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Lessons for the Treaty Process from the International Law Commission and International Environmental Law

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1. Introduction

In March 2014, Amnesty International published *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy*.[1] *Injustice Incorporated* details four case studies described by Amnesty as "emblematic" for the way in which they demonstrate how "corporate political and financial power intertwined with specific legal obstacles [...] allow companies to evade accountability and deny, or severely curtail, remedy."[2] *Injustice Incorporated* concludes with recommendations for legal reform, yet does not call for a "binding international treaty" as a necessary mechanism for implementation of the reforms. Instead, recommendations are focused upon measures that could be implemented through state practice, whether of legislatures or courts. Yet Amnesty, together with many other civil society groups and states of the global south, have thrown their support behind the negotiation of a "binding" treaty in the business and human rights context.[3]

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[1] AMNESTY INTERNATIONAL, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy,* 07.03.2014 <http://www.amnesty.org/en/documents/POL30/001/2014/en/> accessed 26.05.2017.

[2] Ibid 11.

[3] S SHETTY, 'Corporations have rights. Now we need a global treaty on their responsibilities', Amnesty International, 21.01.2015 <https://www.amnesty.org/en/articles/blogs/2015/01/corporations-have-rights-now-we-need-a-global-treaty-on-their-responsibilities/> accessed 26.05.17. See

Drawing upon the case studies presented in *Injustice Incorporated*, this chapter will examine the treaty debate through the lens of international environmental law, with attention to the work of the International Law Commission. Amnesty highlights that the chosen case studies have in common a wide-ranging and, at most, only partially successful search for remedy and justice over many years and in many fora. Also notable, but not explicitly identified by Amnesty, is that each case study may be characterized as an example of transnational environmental harm[4] with corporate power of a rich country externalizing environmental costs to a poor one – whether, as in the first three cases, by transfer of potentially hazardous industrial technologies through foreign direct investment, or, in the fourth case, the physical transfer of hazardous waste. Thus, all involve environmental harm with associated violations of human rights. This is important, as Ecuador, a key player in the push toward a binding treaty, is known for the notorious and never-ending Chevron-Ecuador oil pollution dispute – another environmental case.[5] Moreover, *Kiobel*, the case that led to the decision emanating from the United State Supreme Court limiting the application of the Alien Tort Statute by US courts due to cases that do not violate the "presumption against extraterritoriality", may be seen as arising out of an effort to seek justice over the deaths of environmental activists voicing concerns over oil pollution on Ogoni lands in Nigeria.[6] Indeed, it is increasingly common to hear expressions of concern over the persecution of "environmental rights defenders", whether or not they self-identify as indigenous peoples.[7] Yet discussions of the treaty debate in the business and human rights context are generally divorced from existing lessons within international environmental law.

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further information on the binding treaty process, <http://business-humanrights.org/en/binding-treaty> accessed 26.05.2017; Intergovernmental Working Group, <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx > accessed 26.05.2017.

[4] SL SECK, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011) 3(1) *Trade, Law & Development* 164, 174-76.

[5] See Resolution co-sponsored by South Africa and Ecuador on the need for a BHR treaty <http://business-humanrights.org/en/binding-treaty> accessed 26.05.17. See also Texaco/Chevron lawsuits (re Ecuador), as described on the Business and Human Rights Resource Centre website <http://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador > accessed 26.05.17.

[6] SL SECK, 'Kiobel and the E-word: Reflections on Transnational Environmental Responsibility in an Interconnected World' *Law at the End of the Day*, 05.07.2013 <http://lcbackerblog.blogspot.ca/2013/07/sara-seck-on-kiobel-and-e-word.html> accessed 26.05.2017.

[7] See, for example, United Nations Secretary-General, *Situation of Human Rights Defenders,* UNGA 68th Sess., UN Doc A/68/262 (05.08.2013) paras 15-18; M. Sekaggya, Report of the Special Rapporteur on the Situation of Human Rights Defenders, UN Doc A/HRC/19/55 (21.12.2011), paras 60-87, 124-126.

The chapter will first examine each of the Amnesty case studies in order to document the state practice identified, and the gaps that need to be filled. The chapter will then consider the work of the International Law Commission in its progressive codification of the law on prevention and loss allocation with respect to Transboundary Harm Arising from Hazardous Activities, culminating in draft Articles[8] and draft Principles,[9] respectively, in 2001 and 2006. The modest claim of this chapter is that as the key United Nations body responsible for the progressive development and codification of international law, the work of the ILC should surely be of relevance to the treaty debate. Bringing together the Amnesty case studies with the work of the ILC, the chapter will consider whether in fact there are lessons for the treaty debate to be learned from this body of work.

2. The Amnesty Case Studies

The Amnesty report *Injustice Incorporated* details four case studies: (1) the 1984 Bhopal gas disaster in India; (2) the 1995 Omai mine tailings dam rupture in Guyana; (3) the three decades long dumping of mine waste at the Ok Tedi mine in Papua New Guinea beginning in the 1980s; and (4) the 2006 dumping of toxic waste in Abidjan in Côte d'Ivoire by Trafigura. Each will be briefly examined in turn.

(1) the 1984 Bhopal gas disaster in India:

The Bhopal gas plant tragedy has elicited extensive commentary, and rightly so given the horrific events and failure of satisfactory legal remedy and accountability.[10] On December 2, 1984, toxic gas leaked from a methyl isocyanate (MIC) storage tank at the Union Carbide India Limited (UCIL) pesticide manufacturing plant in Bhopal, India. Majority-owned by United States-based Union Carbide Corporation (UCC), the UCIL plant had been built in 1968 close to "densely populated slum areas" which expanded over the years to accommodate rural migrants.[11] According to Amnesty, the leak was responsible for the death of between 7000 – 10,000 people within three days of the accident, and more than 570,000 people were exposed to "damaging levels" of the gas, "leading to a range of chronic

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[8] INTERNATIONAL LAW COMMISSION, *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,* Report of the International Law Commission: Fifty-third Session, UN Doc A/56/10 (2001) 366-436.

[9] INTERNATIONAL LAW COMMISSION, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising from Hazardous Activities*, Report of the International Law Commission: Fifty-eighth Session UN Doc A/61/10 (2006) 101-182.

[10] In addition to AMNESTY INTERNATIONAL, above n 1, see the extensive writings of Upendra Baxi on Bhopal. See, for example, <http://upendrabaxi.in/ > accessed 26.05.2017.

[11] AMNESTY INTERNATIONAL, above n 1, 33.

and debilitating illnesses" with consequences felt still today.[12] While evidence suggests management at UCC had been aware of safety problems at the Bhopal plant for years, cost-cutting measures and a lack of local laws relating to hazardous industries combined to create a situation in which no comprehensive emergency plans existed to warn the local communities about what to do in the event of a leak, even though such plans were in effect at a comparable Union Carbide plant in the United States.[13] Moreover, the withholding of timely and accurate information with regard to the toxicological properties of the chemicals involved and appropriate treatments exacerbated health problems in the aftermath and over the long term.[14]

The Amnesty report details numerous legal actions, both criminal and civil, brought in the courts of India and the United States over many years, which resulted in a 1989 civil settlement agreement of US$470 million bestowing civil and criminal immunity on UCC and UCIL, despite an initial claim by India for US$3.3 billion.[15] This settlement was reached in India after US courts dismissed actions brought by victims and consolidated into one claim brought by India, on the basis of the doctrine of *forum non conveniens*.[16] In 2010, criminal negligence convictions were

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[12] Ibid 35. For a detailed discussion of the health effects see R DHARA, 'Health Effects of the Bhopal Gas Leak: a Review' (Spring 1994) *New Solutions* 40.

[13] Ibid.

[14] Ibid 37.

[15] The Supreme Court of India upheld the civil settlement and civil immunity granted in the settlement, but quashed the decision to grant criminal immunity in *Union Carbide Corporation v Union of India*, Supreme Court of India (1991) 4 SCC 584; AIR 1992 SC 248.

[16] AMNESTY INTERNATIONAL, above n 1, 43-46. *The Union of India v Union Carbide Corporation*, US Southern District Court of New York, 8 April 1985, reproduced in APPEN Report, *The Bhopal Tragedy: One Year After* (Sahabat Alam Malaysia 1985) 223-228, dismissed by Judge Keenan *In Re Union Carbide Corporation Gas Plant Disaster* 634 F Supp 842 (SDNY 1986). Subsequent attempts to bring additional civil cases in the United States have been made and have also been unsuccessful. In *Bi v Union Carbide Chems. and Plastics Co.*, 984 F 2d 582 (2d Cir) cert. denied 510 US 862, 114 S Ct 179, 126 L Ed 2d 138 (1993) class action lawsuits were dismissed on the grounds of *forum non conveniens* by Judge Keenan who held that his analysis and conclusions from 1986 decision were still appropriate. In November 1999 a group of victims filed a suit under the Alien Tort Claims Act against UCC and its former CEO, Warren Anderson. This claim was dismissed by Judge Keenan on the grounds that the plaintiffs lacked standing and because proceedings were barred by the 1989 settlement, see *Bano v Union Carbide Corporation*, 273 F3d 120 (2d Cir. 2001). In November 2004, claims were filed against UCC and its former CEO, Warren Anderson for damage arising from alleged water pollution caused by the Bhopal plant and were, again, dismissed by Judge Keenan, *Sahu v Union Carbide Corporation* 2006 WL 3377577 (SDNY 20.11.2006) No 04 Civ 8825 (JFK), reinstated by the Court of Appeal on technical grounds, *Sahu v Union Carbide Corporation*, 2012 WL 2422757 (SDNY 26.06.2012) (No 04 Civ 8825 (JFK)), and ultimately dismissed again

finally handed down against UCIL and seven accused, but not against UCC or Warren Anderson, the chairman of UCC at the time of the disaster, who was previously declared an absconder and subject to an extradition request.[17] Notably, the civil settlement agreement provided that if it was insufficient to address the costs of personal injuries and compensation, the government of India would be responsible for any shortfall.[18] However, as noted by Amnesty, "the settlement agreement did not take into account damages for environmental pollution generated by the plant's operations. As a result, the award was not calculated to cover or compensate for damage to the environment, life, health or property resulting from plant contamination."[19]

In addition to the inadequacy of the economic settlement and its fraught implementation process, the Amnesty report highlights the ongoing health effects of the gas leak and the ongoing environmental pollution at Bhopal, including groundwater contamination.[20] As yet unresolved civil claims for environmental damage and clean up have been brought in US courts and public interest litigation commenced in Indian courts.[21] Meanwhile, UCC divested from UCIL, and was subsequently purchased by Dow Chemical. Dow denies any responsibility for the Bhopal disaster.[22]

(2) the 1995 Omai mine tailing dam rupture in Guyana:

The Omai mine tailings dam rupture is much less well known than the Bhopal gas plant disaster, although the Canadian case law emerging out of the failed attempt to litigate against Canadian-based Cambior Inc. was the subject of detailed analysis in a paper published by the author in 1999.[23] Omai Gold Mines Limited

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by Judge Keenan, *Sahu v Union Carbide Corporation* No 04 Civ 8825 (JFK) (SDNY 2012).

[17] AMNESTY INTERNATIONAL, above n 1, 41-42. *State of Madhya Pradesh v Warren Anderson (Absconder) and Others, in the Court of Chief Judicial Magistrate Bhopal, Madhya Pradesh*, Cr. Case No 8460/1996 - Date of Institution 01.12.1987, Judgment of 07.06.2010.

[18] AMNESTY INTERNATIONAL, above n 1, 49.

[19] Ibid.

[20] Ibid 50-54.

[21] Ibid 47, 53-59. In July 2004, the Bhopal Gas Peedith Mahila Udyog Sangathan, filed proceedings in the Madhya Pradesh High Court against a number of defendants, including the government of India, the Madhya Pradesh state government, UCC, Eveready (formerly UCIL) and Dow. The plaintiffs seek damages of US$3.3 billion for environmental pollution, environmental remediation and medical assistance for victims. This case is ongoing.

[22] AMNESTY INTERNATIONAL, above n 1, 4-57.

[23] S L SECK, 'Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law' (1999) 37 *Canadian Yearbook of International Law* 139, 154-168, 188-189.

(OGML) was a joint venture of Cambior Inc., US-based Golden Star Resources, and the government of Guyana, established to operate OGML in accordance with a Mineral Agreement and accompanying Environmental Impact Statement (EIS).[24] OGML began operations in 1993, and in August 1995, the banks of its tailings dam ruptured and collapsed, spewing effluent laced with cyanide and heavy metals into the Omai and then Essequibo rivers.[25] Indigenous Guyanese villagers who relied upon the Essequibo River for "transport, food harvesting and subsistence fishing, drinking water, animal husbandry, irrigation, bathing and recreation" noticed changes in the river including scores of dead fish, and stopped using the water or consuming the fish even before being notified of the problem.[26] It took 5 days for the spill to be contained, and 3 days for official government notification of the environmental disaster.[27] Yet, shortly thereafter the government declared the water quality met Canadian standards and lifted the water ban.[28] As documented in the Amnesty report, an earlier spill had occurred at a time when OGML was seeking to discharge higher concentrations of cyanide in wastewater than was permitted under the EIS, and subsequent discharges were allowed in 1996.[29]

The extent to which the spill in fact impacted people's health has been controversial, due in part to conclusions of a Guyanese government Commission of Inquiry to the effect that "there had been no serious risks to the health of riverian communities."[30] Yet community concerns about water quality persisted due to a lack of government environmental monitoring coupled with a lack of assessment of health effects.[31] While the mine was allowed to resume operations under new environmental protection legislation, the Amnesty report highlights the lack of governmental financial and technical capacity to effectively regulate compliance.[32]

Immediately after the spill, Cambior offered very small amounts of compensation to some affected people as full and final settlement of OGML's liability.[33] These settlements were criticized as inadequate and unjust as many of those who signed were illiterate and had not received legal advice.[34] A class action lawsuit was commenced in Canadian courts in 1997 on behalf of an estimated 23,000 victims, but this was dismissed on the basis of the doctrine *forum non*

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[24] AMNESTY INTERNATIONAL, above n 1, 65.
[25] Ibid 66.
[26] Ibid 66-67.
[27] Ibid 67.
[28] Ibid.
[29] Ibid 67-68.
[30] Ibid 69.
[31] Ibid.
[32] Ibid 72-73.
[33] Ibid 73. See further, A MCINTOSH, 'Cambior pays off poor Guyanese at $150 a pop' *The Montreal Gazette*, 09.09.1995; R RAMRAJ, 'The Omai disaster in Guyana' (2001) 43:2 *Geographical Bulletin* 88.
[34] Ibid.

conveniens.[35] Legal actions brought in Guyana were unsuccessful for various reasons,[36] and in 2001 Cambior acquired Golden Star Resources' share in the mine. In 2006, Canadian company Iamgold bought Cambior's share and ran the mine until it closed in 2008.[37]

(3) the dumping of mine waste at the Ok Tedi mine in Papua New Guinea:

The third case in the Amnesty report also involves mining, but this time instead of a tailings dam spill, the problem was the dumping of mine waste directly

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[35] Ibid 74-76. *Recherches Internationales Québec v Cambior Inc and Home Insurance and Golder associés ltée, corespondents* [1998] QJ No 2554, Québec Super Ct (Class Action), 14.08.1998. See analysis of this decision in SL SECK, above n 23.

[36] AMNESTY INTERNATIONAL, above n 1, 76-78. In August 1998 an action on behalf of 23,000 riverian Guyanese was brought against Cambior, OGML and others. The plaintiffs sought compensation of around US$150million and injunctions to (1) prevent the defendants from discharging further cyanide and other heavy metals into the rivers; (2) to direct the defendants to remediate the damage caused by the 1995 spill, and (3) to provide the residents with reliable supplies of potable water. *Judith David and Elizabeth David v Cambior Inc, Golder and Associates, Home Insurance, and Omai Gold Mines Limited*, the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, No 867-W, Statement of Claim, 16 August 1999. This action was dismissed against plaintiffs outside Guyana on 28 March 2000, leaving OGML as the sole defendant. The action against OGML was dismissed 12 February 2002 by the Guyana High Court with no written reasons provided. See, for example, INTERNATIONAL HUMAN RIGHTS CLINIC, 'All that Glitters: Gold Mining in Guyana: The failure of government oversight and the human rights of Amerindian communities' (March 2007) Human Rights Program, Harvard Law School, 39. A second case was brought against Cambior, OGML, Golden Star Resources and others in the Guyanese courts in May 2003. The plaintiffs sought: (1) US$2 billion in damages; (2) injunctions ordering the defendants to provide potable water and meet the costs of medical monitoring of the Essequibo population; (3) the discontinuation of effluent dumping into the rivers; (4) various measures to ensure that improved management and contingency plans were put in place at the mine; and (5) US$1 billion in punitive damages. The case was dismissed in October 2006 with no written reasons provided. Justice Carl Singh provided a verbal judgment articulating the finding the representative nature of the suit "inappropriate" and "bad in law" and ruling that the residents did not share common interest. *Judith David, Richard Bowens, and Lilmattie v. Cambior Inc, Golder associés ltée and Associates, Home Insurance, and Omai Gold Mines Limited, Knight Piesold, Golden Star Resources, The Attorney General on Behalf of government of Guyana/Ministry of Public Works, JP Morgan Canada, the Royal Bank of Canada, Societe Generale Canada, Credit Lyonnais, Banque ABN AMRO NV SUCC Du Canada, National Bank of Canada and Citibank of Canada*, the High Court of the Supreme Court of the Judicature (Civil Jurisdiction) Demerara, Civil Jurisdiction.

[37] AMNESTY INTERNATIONAL, above n 1, 66, 78.

into a river over the course of thirty years. Australia's Broken Hill Proprietary Company Limited (BHP) was the majority owner and operator of Ok Tedi Mining Limited (OTML), and the mine was one of Papua New Guinea (PNG)'s most important contributors to the economy.[38] However, while the original mining agreement provided that waste was to be stored in a tailings dam, OTML was allowed to operate without one after a landslide destroyed the dam's foundations in 1984 while it was under construction.[39] The ongoing riverine waste disposal cumulatively has had a devastating impact on the environment and the 250 indigenous communities who rely upon the water in the Ok Tedi and Fly rivers and adjacent forests for subsistence.[40] Yet, the PNG government never ordered OTML to mitigate the environmental impact or to rehabilitate the river system.[41]

In 1994, claims were brought against BHP in Australian courts on behalf of 30,000 indigenous villagers, while other claims were filed in PNG courts.[42] This Australian litigation was also the subject of detailed analysis in the 1999 article published by the author.[43] Notably, the remedy sought included not only civil damages for the destruction of subsistence livelihoods, but also court orders to stop further dumping and to construct a tailings dam.[44] Claims based on nuisance and trespass were dismissed on the basis of the Mozambique principle according to which courts do not have jurisdiction to hear cases relating to foreign property rights, while other claims were dismissed on the basis of other doctrines.[45] Ultimately, some claims did proceed, although only those for which a damages remedy could be ordered.[46] Notably, while *forum non conveniens* was argued, the Australian version of the doctrine provides the court with more discretion and so

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[38] Ibid 81-82.
[39] Ibid 82.
[40] Ibid 81-82.
[41] Ibid 83.
[42] Ibid 84. The cases brought in the Australian courts were: *No.5782 of 1994 Rex Dagi and Others v The Broken Hill Proprietary Company Limited* (CAN 004 028 077) *and Ok Tedi Mining Limited*; *No 5980 of 1994 Barry John Shackles; Daru Fish Supplies Pty. Ltd. v The Broken Hill Proprietary Company Limited* (CAN 004 028 077) *and Ok Tedi Mining Limited*; *No 6861 of 1994 Baat Ambetu and Others v The Broken Hill Proprietary Company Limited* (CAN 004 028 077) *and Ok Tedi Mining Limited*; *No.6862 of 1994 Alex Maun and Others v The Broken Hill Proprietary Company Limited* (CAN 004 028 077) *and Ok Tedi Mining Limited*.
[43] SL SECK, above n 23, 171-74, 193-96.
[44] AMNESTY INTERNATIONAL, above n 1, 84.
[45] Ibid 45. The Mozambique principle comes originates from *British South Africa Co v. Companhia de Moçambique* [1893] A C 1 602. The *Dagi* case was dismissed on the basis of this principle. Portions of the *Shackles*, *Ambetu*, and *Maun* cases were dismissed on the basis of the 'act of state' principle which dictates that the Courts of one State will not judge the sovereign acts of another State within its own territory.
[46] AMNESTY INTERNATIONAL, above n 1, 45.

did not lead to dismissal from Australian courts as had been the case in both Bhopal (United States) and Cambior (Canada).[47]

The Amnesty report details the attempts by BHP and the PNG government to legislatively block victims from pursuing their claims by criminalizing the filing of lawsuits in foreign courts, and the contempt of court actions brought in response in Australian courts against OTML and BHP.[48] BHP and all plaintiffs ultimately reached a settlement in 1996, according to which BHP was to pay compensation to affected villagers, provide an equity share in the mine in trust for local communities, consider rehabilitation measures, and implement a tailings containment.[49] However, subsequent studies of the environmental impact of the mine led BHP to conclude that these would be greater than predicted and mitigation measures would be unsuccessful.[50] As the PNG government wanted to keep the mine open, BHP began to divest from the mine, and secured an agreement with the PNG government granting it immunity from further liabilities even as OTML decided against implementation of a tailings containment system.[51] Under the agreement, BHP transferred all its shares to a Singaporean company (the PNG Sustainable Development Program Limited) in 2002. [52] Meanwhile, Community Mine Continuation Agreements offering compensation packages were signed between OTML and local communities in order to keep the mine operating,[53] yet, as

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[47] SL SECK, above n 23, 157-74.

[48] AMNESTY INTERNATIONAL, above n 1, 85-87.

[49] Ibid 87. The agreement was codified as *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act* 1995 in PNG. Under the agreement BHP agreed to pay around US$86 million to affected villagers along the river and an additional US$31 to those most severely affected in the lower OK Tedi river area. Under the agreement plaintiffs retained the right to recommence legal action in the Supreme Court of Victoria with regards to any dispute related to the settlement. The PNG government further passed the *Compensation (Prohibition of Foreign Legal Proceedings) Act 1995* imposing fines or imprisonment for anyone who brings proceedings in a foreign court in relation to compensation claims arising from any mining and petroleum projects in PNG.

[50] AMNESTY INTERNATIONAL, above n 1, 88.

[51] Ibid. In April 2000, two new actions were brought in the Supreme Court of Victoria against BHP and OTML seeking to enforce commitments made in the *Eighth Supplemental Agreement*, which had allegedly not been honoured, specifically the failure to construct a tailings containment system to mitigate environmental damage. *Rex Dagi v The Broken Hill Proprietary Company Limited and Ok Tedi Mining Limited* No 5002 of 2000; *Gabia Gagarimabu v The Broken Hill Proprietary Company Limited and Ok Tedi Mining Limited* No 5003 of 2000. However, before these cases were heard the PNG government and BHP came to a new agreement, the *Ok Tedi Mine Continuation (Ninth Supplemental) Agreement (The Mining Act 2001)*.

[52] AMNESTY INTERNATIONAL, above n 1, 89.

[53] Ibid.

environmental impacts were worse than imagined, compensation was enhanced in 2007.[54]

In 2013, the PNG Parliament passed a bill giving itself complete ownership of OTML and removing all legal liability limits against BHP (now BHP Billiton).[55] In early 2014, a PNG court issued an interim order restraining OTML from further dumping of mine waste, an order that the PNG government planned to appeal.[56]

(4) the 2006 dumping of toxic waste in Abidjan, Côte d'Ivoire by Trafigura:

This case has a slightly different character from the three other examples in the Amnesty report, as the transnational character here is not the transfer of potentially hazardous industrial technology, but rather the direct transfer of the hazardous waste itself. In August 2006, hazardous waste was dumped in nearly twenty different locations around the city of Abidjan, "close to houses, workplaces, schools, fields, and the city prison".[57] The waste was dumped by Compagnie Tommy, a small newly licensed Ivorian company without the "means or expertise to handle hazardous waste" that had been contracted to dispose of the waste by Trafigura, "the world's third largest independent trader of crude and oil products."[58] According to Amnesty, the contract called for Compagnie Tommy to "discharge" the waste in an "open dumpsite for domestic waste, located in a poor residential district of Abidjan" with "no facilities for storing or processing hazardous waste."[59] Nor did the contract call for any such treatment.

Trafigura had purchased coker naphtha from a Mexican state-owned petroleum company, and used a process of caustic washing to refine it, which took place on board the *Probo Koala* in the Mediterranean, a ship chartered by Trafigura.[60] Trafigura's intention was to sell the refined product as a "cheap blendstock for gasoline" and to dispose of the waste subsequently stored in the ship. Having chosen this method of refinement over a different process that would have produced a less harmful waste, Trafigura contemplated disposing of the waste safely through a Dutch specialist company. However, this would have been very expensive.[61]

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[54] Ibid 91.
[55] Ibid 93.
[56] Ibid 94. *Bagari and Others v Minister for Finance of Papua New Guinea and Others*, WS 14 of 2014, Order of the National Court of Justice of Papua New Guinea (24.01.2014).
[57] AMNESTY INTERNATIONAL, above n 1, 97.
[58] Ibid.
[59] Ibid.
[60] Ibid 97-98.
[61] Ibid 98.

According to Amnesty, people living or working near the waste sites in Abidjan experienced symptoms ranging from nosebleeds and vomiting to skin lesions and respiratory problems that were found by the World Health Organization to be consistent with exposure to this type of waste.[62] At least 100,000 people sought treatment at health facilities while others sought traditional healers or received no treatment at all (the elderly). While the government provided free medical treatment for thousands, Trafigura never made public full information about the exact composition of the waste, and disputes the possibility that it could cause long-term consequences.[63] The government took initial steps to remove the waste and clean it up, yet sources including Amnesty have documented that the decontamination process was not complete despite settlement money paid by Trafigura that was designated for this purpose.[64]

A National Commission of Enquiry concluded that there had been systemic failings of Ivorian institutions, including enforcement of licence requirements, but also that there were clearly failings of corporate actors and individuals who must have known of the inability of Compagnie Tommy to safely dispose of the waste.[65] Criminal prosecutions were brought against various individuals in Côte d'Ivoire courts. However, a settlement agreement entered into between the government and Trafigura provided immunity to all members of Trafigura, including, in practice, individual Trafigura executives and employees who had been charged criminally and released on bail.[66] Two individuals were ultimately convicted, neither from Trafigura or the government of Côte d'Ivoire.[67]

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[62] Ibid 99.
[63] Ibid.
[64] Ibid 100.
[65] Ibid 101. Republic of Côte d'Ivoire, *National Commission of Enquiry on the toxic waste in the district of Abidjan*, 15.11.2006.
[66] AMNESTY INTERNATIONAL, above n 1, 102. In September 2006, State prosecutors in Côte d'Ivoire brought criminal charges against a number of individuals alleged to have been involved in the dumping of the toxic waste. The accused included local port and customs officials, employees of local companies implicated in the dumping, and the CEO and two employees of the Trafigura Group. *Yao Essaie Motto & Others v Trafigura Limited and Trafigura Beheer BV*, High Court of Justice, Queen's Bench Division, Claim No HQ06X03370. The government of Côte d'Ivoire and Trafigura reached a settlement, the *Protocol of agreement (Protocole d'accord) between the State of Côte d'Ivoire and the Trafigura Parties*, 13.02.2007, which effectively ended all actions in the Côte d'Ivoire against members of Trafigura.
[67] AMNESTY INTERNATIONAL, above n 1, 102-103. Salomon Ugborugbo (head of Compagnie Tommy) and Essoin Kouao (shipping agent from WAIBS (West African International Business Services), the port agent used by Trafigura who had recommended Compagnie Tommy) were ultimately convicted in relation to the incident. *Arrêt No 14 du 22/10/2008*, Cour d'Assises, Cour d'Appel Abidjan.

The settlement agreement was entered into in 2007, before a full determination had been made of the number of victims and the nature of the harm, and without prior consultation with victims. The amount was US$200 million, and it was intended for compensation and clean-up costs, with Côte d'Ivoire agreeing to compensate the victims and to take responsibility for any future claims.[68] Yet the method of distributing the compensation has been critiqued for failing to include victims who chose traditional healers, victims whose medical forms were not properly completed by medical staff at the time of the emergency, and victims who did not have official identify cards.[69]

Legal actions were also brought in foreign courts. A civil action in 2006 in UK courts resulted in a 2009 US$49 million settlement agreement between Trafigura and 30,000 claimants.[70] Terms of the settlement included that Trafigura would not admit liability, the law firm would not bring any further claims against Trafigura relating to the waste, and confidentiality was imposed upon independent experts who examined medical evidence as well as the claimants and their lawyers. However, a joint public comment was released that stated in part that the plaintiffs' law firm acknowledged "the slops could at worst have caused a range of short term low level flu like symptoms and anxiety."[71] Distribution of the settlement funding to victims was met with fraud and irregularities, with thousands left unpaid. Ultimately, victims who had not been included in this action were left without access to necessary information and expertise.

A criminal prosecution was brought by the Dutch Public Prosecutor against Trafigura Beheer BV (TBBV), the group holding company incorporated in the Netherlands,[72] as well as one against Trafigura Limited (a wholly owned subsidiary of TBBV incorporated in the UK)'s London-based employees, and the Captain of the *Probo Koala*.[73] Separate charges were brought in the Netherlands against Trafigura's chairman.[74] After some successful convictions under EU and Dutch law, including a €1 million fine imposed on TBBV, many of which were appealed, an out-of-court settlement was reached ending all legal proceedings that obliged TBBV to pay the fine, and imposed fines on individuals as well.[75] However, the company took the

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[68] AMNESTY INTERNATIONAL, above n 1, 103.
[69] Ibid 104.
[70] Ibid 105.
[71] Ibid. The joint statement was approved by the High Court, *Motto & Ors v Trafigura Ltd & Anor* [2011] EWHC 90201 (Costs) (15.02.2011), paras 70, 109.
[72] AMNESTY INTERNATIONAL, above n 1, 97.
[73] Ibid 107.
[74] Ibid 108.
[75] Ibid. The Dutch Court of First Instance found TBBV, Naeem Ahmed (a London-based employee of Trafigura Ltd), and Captain Chertov guilty. See Amnesty International English translation of verdict on Trafigura Beheer BV, LJN (National Case Law Number): BN2149, District Court of Amsterdam, 13/846003-06 (PROMIS), 23.07.2010. The Court of appeal annulled the verdict against Naeem Ahmed in July

position that despite this no executives of Trafigura had accepted a conviction or made any admission of liability or guilt.[76] Meanwhile, Trafigura Limited, was never investigated or prosecuted in the UK.[77]

(5) Conclusions

In sum, the case studies presented in Amnesty's *Injustice Incorporated* illustrate that environmental contamination issues may feature prominently in relation to transnational corporate human rights violations, and, while host and home state practice has emerged attempting to address remedy for victims, this practice is sporadic and inadequate. The rights violated in these examples include rights of local peoples to health, food, water, livelihood, and a clean environment.[78] However, home and host states have failed at working cooperatively to meet their obligations to provide access to effective remedy for victims. These failures have been compounded by allegations of corruption at multiple levels that inhibit both the awarding of compensation in the first place and its delivery once awarded.[79]

The case studies also suggest that it is not simply a question of rectifying doctrines such as the much criticized common law doctrine of *forum non conveniens*. As the Ok Tedi litigation in particular illustrates, even where home state courts accept jurisdiction over a case and a settlement is reached, clean up, justice and accountability may still be out of reach. Ultimately, *Injustice Incorporated* identifies three major obstacles to remedy:[80] (a) "extraterritorial" legal issues, such as separate legal personality, limited liability, and jurisdictional hurdles; (b) corporate control over information leading to a lack of access to information by victims; and (c) the nature of "corporate-state relationships" that impact the "willingness and ability of States to uphold human rights, including the right to remedy."

2011. This was appealed by the Public Prosecutor. The Court of Appeal upheld the €1 million fine against TBBV, though the ruling was appealed by both TBBV and the Public Prosecutor. All legal proceedings were ended in November 2012 when the Dutch Public Prosecutor and TBBV, Claude Dauphin and Naeem Ahmed reached a settlement. As a result, the Court of Appeal ruling obliging TBBV to pay the €1 million fine became final. In addition, the settlement provided for TBBV to pay a further €300,000, Claude Dauphin (Trafigura's CEO) a €67,000 fine, and Naeem Ahmed was required to pay a €25,000 fine. AMNESTY INTERNATIONAL, above n 1, 108-109.

[76] AMNESTY INTERNATIONAL, above n 1, 108-109.

[77] Ibid 110.

[78] Ibid 82, 98. See further on the topic of environmental rights, J KNOX, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox: Mapping Report*, UNHRC, 30.12.2013, UN Doc A/HRC/25/53.

[79] See, for example, AMNESTY INTERNATIONAL, above n 1, 50, 76, 107, 110.

[80] Ibid 199.

3. Contributions of the International Law Commission

(1) State Responsibility, Liability, and Do No Harm

The work of the International Law Commission (ILC) will be the subject of attention in this part.[81] In 1947, the UN General Assembly established the ILC with the mandate to "initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification".[82] The ILC has since that time issued many reports and studies that have been considered influential by the International Court of Justice, whether or not they codify or progressively develop customary international law, and has also prepared draft treaties for "[m]any of the most important international conventions."[83] Importantly, the ILC has considered analogous issues to those of concern in the business and human rights treaty debate. The work of the ILC deserves serious attention and reflection.

As is well known, in the 1950s the ILC began work on the codification of the international law of state responsibility[84] – which resulted in 2001 in draft *Articles on the Responsibility of States for Internationally Wrongful Acts* [hereinafter DARS].[85] The DARS have been well received by international courts and tribunals, including the International Court of Justice.[86] In the business and human rights context,

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[81] See generally International Law Commission <http://legal.un.org/ilc/ > accessed 26.05.2017.

[82] Ibid. The ILC was created in accordance with Art 13(1)(1) of the Charter of the United Nations.

[83] See generally MN SHAW, *International Law,* 7th ed, Cambridge University Press, 2014, pp 84-86; A BOYLE and C CHINKIN, *The Making of International Law*, Oxford University Press, 2007, especially pp 171-204. Boyle and Chinkin note that the ILC has tended not to draw a "sharp distinction between codification and progressive development," enabling international tribunals to rely on ILC work "without overtly enquiring whether particular articles represent existing law, revision of existing law or a new development of the law." A BOYLE and C CHINKIN, ibid, p 200.

[84] 'State Responsibility' in *Summaries of the Work of the International Law Commission* <http://legal.un.org/ilc/summaries/9_6.shtml> accessed 26.05.2017.

[85] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* Report of the International Law Commission: Fifty-third Session, UN Doc A/56/10 (2001) pp 43-365.

[86] BOYLE and C CHINKIN, above n 83, pp 183-185. For example, an early version of the DARS was relied upon by the International Court of Justice (ICJ) in *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* , Judgement, 25.09.1997, ICJ Reports 1997, 7, paras 47, 79, 83. The ICJ further commented in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia v. Serbia*) ICJ Reports 2007, 7, para 420, that Art 16 of DARS dealing with coercion of a

scholars frequently cite DARS Article 8 for the proposition that the conduct of non-state actors, including businesses, cannot be directly attributed to the state unless the business was acting under the "instructions of, or under the direction and control of" that state (the effective control test).[87] Contested interpretations of this and related Articles that raise the possibility of attribution of transnational corporate conduct to the state have received much attention in the business and human rights literature, including Article 5 (agency), Article 7 (governmental authority), Article 9 (conflict zones), and Article 11 (adoption of conduct).[88] As I have argued elsewhere, other Articles of DARS, are clearly relevant to conceptualizing the state duty to protect, including Article 4 which draws attention to the conduct - both actions and omissions - of state organs, including organs of the home state.[89] Indeed, it follows from Article 4 of DARS that as judicial organs are state organs too, home states have a duty of due diligence to prevent and remedy human rights violations by TNCs, including a duty of both courts and legislatures to provide victims of human rights violations with access to justice through home State courts.[90] Moreover, this argument is strengthened, not weakened, by Principle 25 of the UN Guiding Principles.[91]

State or another international organization is reflective of customary international law.

[87] See generally SL SECK, 'Conceptualizing the Home State Duty to Protect Human Rights' in Karin Buhman, Mette Morsing, & Lynn Roseberry (eds), *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives,* Palgrave Macmillan, 2011, pp25, 39-40. For a small sample of sources see NMCP JÄGERS, *Corporate Human Rights Obligations: In Search of Accountability,* Intersentia 2002, pp 169-72; O DE SCHUTTER, 'The Accountability of Multinationals for Human Rights Violations in European Law' in P ALSTON (ed), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp 235-237; R MCCORQUODALE and P SIMONS, 'State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70:4 *Modern Law Review* 598.

[88] SL SECK, above n 87, pp 39-42 and sources cited. See also Art 16 (aiding or assisting) for the possibility of direct state complicity. SL SECK, above n 87, p 46 citing R MCCORQUODALE and P SIMONS, above n 87, 611-15.

[89] SL SECK, above n 87, pp 43-44.

[90] Ibid pp 43, 45-46.

[91] Principle 25 states: "As part of their duty to protect … 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." UN Guiding Principles, Principle 25, page 22. While the scope of meaning of "jurisdiction" is clearly contested (and undermined by those who unnecessarily argue in favour of "extraterritorial" obligations), the reference in the Commentary to Principle 25 to National Contact Points of the OECD Guidelines for Multinational Enterprises clearly supports an interpretation that this Principle applies to home states. See further SL SECK, 'Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights' (2011) 49 *Canadian Yearbook of International Law* 51, 111-12.

What has received far less attention in the business and human rights scholarly and advocacy communities is the parallel work undertaken by the ILC initially conceptualized as International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law. Begun in the 1970s, this plan of work was specifically designed to consider secondary rules for acts such as industrial activities that were not in themselves wrongful under international law, but which could cause international harms such as transboundary pollution impacting the territory of another state.[92] This approach was strongly criticized by many, including notably Professor Ian Brownlie who described this approach as "fundamentally misconceived" in its confusion of primary and secondary rules, and its failure to appreciate that "much of state responsibility […] is concerned with categories of lawful activities which have caused harm."[93]

In 1997, the ILC's work on international liability was subdivided into two separate streams, one on the Prevention of Transboundary Damage from Hazardous Activities, which resulted in 2001 in draft Articles (Prevention Articles);[94] while the other resulted in 2006 in draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities (Loss Allocation Principles).[95] These two bodies of work are now considered a contribution to the codification of primary rules of international environmental law designed to address transboundary environmental risk management.[96] However, relegating the relevance of this body of work to the environmental arena would be a grave mistake, although an easy one to make in light of the problem of fragmentation in international law.[97]

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[92] A BOYLE and C CHINKIN, above n 83, 197-198.

[93] I BROWNLIE, *System of the Law of Nations: State Responsibility (Part I)*, Clarendon Press 1983, p 50. See also A BOYLE and C CHINKIN, ibid, who describe the original conceptualization as "fundamentally confused" and "extraordinary" in part for "appear[ing] to believe that no primary obligations of environmental protection existed" and "unable to grasp that international law might …impose obligations of regulation, diligent control, and prevention of harmful emissions even in respect of lawful activities without either prohibiting the activities or excluding the possibility of state responsibility for breach of these activities." ibid.

[94] INTERNATIONAL LAW COMMISSION, above n 8.

[95] INTERNATIONAL LAW COMMISSION, above n 9.

[96] On the conceptualization as primary rules, see ibid 'Principle 1: Commentary' para 6.

[97] See, for example, INTERNATIONAL LAW COMMISSION STUDY GROUP, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' *Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, A/CN.4/L.682 and Corr.1, 13.04.2006.

As I have discussed elsewhere,[98] the kind of environmental harms identified in the second and third Amnesty case studies, if not the first, may be classified as "intra-territorial" problems that, if examined through the lens of Principle 2 of the 1992 Rio Declaration,[99] fall within the exclusive territorial jurisdiction of the host state. This is because the starting point of Principle 2 is the sovereign right of states to exploit their natural resources in accordance with their own environmental and developmental policies (reflecting the principle of permanent sovereignty over natural resources).[100] That these environmental policies need not be so rigorous as those of the "first world" is also embedded in the Rio Declaration (all Principles of which were re-endorsed in the 2012 Rio +20 process culminating in *The Future We Want*).[101] Specifically, Principle 11 provides that while all states must enact effective environmental regulation, the application of standards and management practices from rich countries within developing countries may "be inappropriate and of unwarranted economic and social cost."[102]

However, examining these cases through an international human rights lens, as does the Amnesty Report, highlights that this interpretation of Principle 11 is fundamentally flawed. Local communities in host states anticipate that environmental standards applied by transnational corporations will be equally rigorous wherever in the world businesses operate. Environmental human rights include both procedural rights protections, and substantive rights protections, as well as additional protections for vulnerable groups.[103] While substantive environmental rights that may be classified as second generation social, economic, and cultural rights, or third generation peoples rights,[104] may arguably be interpreted as requiring progressive realization by states, this does not mean that businesses with a responsibility to respect human rights and thus to do no harm are off the hook. Indeed, it is precisely when states are failing in their duty to protect human rights by failing to pass and enforce appropriate regulatory standards that the business responsibility to respect rights requires businesses to go beyond strict compliance with domestic host state law and embrace their independent responsibility to respect rights. Importantly, the responsibility of the state and the business will be separately engaged for breaches of their independent duties.

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[98] SL SECK, above n 4, 170; see also SL SECK, 'Human Rights and Extractive Industries: Environmental Law and Standards' *Human Rights Law and Extractive Industries*, Paper No 12, Page No 12-1 – 12-42 (Rocky Mt Min L Fdn 2016).
[99] *Rio Declaration on Environment and Development*, Rio de Janeiro, 14.06.1992, UN Doc. A/CONF.151/26 (vol. 1); 31 ILM 874 (1992).
[100] Ibid Principle 2.
[101] United Nations General Assembly, *The Future We Want*, Rio de Janeiro, 11 September 2011, UNGA 66th Sess., UN Doc. A/RES/66/288.
[102] *Rio Declaration,* n 98, Principle 11.
[103] J KNOX, above n 78.
[104] S BAVIKATTE and T BENNETT, "Community stewardship: the foundation of biocultural rights" (2015) 6:1 *Journal of Human Rights and the Environment* 7-29.

A different question is whether the "do no harm principle", embedded within the second half of Rio Principle 2, applies to home states as well as host states. This principle is widely understood to reflect customary international law, although its precise meaning and scope are contested. The Principle arose initially out of international disputes such as the 1930s Canada-United States international arbitration over air pollution arising from the Trail Smelter in British Columbia, Canada, and harming farmers in the United States.[105] According to Principle 2, while engaging in activities within their jurisdiction or control, states may not cause harm to the territory of other states (transboundary harm) or areas beyond the jurisdiction of any state (global commons harm). This "do no harm" principle is generally understood as requiring the exercise of due diligence,[106] and provides a basis for the ILC's Prevention Articles and Loss Allocation Principles. An unanswered question is whether the ILC's work, and the do no harm principle more generally, are relevant for what I and others classify as "transnational harm" – that is harm arising from foreign direct investment associated with the transfer of potentially hazardous industrial technologies, as found in Amnesty case studies 1-3, as well as to the actual transfer of the hazardous substances, as found in Amnesty case study 4, which can more easily be viewed as a type of transboundary movement.[107] While the ILC initially conceptualized transnational harm as falling within its plan of work, it was ultimately not explicitly included, and has been described by Shinya Murase as having "disappeared" over time.[108] Despite this, the Commentaries of the Loss Allocation Principles frequently reference the Bhopal disaster for support.[109]

Thus, fragmentation issues aside, a key question is whether the focus of the Prevention Articles and Loss Allocation Principles on *transboundary* harm should be understood as limited to situations of physical border-crossing of hazardous *substances* causing harm, or whether it should also include the border-crossing of foreign direct investment and related exports of potentially hazardous *technologies.*[110]

(2) ILC Prevention Articles and Loss Allocation Principles

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[105] RM BRATSPIES and RA MILLER (eds), *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration*, Cambridge University Press, 2006.

[106] J KNOX, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96:2 *American Journal of International Law* 291.

[107] SL SECK, above n 4, 180-81.

[108] S MURASE, 'Perspectives from International Economic Law on Transnational Environmental Issues' (1995) *Receuil Des Cours* 287, 396-98.

[109] SL SECK, *Home State Obligations for the Prevention and Remediation of Transnational Harm: Canada, Global Mining, and Local Communities* (DPhil thesis, York University 2008), p 295. See INTERNATIONAL LAW COMMISSION, above n 9, n.415, n. 468, n. 473, and n. 478.

[110] This issue is explored at length in SECK, above n 109, pp 290-413.

The ILC Prevention Articles were designed to address the "imperative for operators of hazardous activities to take all steps necessary to prevent harm."[111] Article 1 provides that the Prevention Articles apply to "activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."[112] Transboundary harm is defined in Article 2(c) as "harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border."[113] State of origin is defined in Article 2(d) as "the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are planned or are carried out."[114] Thus the scope of the Prevention Articles is dependent upon understandings of "territory," "jurisdiction," and "control," among other terms. As I have analyzed in detail elsewhere, it is possible to argue that transnational harm associated with foreign direct investment in large-scale mining falls within the scope of Prevention Articles, even if this was not the intention of the drafters.[115] One could then read the Prevention Articles with the understanding that the "State of origin" could be the home state which serves as the base for foreign direct investment and thus transnational corporate conduct.

The ILC Prevention Articles have been described as a codification of "pre-existing law on transboundary risk management."[116] While not overly ambitious, they nevertheless provide useful lessons for a possible business and human rights treaty. Article 3 provides that the state of origin "shall take all appropriate measures to prevent significant transboundary harm or at any rate to minimize the risk thereof."[117] This includes an obligation to "adopt and implement national legislation incorporating accepted international standards."[118] It is understood as an obligation of "due diligence" that is:

> "[M]anifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in a timely fashion, to address them. Thus States are under an obligation to take *unilateral* measures to prevent significant transboundary harm …"[119]

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[111] INTERNATIONAL LAW COMMISSION, above n 8, p 377.
[112] Ibid p 380.
[113] Ibid p 386.
[114] Ibid p 386.
[115] SL SECK, above, n 109, pp 296-303.
[116] A BOYLE and C CHINKIN, above n 83, p 198.
[117] INTERNATIONAL LAW COMMISSION, above n 8, p 390.
[118] Ibid p 391.
[119] Ibid p 393 [emphasis added].

While the "operator of an activity is expected to bear the costs of prevention," the State of origin is expected to put in place "administrative, financial, and monitoring mechanisms" that meet a standard of "good Government."[120]

Article 4 addresses the importance of state cooperation in good faith, as the participation of the state likely to be affected is "indispensible" to enhancing the effectiveness of preventative action.[121] This Article could be seen as promoting communication between home and host states. Articles 5-7 outline regulatory requirements that the state of origin must implement. These include requirements of prior authorization[122] and prior assessment.[123] Article 8 provides for timely notification of risk of the state likely to be affected, including transmission of all available technical and other relevant information.[124] Articles 9-13 then provide procedures "essential to balancing the interests of all States concerned",[125] with factors to consider listed in Article 10, and a requirement in Article 12 that states exchange information concerning the proposed activity.[126]

Importantly, Article 13 contemplates that states shall provide the "public likely to be affected" with the "relevant information relating to [the] activity, the risk involved, and the harm which might result and ascertain their views."[127] This obligation is applicable even if the public is beyond the borders of the state.[128] However, Article 14 provides a narrow exception with regard to national security and industrial secrets, including information protected by intellectual property.[129] Article 15 compliments Article 13 by requiring that access to justice be provided in the courts of the state of origin, in keeping with the principle of non-discrimination.[130] However, the Prevention Articles do not impose a requirement that a judicial remedy or other procedure be in place for state nationals in the first place and so this Article must be distinguished from a true right of transnational access to justice.[131] Thus, a state would be in compliance with the Article 15 non-discrimination principle where access to justice is simply unavailable to anyone. The key is that the availability – or unavailability – of access to justice does not distinguish between citizens of the state of origin and the affected state. Additional

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[120] Ibid p 395.
[121] Ibid p 396.
[122] Ibid p 399 (Art 6).
[123] Ibid p 402 (Art 7).
[124] Ibid p 406.
[125] Ibid p 406.
[126] Ibid pp 413-420. See detailed analysis in SECK, above n 109, pp 308-310.
[127] Ibid p 422.
[128] Ibid p 424 (Commentary to Art 13, para (6)).
[129] Ibid p 426. However, the state of origin "shall cooperate in good faith with the State likely to be affected in providing as much information as possible in the circumstances."
[130] Ibid p 427.
[131] See further analysis in SL SECK, above n 109, p 312.

Articles contemplate the importance of emergency preparedness and notifications of emergencies.[132]

The 2006 Loss Allocation Principles were the result of a request that the ILC resume its work on liability "largely at the behest of developing countries", despite the view of some ILC members and some governments that these were unnecessary due to the existence of the Articles on State Responsibility and the Prevention Articles.[133] The drafting process of the Loss Allocation Principles was politically charged due in part to state rejection of the possibility of state liability, and the resulting "pure soft law" text has been described as a "collective failure of nerve" rather than a "reasoned outcome."[134] They are nevertheless – or perhaps for this reason – useful to consider. As noted above, access to justice is contemplated in the Prevention Articles. However, as will be seen, the Loss Allocation Principles consider the importance of remedy more expansively.

The scope of the Loss Allocation Principles is said to be the same as the scope of the Prevention Articles.[135] "Victim" is defined as "any natural or legal person or State that suffers damage,"[136] while "operator" is defined as "any person in command or control of the activity at the time the incident causing transboundary damage occurs."[137] According to Principle 3, the purpose of the Loss Allocation Principles is twofold: to "ensure prompt and adequate compensation to victims of transboundary damage" and to "preserve and protect the environment in the event of transboundary damage, especially with regard to mitigation of damage to the environment and its restoration and reinstatement."[138] Accordingly, the Loss Allocation Principles contemplate the imposition of strict liability on the operator "or, where appropriate, other person or entity", although liability may be limited.[139] Principle 4 contemplates that measures should require the operator or other entity to "establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation," and, in appropriate cases, industry-wide funds should be established at the national level.[140]

Principle 6(1) is the only Principle to be drafted using mandatory language, and goes beyond the Prevention Articles by requiring States to "provide their

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[132] INTERNATIONAL LAW COMMISSION, above n 8, p 429 (Art 16), p 431 (Art 17).
[133] AE BOYLE, 'Globalising Environmental Liability: the Interplay of National and International Law' (2005) 17 *Journal of Environmental Law* 3, 5; R LEFEBER, *Transnational Environmental Interference and the Origin of State Liability*, Kluwer Law International, 1996, pp 190-191.
[134] BOYLE and C CHINKIN, above n 83, pp 199-200.
[135] INTERNATIONAL LAW COMMISSION, above n 9, pp 111-112.
[136] Ibid p 122 (Principle 2(f)).
[137] Ibid p 122 (Principle 2(g)). Operator is not defined in the Prevention Articles.
[138] Ibid p 140.
[139] Ibid p 151 (Principle 4(2)).
[140] Ibid p 151 (Principle 4(3) and (4)).

domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage…".[141] Non-discrimination is then invoked more meaningfully here, and without prejudice to victims seeking remedies elsewhere, although states are also called upon to provide recourse to expeditious international claims settlement procedures.[142] Principle 7 encourages states to conclude "specific global, regional or bilateral agreements" in respect of particular categories of hazardous activities, including with them arrangements for industry and/or State funds to provide supplementary compensation."[143] Finally, Principle 9 provides that each state "should adopt the necessary legislative, regulatory, and administrative measures to implement" the principles, and should cooperate to do so.[144]

It is important to consider the relationship between the Prevention Articles, Loss Allocation Principles, and the DARS. According to the Preamble of the Loss Allocation Principles, the Principles are without prejudice to the rules relating to State Responsibility, and a claim may lie under those rules in the event of a breach of an obligation of prevention.[145] The "basic understanding" of the Principles is described as the need to adopt a "scheme of allocation of loss, spreading the loss among multiple actors, including as appropriate the State", with a "central theme" being that each state has the freedom to choose "one option or the other in accordance with its particular circumstances and conditions."[146] As both the Prevention Articles and Loss Allocation Principles are understood as primary rules, state responsibility may also be invoked "to implement not only the obligations of the State itself but also the civil responsibility or duty of the operator."[147]

While the Loss Allocation Principles have been criticised by some as being too weak and not sufficiently reflective of existing international law obligations,[148] they nevertheless provide food for thought as a model for a business and human

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[141] Ibid p 172.
[142] Ibid pp 172-174.
[143] Ibid p 180.
[144] Ibid pp 181-182.
[145] Ibid p 111 and p 114. This suggests that where a failure of prevention has occurred, recourse to state responsibility is in order; whereas where the obligations of prevention have been complied with yet damage occurs nonetheless, recourse to the loss allocation principles is required. However, the relationship is not entirely clear.
[146] Ibid p 112.
[147] Ibid pp 118-119.
[148] AE BOYLE above, n 133; A BOYLE and C CHINKIN, above n 83, pp 198-200. See also the related yet distinct work of the INTERNATIONAL LAW ASSOCIATION, 'Final Report of the Transnational Enforcement of Environmental Law Committee' in *Report of the 72nd Conference held in Toronto 4-8 June, 2006,* London, 2006, p 655. See comparative analysis of the ILA Report in SL SECK, above n 109, pp 326-329.

rights treaty. Several ideas are notable, perhaps especially that specific treaties, whether bilateral, regional, or multilateral, be negotiated with regard to specific categories of hazardous activities; and that these treaties contemplate the need for strict civil liability, mandatory insurance, and industry-wide supplementary funds.

4. Conclusions: Lessons for the Treaty Process

The *Injustice Incorporated* case studies demonstrate that there is no single cause of transnational corporate impunity, but rather it is the result of many failings. The challenge, then, in the design of a business and human rights treaty, is how to address these multiple failings in the design of a single treaty. For the purpose of this chapter, the question is whether the work of the ILC in the Prevention Articles and Loss Allocation Principles has anything to offer.

One key finding of the Amnesty case studies is that home and host states have failed to work cooperatively to meet their respective obligations to provide access to effective remedy for victims. Rather, state practice has been both sporadic and inadequate. In addition, as noted above, the Amnesty report concludes that "extraterritorial" legal issues such as separate legal personality, limited liability, and jurisdictional hurdles create obstacles to justice. The importance of cooperation between the state of origin and the state likely to be affected is stressed in both the Prevention Articles, and the Loss Allocation Principles. This is in keeping with more recent statements by Professor John Knox on the obligations of states to cooperate in the protection of environmental rights, including rights affected by climate change.[149] Importantly, neither the ILC Prevention Articles nor the ILC Loss Allocation Principles conceptualize the solution to transboundary harm as requiring "extraterritoriality", preferring instead to speak of a dual responsibility to regulate in keeping with duties of international cooperation. The ILC Prevention Articles specifically contemplate that the state of origin shall regulate the industrial activity at issue, which, in a case of transboundary border-crossing pollution harm, would mean the state where the industrial activity is physically located is to regulate in a comprehensive manner.[150] Yet both the ILC Prevention Articles and Loss Allocation Principles also contemplate a regulatory role for the affected state, whether the provision of information to those likely to be affected by environmental harm,[151] or more comprehensively that each state adopt legislative, administrative, and regulatory measures necessary to implement the Loss Allocation Principles.[152] The relationship between a home and host state in a transnational foreign direct investment context is, of course, not identical to that of states in the transboundary

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[149] INTERNATIONAL LAW COMMISSION, above n8, Art 4; INTERNATIONAL LAW COMMISSION, above n 9, Principle 9; J KNOX, above n 78, 18.
[150] INTERNATIONAL LAW COMMISSION, above n 8, Arts 5-7.
[151] INTERNATIONAL LAW COMMISSION, above n 8, Art 13.
[152] INTERNATIONAL LAW COMMISSION, above n 9, Principle 9.

pollution context, yet the idea that it is normal and essential for more than one state to play a role in addressing the problem at issue is surely an important lesson. The key is to move to a language of shared responsibility, and away from the language of extraterritoriality, thereby opening the door to acceptance of the essential nature of the home state regulatory role as a demonstration of responsibility for existing transnational relationships.

A second lesson from the ILC and environmental law more generally is the focus upon the responsibility of "operators" of hazardous activities, or, where appropriate, other persons or entities.[153] This language gets to the core of who is in control of the industrial activity, potentially overcoming issues of separate legal personality of parent and subsidiary companies in appropriate cases. Moreover, a focus on the operator of an activity moves away from questions surrounding the types of businesses that would be subject to a treaty obligation - for example, it would no longer appear relevant whether or not the business is a state-owned enterprise.[154] A related issue is the concern over limited liability being used to restrict the ability of victims to seek compensation for harm by insulating the parent company from liability. Lessons from the ILC Loss Allocation Principles highlight the importance of insurance coverage for hazardous activities, as well as the need for supplementary industry funds.[155] Regulations mandating adequate insurance coverage could easily be incorporated into both home and host state regulation in line with the duty to cooperate to ensure no hazardous activity takes place without it; similarly, the importance of appropriate emergency preparedness and response is something that is contemplated by the ILC, and clearly of relevance to some of the Amnesty case studies, most notably Bhopal.

Another concern raised by the case studies is that of control over information with regard to the nature of hazardous materials being used and lack of access to information by victims in the event of harm. While the focus of the Amnesty report is upon the need for access to information in order to clean up and remedy environmental and health harms, the ILC Prevention Articles stress the importance of participatory processes in environmental decision-making, loosely in line with the three pillars of participatory environmental rights.[156] The importance and content of these rights has been clarified recently by Professor Knox, including the need to respect freedom of expression and the right to protest of environmental

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[153] INTERNATIONAL LAW COMMISSION, above n 9, Principle 2. The language of "owner or operator" is found in some domestic environmental law statutes and has been interpreted to "include individuals or corporations who exercise control even if title to the site is held by a distinct corporation." SL SECK, above n 23, 182.

[154] This has been an issue of concern with regard to the scope of the mandate of the treaty discussion at the UN Human Rights Council. See D CASSEL and A RAMASASTRY, 'White Paper: Options for a Treaty on Business and Human Rights' (May 2015) 36-38.

[155] INTERNATIONAL LAW COMMISSION, above n 9, Principle 4.

[156] INTERNATIONAL LAW COMMISSION, above n 8, Arts 5-8, 13, and 15.

human rights defenders, who face extraordinary risks.[157] Again, a key lesson from the ILC is the importance of both home and host states working cooperatively to ensure that procedural decision-making processes are inclusive before operations begin, with information shared at an early stage, and processes put in place to ensure ongoing communication, oversight, and emergency preparedness throughout the lifecycle of a project.[158] In this way, problems will not fester (as in Ok Tedi), and if or when accidents happen (as in Bhopal, Cambior), processes and relationships will exist to address problems without need of recourse to legal sanctions.

An additional lesson arises with regard to the nature of corporate-state relationships that impact the willingness and ability of states to uphold human rights, including the right to remedy. Both ILC Prevention Articles and Loss Allocation Principles emphasize the importance of access to remedy in accordance with the principle of non-discrimination – that is, access to home state courts should be available on equal terms to those within home or host states.[159] Of course, access to remedy must go beyond non-discrimination to mean access to effective remedy. Nevertheless, following the model of the ILC could place home state courts in a key residual role, overcoming challenges faced by host state capacity issues as well as host state reluctance to prosecute. Having said this, the Ok Tedi case study clearly demonstrates that while doctrines such as *forum non conveniens* are often blamed for access to remedy problems, even where it is not a barrier, effective remedy does not necessarily follow.

Notably, Principle 7 of the Loss Allocation Principles specifically contemplates the importance of treaties being developed to address specific issues. Here it is worth revisiting the fourth Amnesty case study, the Trafigura case, which raises distinct issues for it concerns transboundary movements of hazardous wastes rather than transnational movements of foreign direct investment and technologies. Curiously, and unlike the other three case studies, the problem that arose in Trafigura is already subject to multilateral environmental agreements. It is beyond the scope of this paper to provide a history of the negotiations and controversy over the 1989 Basel Convention on the Control of Transboundary Movements of

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[157] J KNOX, above n 78, 8-12.

[158] Going beyond the environmental focus of the *ILC Prevention Articles*, it would be necessary to incorporate free, prior and informed consent of indigenous peoples. This could lead to community/company agreements common in the extractive industries context, for example. See J GATHII and IT ODUMOSU-AYANU, 'The Turn to Contractual Responsibility in the Global Extractive Industry' (2015) 1 *Business and Human Rights Journal* 69-94.

[159] INTERNATIONAL LAW COMMISSION, above n 8, Art 15; INTERNATIONAL LAW COMMISSION, above n 9, Principle 6.

Hazardous Wastes and their Disposal.[160] This history has been well documented elsewhere, including the concerns expressed by countries of the global south that viewed the dumping of hazardous wastes in African countries as a crime and therefore something to be banned, rather than something that should be subject to a notification and consent procedure as the one established in the Basel Convention.[161] For the purpose of this paper, what is of interest is that in addition to the Convention itself, a Protocol on Liability and Compensation was successfully negotiated and adopted in 1999.[162] However, beyond critiques of the substance of this Protocol is the fact that over 15 years since its negotiation, there are only 11 state parties – all of whom are from the global south – and so the Protocol is not yet in force, as this requires a minimum of 20 state parties.[163]

This scenario is not uncommon. Principle 13 of the 1992 Rio Declaration calls for states to develop national laws on liability and compensation, and to "more expeditiously" develop "international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." Yet states have failed to do this in many contexts, and even where they have negotiated a treaty, a lack of widespread ratification among other issues has raised concerns that these treaties may not in fact be the best way to address the liability and compensation problem.[164] Ultimately, it is wise to remember that the adoption and negotiation of a text – whether a progressive codification of customary international law or a newly agreed treaty text – is only the first step.

Moreover, even well-ratified and implemented treaties will not solve problems if not appropriately designed. A different problem identified in the case studies that is not addressed by either the ILC Prevention Articles or the ILC Loss Allocation Principles is the problem of corruption at multiple levels, inhibiting both

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[160] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22.03.1989, entered into force 05.05.1992) 1673 UNTS 126, 28 ILM 657.

[161] Z LIPMAN, 'Trade in Hazardous Waste' in S ALAM, S ATAPATTU, C GONZALEZ, and J RAZZAQUE (eds), *International Environmental Law and the Global South,* Cambridge University Press, 2015, pp256, 262-265.

[162] Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, Basel, 10 December 1999, UN Doc UNEP/CHW.1/WG/1/9/2. See Z LIPMAN, ibid 268-269.

[163] 'List of Parties and Signatories', <http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx#note1> accessed 26.05.2017.

[164] J BRUNNÉE, 'Of Sense And Sensibility: Reflections On International Liability Regimes As Tools For Environmental Protection' (2004) 53:2 *International and Comparative Law Quarterly* 351; A DANIEL, 'Civil Liability Regimes as a Complement to Multilateral Environmental Agreements: Sound International Policy or False Comfort?' (2003) 12:3 *Review of European, Comparative & International Law* 225.

the awarding of compensation and its delivery once awarded. This may be surprising given the prevalence of anti-corruption conventions.[165] It is unclear, however, whether the explanation lies in the fact that implementation and enforcement of these state obligations has only recently begun to manifest in earnest, or whether the nature of the conventions misses the kinds of corruption experienced by human rights victims seeking access to remedy, as opposed to that facing business enterprises who seek a level playing field for commercial transactions. Whatever path is taken in the development of a business and human rights treaty, the work of the ILC on the prevention and loss allocation of transboundary harm and related treaty developments provide insights into what may be possible, and what may be required for an effective regime to prevent and remedy the kinds of harms highlighted in the Amnesty case studies.

[165] Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (adopted 21.11.1997, entered into force 15.02.1999); United Nations Convention Against Corruption (adopted 31.10.2003, entered into force 14.12.2005) 43 ILM 37. See also SL SECK, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' (2008) 46 *Osgoode Hall Law Journal* 565-603.