html>> accessed 16 January 2017.

²⁷⁷⁹ Transport Can., Maritime Law Reform Discussion Paper 15 n.12 (2005).
<<http://www.tc.gc.ca/en/report/tp14370epdf>> accessed 16 January 2017.

²⁷⁸⁰ Protocol on Civil Liability and Compensation for Damage Caused by The Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on The Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on The Transboundary Effects of Industrial Accidents Kiev, 21 May (2003).
<https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-16&chapter=27&lang=en> accessed 16 October 2017.

	Estonia, Georgia, Latvia, Moldova, Romania, Ukraine	
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