

**ACCOUNTABILITY OF MULTINATIONAL CORPORATIONS FOR HUMAN  
RIGHTS VIOLATIONS UNDER INTERNATIONAL LAW**

by

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I declare that **Accountability of multinational corporations for human rights violations under international law** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

A handwritten signature in black ink, appearing to read 'F. Mnyongani', with a long horizontal flourish extending to the right.

16 June 2016

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Mr Freddy Duncan Mnyongani

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Date

To

Fr Dominic Scholten OP

A father, a mentor and an inspiration.

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## On multinational corporations, human rights and international law

“Multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law’s ability to impose basic human rights norms.” Stephens B “The amorality of profit: Transnational corporations and human rights” 2002 (46) *Berkeley Journal of International Law* 54.

“[C]orporations still remain clearly outside the mainstream of international law.” Duruigbo E “Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges” 2008 (6) *Northwestern Journal of International Human Rights* 228.

“Traditional international law does not have much to say about MNCs. If it has shown any interest at all, it has been more concerned with protecting the rights of corporations than with enforcing their duties.” Kamminga MT “Holding Multinational Corporations Accountable for Human Rights Abuses: A challenge for the EC” in Alston P, Bustelo M and Heenan J (eds) *The EU and Human Rights* (Oxford University Press Oxford 1999) 556.

**Key terms:**

Multinational Corporations; corporate accountability; human rights; non-state actors; international law; nationality; domestic law; host state; home state; international personality; state responsibility; *forum non conveniens*; globalization; arbitration, corporate form; incorporated; extraterritorial; state-centric; international human rights; private sphere; public sphere; due diligence; jurisdiction

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## CHAPTER 1

### GENERAL INTRODUCTION

#### 1 INTRODUCTION

The question of human rights accountability of corporations in the course of their international operations raises a number of challenges which this study will address. The first challenge is conceptual. By their very nature, corporations are a business concept designed to facilitate business.<sup>1</sup> Inevitably, to talk of corporate accountability for human rights violations, shifts the discussion to an area which has, until the period shortly after the Second World War, not been the concern of business. The second challenge relates to the nature and function of international law.<sup>2</sup> Historically, international law has been understood to be a system of rules designed to govern inter-state relations.<sup>3</sup> To this end, the very notion of arguing for corporate accountability in international law is seen by some scholars as being misplaced and is therefore contested.<sup>4</sup> Part of the contest is due to the fact that international law is “an actor-centred law” which only operates through its subjects.<sup>5</sup> Corporations, the argument goes, are not subjects of international law and therefore do not hold any obligations under the legal system.<sup>6</sup> The subtext underlying this resistance is that since corporations do not have legal personality

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- 1 See Friedman M *Capitalism and Freedom* (University of Chicago Press Chicago 1962) 133 who states that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud”.
  - 2 The use of the term “international law” in this study will be with reference to “public international law”. Private international law and its principles will only be discussed in as far as it is applicable to this study.
  - 3 See Hansen RF “The international legal personality of multinational enterprises: Treaty, custom and the governance gap” 2010 (10) *Global Jurist* 12-13; Vázquez CM “Direct vs indirect obligations for corporations under international law” 2005 (43) *Columbia Journal of International Law* 955; Klabbbers J “(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors” in Bianchi A (ed) *Non-State Actors and International Law* (Ashgate Publishing Limited Farnham 2009) 35 and Menon PK “The international personality of individuals in international law: A broadening of the traditional doctrine” 1992 (1) *Journal of Transnational Law and Policy* 155.
  - 4 See Ratner SR “Corporations and human rights: A theory of legal responsibility” 2001 (111) *The Yale Law Journal* 449 stating that: “Some traditional legal scholars might see corporate duties as unprecedented or even doctrinally prohibited, asserting that only states, and perhaps individuals, are holders of obligations.” See also Vázquez 2005 *Columbia Journal of International Law* 932-933.
  - 5 Walter C “Subjects of international law” 2007 *Max Planck Encyclopaedia of Public International Law* para 28.
  - 6 Hansen 2010 *Global Jurist* 74.

in international law, it therefore follows that they cannot and should not be held to account directly under the legal system.

The discussion above raises fundamental challenges about international law doctrines, its subjects and its scope. Throughout history, questions regarding the nature of international law, its subjects and its scope have been a subject of polarised philosophical and theoretical debates. At the heart of the debates lies the perennial tension between natural-law scholars and positivists. The importance of both these philosophical and theoretical positions cannot be underestimated. An international law scholar for instance, who adopts a positivistic view of international law, will not reach the same conclusion as the one who adopts a natural law inspired view. The philosophical approaches are intertwined with the vision, scope and nature of international law. Each approach has its own vision of international law. A positivistic approach to international law is narrow and restrictive, while the natural law approach adopts a wider application and interpretation of the rules of international law. In relation to corporations, a positivistic conception of international law would be dismissive of the very thought of accommodating them under the international legal system.<sup>7</sup> On the other hand, in light of its wider approach to the rules of the legal system, a natural law inspired approach would adopt a more receptive approach to corporations. This study, though not discarding the positivistic conception of international law altogether, will adopt a natural law inspired approach.

For reasons rooted in history, international law arose within a context whereby states wielded a lot of power.<sup>8</sup> Because of its position, the nation state became both the primary subject and duty bearer to which all international law rules were addressed. Within this state-centric model, accountability in international law became limited to state responsibility. All other non-state<sup>9</sup> entities such as

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7 Muchlinski PT "Multinational Enterprises as Actors in International Law: Creating 'Soft Law' Obligations and 'Hard Law' Rights" in Noortmann M and Ryngaert C (eds) *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate Farnham 2010) 10.

8 Humphrey JP "On the foundations of international law" 1945 (39) *American Journal of International Law* 231-243.

9 For the various categories of non-state actors see Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 271-316; Alston P "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?"

liberation movements, insurgents, international organisations and the individual, among others, had an indirect relationship with international law through the nation state. Traditionally, these entities bore no direct duties and were only indirectly accountable in international law through states. In the last half a century, as this study will later demonstrate, the dawn of the era of human rights has marked a “major departure from the traditional character of international law”.<sup>10</sup> As part of this shift, international law conferred limited international legal personality to a limited number of subjects such as the individual and international organisations.<sup>11</sup> Despite this shift, the state-centric nature of the legal system continued to be its defining feature.

The phenomenon of globalisation has brought about new challenges in international relations. In the era of globalisation, non-state actors like multinational corporations (MNCs)<sup>12</sup> have grown in numbers, stature and power. The emergence of these entities poses a challenge to the traditional methods of accountability in international law.<sup>13</sup> Tzevelekos makes an apt point that had the activities of some of the non-state actors been those of states, they would have probably amounted to wrongful conduct under international law.<sup>14</sup> But because they are non-state entities, there is no responsibility under international law. In

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in Alston P (ed) *Non-State Actors and Human Rights* (Oxford University Press Oxford 2005) 3–36.

- 10 Van Hoof F “International Human Rights Obligations for Companies and Domestic Courts: An unlikely Combination?” in Castermans-Holleman M, Van Hoof F and Smith J (eds) *The Role of the Nation-State in the 21st Century Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (Kluwer Law International The Hague 1998) 47; Menon 1992 *Journal of Transnational Law and Policy* 153.
- 11 See Dugard *International Law: A South African Perspective* 4th ed (Juta Cape Town 2011) 1; Higgins R “Conceptual Thinking about the Individual in International Law” in Falk RA (ed) *International Law: A Contemporary Perspective* (Westview Press Boulder 1985) 478.
- 12 Sometimes referred to as Transnational Corporations (TNCs) or Multinational Enterprises (MNEs). In essence there are no ideological or conceptual differences between the two. Both MNCs and TNCs are defined as corporations whose headquarters are in one country and operate in foreign jurisdictions either wholly or through subsidiaries. See Addo MK *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999) 3 including footnote 1; Vagts DF “The multinational enterprise: A challenge for transnational law” 1970 (83) *Harvard Law Review* 740; Kamminga and Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* 2-3; Donaldson T *The Ethics of International Business* (Oxford University Press Oxford 1989) 30; Deva 2003 *Connecticut Journal of International Law* 6. The concept of MNC will be discussed further in chapter 2 of this study.
- 13 See Nijman JE *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press The Hague 2004) 354.
- 14 Tzevelekos V “In search of alternative solutions: Can the state of origin be held internationally accountable for investors’ human rights abuses that are not attributable to it?” 2010 (35) *Brooklyn Journal of International Law* 157.

these non-state actors, a system designed to deal with the abuse of power by the state and its agents is confronted with power that emerges from private entities such as MNCs. Conceptually this is creating a mismatch between the system of accountability in international law and MNC power.<sup>15</sup> To bridge the gap requires a paradigm shift. About this, Clapham writes that “trying to squeeze international actors into the state-like entities box is, at best, like trying to force a round peg into a square hole, and at worst, means overlooking powerful actors on the international stage”.<sup>16</sup> In the last four decades, the international community has with marginal success tried to address the challenges raised by MNCs.

This chapter seeks to set the context for the discussion of accountability of MNCs for human rights violations in international law. Flowing from this introduction, which constitutes the first part, the second part of the chapter will be general in tone in that it will give a brief overview of the quest for accountability in the era of globalisation. The third part will introduce the concept of legal personality and its importance for both municipal and international law. In the fourth part, the chapter will give a brief discussion of why there is an accountability vacuum for MNCs. This will be followed by the fifth part which will discuss factors that hamper the control and regulation of the international operations of MNCs under the traditional system of accountability. It will be argued that there is a need to hold MNCs accountable under international law as their international operations, particularly in relation to human rights, are currently not directly regulated by any rules of international law.<sup>17</sup> The last section will present the purpose and outline of this study.

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15 Shelton D “Protecting human rights in a globalized world” 2002 (25) *Boston College International and Comparative Law Review* 314.

16 Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 80.

17 Kinley D and Tadaki J “From talk to walk: The emergence of human rights responsibilities for corporations at international law” 2004 (44) *Virginia Journal of International Law* 935 write as follows: “At international law, however, the corporate form is barely recognized, still less directly bound, whether with respect to human rights or any other field. There is no transnational regime of human rights law governing the transnational activities of corporations. TNCs [Transnational Corporations] have been able to operate in a *legal vacuum* because international human rights law imposes no direct legal obligations on TNCs” (emphasis added).

## 2 THE QUEST FOR ACCOUNTABILITY IN THE ERA OF GLOBALISATION

The notion that political power resides exclusively within the nation state is anachronistic.<sup>18</sup> In recent years, the world has witnessed a proliferation of powerful non-state entities that operate on the international scene. Research has shown that some of these non-state entities have power that equals that of the nation state or even eclipses it.<sup>19</sup> Some of this power, if exercised, has serious implications for the nation-state.<sup>20</sup> At the core of these modern day international developments, lies the multifaceted phenomenon of globalisation. Globalisation is a rather complex concept to define with precision.<sup>21</sup> It cuts across various academic disciplines and, as a result, the concept lends itself to definitions which are as varied as the various disciplines themselves. For Joyner,<sup>22</sup> for instance, globalisation

refers to an ongoing worldwide integration of capital, currency, goods, people, advanced technologies, and ideas that are moving across national borders at an accelerating pace. Globalisation makes the world ever interconnected and interdependent.

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- 18 Jochnick C “Confronting the impunity of non-state actors: New fields for the promotion of human rights” 1999 (21) *Human Rights Quarterly* 63.
- 19 Stephens B “The amorality of profit: Transnational corporations and human rights” 2002 (20) *Berkeley Journal of International Law* 57 notes that “General Motors, for example, is larger than the national economies of all but seven countries. The largest fifteen corporations have revenues greater than all but thirteen nations”. Some individuals are also more powerful than some states. For example, Shelton 2002 *Boston College International and Comparative Law Review* 279 points out that the *UNDP Development Report* of 1999 reported that the assets of the three wealthiest individuals in the world exceeded the combined gross national product of all least developed countries. McCorquodale R and Fairbrother R “Globalisation and human rights” 1999 (21) *Human Rights Quarterly* 738 point out that corporations make up 51 of the world’s 100 biggest economies, while states take the balance of 49. See also the Oxfam Issue Briefing Report, *Wealth: Having it all and wanting more* (January 2015) available at: [http://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf](http://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-wealth-having-all-wanting-more-190115-en.pdf) (accessed on 30 January 2015). The report shows how global wealth is increasingly being concentrated in the hands of an elite few.
- 20 See Thabane T “Weak extraterritorial remedies: The Achilles heel of Ruggie’s ‘Protect, Respect and Remedy’ Framework and Guiding Principles” (2014) 14 *African Human Rights Law Journal* 45 where he highlights the impact of the decisions of Standard and Poor, itself an MNC, which has the power to determine a country’s credit ratings, and through that determine the ability of a country to borrow money so as to discharge its obligations to its citizens.
- 21 Kobrin SJ “Multinational Corporations, the Protest Movement, and the Future of Global Governance” in Chandler AD and Mazlish B (eds) *Leviathans: Multinational Corporations and the New Global History* (Cambridge University Press Cambridge 2005) 219.
- 22 Joyner CC *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Publishers Inc Oxford 2005) 288-295.



Similarly, Oloka-Anyango sees globalisation as characterised by the increased flow of capital around the world, information technology, the concentration of economic and political power at a supra-state level in multilateral trade, financial institutions and transnational corporations and a growing movement of people.<sup>23</sup> For Sham,<sup>24</sup> globalisation has geographic and political dimensions to it. In the geographic sense, it describes “a change in the space within which we conduct our social relations” and in a political sense it “denotes a shift in the balance of power and the pre-eminence of actors away from the state to non-state actors.”<sup>25</sup> Globalisation so understood, is characterised by its omission of the state as the geographic scope of reference and the dominant actor.<sup>26</sup> An asymmetry is created in that while international law is state-centric, globalisation flourishes where there is less state intervention. In economic debates, the omission of the state features prominently and is often referred to as the invisible hand of the market.<sup>27</sup> The “invisible hand” phrase is usually employed to advocate for less state intervention and regulation of the market. A commonly held view by those with strong leanings to this ideological stance is that the economic market will prosper when there is less involvement by the state.<sup>28</sup>

In the era of globalisation, the ordering of the international community is undergoing multiple processes, all unfolding at the same time.<sup>29</sup> The power of the nation state in international politics is rivalled by the emergence of non-state powers like international organisations, non-governmental organisations,

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23 Oloka-Onyango J “Reinforcing marginalized rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples’ rights in Africa” 2003 (18) *American University International Law Review* 885.

24 Sham H *Legal Globalisation: Money Laundering Law and other Cases* (British Institute of International and Comparative Law London 2004) 66.

25 Sham *Legal Globalisation* 66; Nijman *The Concept of International Legal Personality* 354.

26 Sham *Legal Globalisation* 66. See Joyner *International Law in the 21st Century* 289 for the view that “[t]he globalized market system is becoming less susceptible to regulation by any one state or group of states in particular, as most states are unable to retain control over these financial transactions. As the state’s ability to control its international financial activities continues to be undermined, the global market place is increasingly dominated by the power of private multinational corporations”. Also see Kobrin *The Future of Global Governance* 219.

27 Nijman *The Concept of International Legal Personality* 354.

28 For a critique of the invisible hand see Kelly M “Waving goodbye to the invisible hand: What Enron teaches us about economic system design” 2002 (16) *Business Ethics* 4-5.

29 Weiss BE “Invoking state responsibility in the twenty-first century” 2002 (96) *American Journal of International Law* 798 points out that: “At the beginning of the twenty-first century, the international community is globalising, integrating, and fragmenting, all at the same time.”

corporations, transnational groups, and powerful individuals.<sup>30</sup> Globalisation has facilitated a situation where the traditional institutions are changing, and the new ones are not yet in place.<sup>31</sup> Because of globalisation, the traditional institutions and systems have been rendered inadequate to respond to new challenges. There is therefore a need to conceptualise new institutions or reconceptualise old ones so as to adjust to the new challenges.<sup>32</sup> At the political level there is a need to revise the international law rules so as to respond to the challenges that political globalisation has brought. These challenges range *inter alia* from transnational crimes such as terrorism and illicit drugs to trafficking of weapons.<sup>33</sup> For this study the challenges relate to the accountability of MNCs for their international human rights violations.

As the world is fast becoming integrated and interdependent, a common vocabulary consisting of concepts like *good governance*, *accountability*, *cooperation*, *transparency*, *democracy* and *human rights* has emerged.<sup>34</sup> Some of these concepts have become of importance in international relations.<sup>35</sup> The international community has also realised the need to rethink the scope of international relations in the era of globalisation.<sup>36</sup> The various aspects of globalisation, both positive and negative, are evolving not only fast, but beyond the scope of the existing international legal rules. Though itself not a legal concept, the

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30 Weiss 2002 *American Journal of International Law* 798.

31 Kobrin *The Future of Global Governance* 219.

32 Deva 2003 *Connecticut Journal of International Law* 2; Van den Herik L and Černič JL "Regulating corporations under international law: From human rights to international criminal law and back again" 2010 (8) *Journal of International Criminal Justice* 726.

33 Joyner *International Law in the 21st Century* 291.

34 See Ferreira-Snyman MP and Ferreira GM "Global good governance and good global governance" 2006 (31) *South African Yearbook of International Law* 52-94.

35 Ferreira-Snyman and Ferreira 2006 *South African Yearbook of International Law* 93 conclude that: "Global governance and good governance have become key concepts in public international law and no state can afford simply to ignore the political and legal consequences these notions might have for its position within the international community of states."

36 See Lemert C and Elliott A (eds) *Globalisation: A Reader* (Routledge Taylor & Francis Group London 2010) 284 for the report titled *Our Global Neighbourhood: The Report of the Commission on Global Governance* (2002). The Commission on Global Good Governance was founded in 1991 with the purpose to conduct a survey of the state of global governance at the turn of the twenty first century. In its 1995 report the Commission *inter alia* states that "[g]lobal governance, once viewed primarily as concerned with intergovernmental relationships, now involves not only governments and international institutions but also non-governmental organisations (NGOs), citizens' movements, transnational corporations, academia, and the mass media. The emergence of a global civil society, with many movements reinforcing a sense of human solidarity, reflects a large increase in the capacity and will of the people to control their lives".

effects of globalisation have legal ramifications.<sup>37</sup> A readjustment of legal rules is needed if aspects of globalisation are to be effectively regulated.<sup>38</sup> The challenges posed by globalisation, are not only limited to legal rules but extend also to democratic accountability.

In the political realm, international human rights activists and civil society movements have made the demand for transparency, accountability and democratic decision-making processes from institutions that wield power globally, their rallying point. For instance, since Seattle in 1999,<sup>39</sup> all subsequent World Trade Organisation (WTO) Ministerial meetings have been marked by “anti-globalisation” street protests. Though called “anti-globalisation” protest, the protesters are not against globalisation *per se*, but are in actual fact demanding more accountability in the era of globalisation. As such, their protests always revolve around the demand for accountability, transparency and democratic participation. The demands have to a large degree been directed at, among others, the Bretten Wood Institutions (BWIs)<sup>40</sup> and the United Nations (UN)<sup>41</sup> to be more accountable in their international operations.<sup>42</sup> As the world becomes more integrated and interrelated, the lines of accountability have also become blurred.<sup>43</sup>

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37 See Booysen H *Principles of International Trade Law as a Monistic System* (Interlegal Pretoria 2003) 100.

38 Joyner *International Law in the 21st Century* 288.

39 The World Trade Organisation (WTO) is a multilateral international institution that deals with rules of trade between states. The governing structure of the WTO is controlled by Ministerial Conferences consisting of all members that meet at least once every two years. These Ministerial meetings have the power to take decisions with far-reaching consequences. Both the 1996 Singapore and the 1998 Geneva meetings went without much protest by activists and civil society movements. However, the 1999 Seattle Ministerial meeting marked a turning point in the history of activism and the demand for accountability of multilateral institutions. For further reading see Stephan H and Power M (eds) *The Scramble for Africa in the 21st Century: A View from the South* (Renaissance Press Cape Town 2006) 202–222 and also Joyner *International Law in the 21st Century* 256–261. Soederberg S “Taming corporations or buttressing market-led development? A critical assessment of the Global Compact” 2007 (4) *Globalisations* 507 refers to the Seattle demonstrations as the “pinnacle of anti-corporate resistance”. It is estimated that about 50,000 people from all over the world attended the Seattle demonstrations.

40 The Institutions founded at the Conference of Bretten Woods, New Hampshire in 1944. These are the World Bank and the International Monetary Fund (IMF).

41 Hoffmann F and Megret F “Fostering human rights accountability: An ombudsperson for the United Nations” 2005 (11) *Global Governance* 43-63.

42 Clarke DL “The World Bank and human rights: The need for greater accountability” 2002 (15) *Harvard Human Rights Law Journal* 206-226; Skogly SI *The Human Rights Obligations of the World Bank and the International Monetary Fund* (Cavendish Publishing Limited London 2001).

43 For instance, Narlikar A and Woods N “Governance and the limits of accountability: The WTO, the IMF, and the World Bank” 2002 (53) *International Social Science Journal* 569 are

Despite the latter being the case, the demand for accountability has intensified. The tide has also turned against non-governmental organisations (NGOs) and human rights advocates, as they too are subjects of the demand for accountability.<sup>44</sup>

The private sphere has in the recent past also witnessed the demand for accountability. As Joseph<sup>45</sup> points out, the demand for accountability in as far as it relates to corporations, has come in four waves. The first wave dealt with the rights of consumers to safe products and was mainly aimed at car manufacturers, tobacco companies and other companies, such as Nestlé, and has also moved to the marketing of genetically modified products. The second wave was mainly concentrated on the extractive industries in developing countries such as Shell in Ogoniland in Nigeria. Exploitive work practices in developing countries, especially in textile industries and toy industries, constituted the third wave. Issues related to the sweat labour by big brand companies such as Nike, were highlighted by the third wave. In the fourth wave, human rights activists focused their call for accountability on the ethics of pharmaceutical companies, especially in as far as it related to pricing of essential medicine.

The 2008 financial crisis, as Bilchitz notes, has made the world aware of how bad financial decisions by private financial institutions can have an impact on the lives of ordinary citizens. While the faulty decisions were made by the financial institutions in pursuit of private profit, states have had to deal with the aftermath of

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on point in stating that: "International economic institutions now address issues, which were previously dealt with at the level of the national government. Put another way, decisions and policies taken at the international level are increasingly affecting groups and people within states. Where previously these people could hold their nations to account for policies, they must now look to international institutions where the decisions are being made. The question therefore arises; to whom are these institutions accountable and are they accountable to those whom they directly affect?"

44 Christensen J "Asking the do-gooders to prove they do good" *The New York Times* (3 January 2004) available at: <http://www.nytimes.com/2004/01/03ACC.html> (accessed on 23 February 2011); Sidel M "Guardians guarding themselves: A comparative perspective on non-profit self-regulation" 2005 (80) *Chicago Kent Law Review* 803-835.

45 Joseph S "Pharmaceutical corporations and access to drugs: The 'Fourth Wave' of corporate human rights scrutiny" 2003 (25) *Human Rights Quarterly* 426. See also Stephens 2002 *Berkeley Journal of International Law* 51-53.

the wrong decisions, which decisions had nothing to do with them in the first place.<sup>46</sup>

Like globalisation, the concept of accountability has gained international currency in use and yet there is no clear definition of it. This is so because accountability covers a broad range of issues. Fisher<sup>47</sup> lists the different kinds of accountability as legal, financial, democratic, political, administrative and electoral. She goes on to point out that accountability can be direct or indirect, vertical or horizontal, formal or informal, internal or external. Internally, accountability refers to how an organisation should adhere to its own objectives, while externally it refers to those objectives which, from a social perspective, an organisation should pursue.<sup>48</sup> Mechanisms for accountability are varied, and so are the requirements for each of the modes of accounting.<sup>49</sup> It therefore becomes important to qualify the kind of accountability one is referring to. The focus of this thesis will be on legal accountability which requires adherence to formal rules, and readiness to justify one's actions in terms of those rules in a forum so designed to hear or adjudicate such matters in accordance with the set rules. The rules envisaged in this thesis are those of public international law.

The term *accountability* has been enunciated in a number of ways.

Bovens describes it as

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- 46 Bilchitz D "Human Rights Beyond the State: Exploring the Challenges" in Vilhena O, Baxi U and Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press Pretoria 2013) 580.
- 47 Fisher E "The European Union in the age of accountability" 2004 (24) *Oxford Journal of Legal Studies* 497.
- 48 Trebilcock MJ and Iacobucci EM "Privatization and accountability" 2003 (116) *Harvard Law Review* 1422-1423.
- 49 See Grant R and Keohane RO "Accountability and abuses of power in world politics" 2005 (99) *American Political Science Review* 35-37 for other forms of accountability such as hierarchical accountability, supervisory accountability, fiscal accountability, legal accountability, market accountability, peer accountability and public reputational accountability.

a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.<sup>50</sup>

A more preferable approach, which will be adopted by this thesis, is that of Grant and Keohane for whom the concept

implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of the standards, and to impose sanctions if they determine that these responsibilities have not been met.<sup>51</sup>

The forum envisaged in this study is an international law one, and so are the standards, and the sanctions.<sup>52</sup> The definition put forward by Grant and Keohane is preferred because it encapsulates accountability which establishes a three-fold relationship of the actor, the set standards and sanctions imposed in accordance with the set standards. The obvious limitation in this regard is a conceptual one in that international law does not have standards to directly hold MNCs to account. Corporations are creations of a domestic statute. In this regard domestic courts are empowered to hold them accountable under domestic laws. Since domestic legislation varies from one state to another, there are no uniform set standards against which corporations are held accountable. The challenge becomes more pronounced when corporations cluster together to form MNCs. The international operations of MNCs often operate beyond the reach of domestic legislation. Since international law does not apply to MNCs, a lacuna is created. In light of the fact that this study seeks to propose a theory to hold MNCs accountable under international law, the definition by Grant and Keohane becomes apt. The triad that

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50 Bovens M "Analysing and assessing accountability: A conceptual framework" 2007 (13) *European Law Journal* 450.

51 Grant and Keohane 2005 *American Political Science Review* 29.

52 Some authors prefer to use the concept of effective regulation to that of accountability. See Deva S "Acting extraterritorially to tame multinational corporations for human rights: Who should 'bell the cat'" 2004 (5) *Melbourne Journal of International Law* 39; and also Van den Herik and Čerňič 2010 *Journal of International Criminal Justice* 725 -743. In other instances authors would prefer the use of obligations as opposed to accountability. See for example Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006); Deva S and Bilchitz D *Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect?* (Cambridge University Cambridge 2013); Vázquez 2005 *Columbia Journal of International Law* 932- 947.

the definition proposes provides good pointers of the three areas that a theory of accountability in international law should take cognisance of.

Since international law rules do not directly address themselves to corporations, this study will argue that there is a need for a paradigm shift so as to bring MNCs under the ambit of the legal system. The challenges posed by globalisation cut across the different established divisions of law including, public international law, private international law, comparative law, conflict of laws, international business law, international trade and international economic law.<sup>53</sup> Each of these divisions can lay a legitimate claim towards advancing a solution for the challenges posed to the human rights accountability as a result of globalisation.<sup>54</sup> In the era of globalisation, as Buergenthal writes, “the traditional dividing line between public and private international law, including international law commercial and economic law, is becoming less pronounced and relevant”.<sup>55</sup> Despite this blurring of the divide, this study will however focus on accountability of MNCs under public international law specifically.<sup>56</sup>

As pointed out above, conventionally, international law rules were meant for states. Practically, this meant that within the state-centric system, states were to a large degree the main actors empowered to invoke international law rules against each other. This being the case, to talk of accountability outside this state-centric matrix becomes a challenge. The challenge is further compounded by the fact that the use of the concept of accountability in international law literature is fairly recent and still in the process of evolution.<sup>57</sup> As such, its clear legal meaning in

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53 Muchlinski PT “Globalisation and legal research” 2003 (37) *The International Lawyer* 225; Ochoa C “Advancing the language of human rights in the global economic order: An analysis of discourse” 2003 (23) *Boston Third World Law Journal* 58.

54 See Muchlinski 2003 *The International Lawyer* 225-227.

55 Buergenthal T “Proliferation of international courts and tribunals: Is it good or bad?” 2001 (14) *Leiden Journal of International Law* 270. The blurring of this divide will be illustrated in Chapter 5 of this study.

56 The use of public international law to respond to globalisation challenges does not necessarily have a universal appeal among scholars. Muchlinski 2003 *The International Lawyer* 238 is of the view that “so long as non-state actors operate across borders, and legal regimes continue to differ and occupy distinct political spaces, private international law will remain central to the regulation of such activities”. On public international law he goes on to write that “it is safe to say that public international law may not be a sufficient or a complete system for dealing with globalisation. The range of subjects it covers may be too narrow, it may exclude non-state actors from holding rights or duties and it may limit the range of dispute settlement options available to such actors”.

57 Nollkaemper A and Curtin D “Conceptualizing accountability in international and European law” 2005 (XXXVI) *Netherlands Yearbook of International Law* 4.

international law is yet to be developed.<sup>58</sup> A much more developed concept with a longer history in international law is that of *responsibility*, which has mainly been used with reference to the state.<sup>59</sup> So understood, the doctrine of state responsibility became the tool through which the contours of states' obligations in their relation to each other were outlined and enforced.<sup>60</sup> In this regard, a distinction is made between *state responsibility* and *international liability*. The difference between the two concepts as Sucharitkul asserts, lies in the fact that the former is about the responsibility of states under international law, while the latter may encompass the liability of a state not only under international law, but also under a municipal legal system.<sup>61</sup> Evidently, the concept of liability is much wider than that of state responsibility, whose use is only confined to international law.

International legal relationships do not exist in a vacuum. The legal system is intertwined with other discourses that take place internationally.<sup>62</sup> The link between international politics and international law has become a reality which both political scientists and international lawyers can no longer ignore.<sup>63</sup> Both international law and international politics, as Slaughter points out, "cohabit the same conceptual space".<sup>64</sup> The relevance of international law is to some degree assessed on the basis of how it responds to modern day challenges.<sup>65</sup> The relationship between the two is even more evident in the international discourse on the threat posed by terrorist organisations. Some of the international challenges like terrorism for instance, require a uniform approach from nation-states. The fact that the international community is so interdependent requires states in their responses to modern day challenges, such as terrorism, to adopt a uniform approach. Failure by one state to cooperate for instance, especially on issues of terrorism may have

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58 Brunnée J "International legal accountability through the lens of the law of state responsibility" 2005 (XXXVI) *Netherlands Yearbook of International Law* 22.

59 State responsibility will be discussed in Chapter 3 of this study.

60 Sucharitkul S "State responsibility and international law liability under international law" 1996 (18) *Loyola of Los Angeles International and Comparative Law Review* 823.

61 Sucharitkul 1996 *Loyola of Los Angeles International and Comparative Law Review* 822. This study will also maintain the distinction between the two concepts.

62 Tiunov OI "The International legal personality of states: Problems and solutions" 1993 (37) *Saint Louis University Law Journal* 324.

63 Okeke CN *Controversial Subjects of International Law* (Rotterdam University Press 1973) 217.

64 Slaughter A-M "International law in a world of liberal states" 1996 (6) *European Journal of International Law* 503.

65 Charney JI "Transnational corporations and developing public international law" 1983 (32) *Duke Law Journal* 769.



devastating consequences for other nation-states.<sup>66</sup> An analogy may be drawn that, in as far as the human rights challenges posed by MNCs are concerned, states may need to have the same unified approach in their response.

International law is not static and as such the widening in scope of the legal system is not a novel phenomenon.<sup>67</sup> According to the Oellers-Frahm, “international law is in permanent development”.<sup>68</sup> Even within its state-centric matrix, international law has had to undergo some adjustments. As Okeke writes, international law has changed from the law of a family of nations based on Western Christendom into the law of a universal world community.<sup>69</sup> Before this change, international law was confined to a limited number of states to the exclusion of a vast majority of other states that make up the modern day international community.<sup>70</sup> The shift to accommodate the non-Western and non-Christian states was itself not based on any of the rules of international law. If anything, it was just a political decision necessitated by the needs of the international community. The impact of the international community on the developments of international law was affirmed by the International Court of Justice (ICJ) in the *Reparations* case that “[t]hroughout its history, the development of international law has been influenced by the requirements of international life”.<sup>71</sup> It can therefore be argued that the evolution of the legal system is inevitable if international law is to remain relevant to the challenges facing the international community.

Following the atrocities of the Second World War, international law has developed rules regarding individual responsibility particularly in relation to criminal responsibility. The use of the concept of individual responsibility was used within

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66 See Charney JI “Universal international law” 1993 (87) *American Journal of International Law* 529-533.

67 See Kennedy D “International law and the nineteenth century: History of an illusion” 1997 (17) *Quarterly Law Review* 99–136.

68 Oellers-Frahm K “Multiplication of international courts and tribunals and conflicting jurisdiction – Problems and solutions” 2001 (5) *Max Planck Yearbook of United Nations Law* 71.

69 Okeke *Controversial Subjects* 1.

70 Duruigbo E “Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges” 2008 (6) *Northwestern Journal of International Human Rights* 232.

71 *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion 1949 ICJ Reports 178 (hereinafter the *Reparation for Injuries* case).

the context of holding individuals to account for their violations of human rights. While there is a tendency to use the two concepts of accountability and responsibility interchangeably, the two are not necessarily the same in scope and field of application.<sup>72</sup> In terms of international law usage, the difference lies in the fact that state responsibility is important to establish legal accountability. It is generally accepted that the concept of state responsibility is limited in scope and can only be applied within a restricted context, while accountability is a much broader term.<sup>73</sup> This, as it will be discussed in chapter three, means that state responsibility only arises within a limited scope prescribed by the rules of international law. Outside the rules of international law, state responsibility does not arise, whereas, as pointed out above, accountability has many facets to it.

A further differentiation to make is that accountability is not necessarily the same as corporate social responsibility. The difference lies in the fact that social responsibility is voluntary, while accountability is a legal imperative.<sup>74</sup> Accountability is more effective when there is an element of control. Control empowers the holder of power to act proactively to direct the course of events, whereas accountability in most cases takes place after the fact.<sup>75</sup> The relationship between control and accountability, in as far as human rights protection is concerned, is crucial. Where the holder of power has control over an entity, there is a better chance of proactively being involved to avert an impending catastrophic situation, whereas, in as far as accountability is concerned, harm may in certain circumstances happen first, as it is the case in criminal matters and only then would the accountability mechanisms be invoked, that is, when the harm has already happened. It may however be accepted that the threat of an impending

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72 Yarwood L *State Accountability for Breaching Jus Cogens Norms* (LLD thesis University of Exeter 2009) 41–42; Ratner SR, Abrams JS and Bischoff JL *Accountability for Human Rights Atrocities in International Law* (Clarendon Press Oxford 1997) 13; Deva S *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge London 2012) 22-23.

73 See Brunnée 2005 *Netherlands Yearbook of International Law* 25; and Nollkaemper and Curtin “Conceptualizing accountability in international and European law” 2005 (36) *Netherlands Yearbook of International Law* 4.

74 Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 195-199; Parker C “Meta-regulation: Legal Accountability for Corporate Social Responsibility” in Kinley D (ed) *Human Rights and Corporations* (Ashgate Farnham 2009) 335-365.

75 Scott C “Accountability in the regulatory state” 2000 (27) *Journal of Law and Society* 39.

sanction, especially where such sanctions are severe, may have a deterrent effect on those intending to inflict harm on others.<sup>76</sup>

At the level of municipal legal systems, the idea of holding individuals to account, either through the law of delict or criminal law, is well established. It is in international law, which is a legal system that is based on consent of states, that the concept of accountability is yet to evolve, especially in relation to non-state actors. But as pointed out above, international law is not static. Over the years, the legal system has responded to the challenges of the international community, albeit at its own slow pace.<sup>77</sup> The needs of the international political system have historically played a major role in shaping the content and character of international law.<sup>78</sup> Even in modern times, it is argued, the needs of the international community will continue to have an impact on the evolution of international law and its development.

Throughout history, the relationship between power and international law has not been incidental.<sup>79</sup> For instance, as a legal system, international law came into being in response to the aftermath of the ravages of the Thirty Years War which ended with the signing of the Peace Treaty of Westphalia in 1648. With the signing of the Peace Treaty of Westphalia the locus of political power shifted. The idea of a universal power either in the hands of the Pope in spiritual matters or the Emperor in temporal matters, was done away with.<sup>80</sup> Instead, a new powerful entity, the state, was created. Unlike the hierarchical system of old, the new states enjoyed equality among themselves and each had sovereign powers within their territory with no supreme power above them.<sup>81</sup> Both the Pope or the Emperor could not interfere in the affairs of the sovereign state, thus state sovereignty was

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76 Grant and Keohane 2005 *American Political Science Review* 29.

77 Gamble JK and Ku C "International law - new actors and new technologies: Center stage NGOs?" 2002 (31) *Law and Policy in International Business* 221.

78 Shaw MN *International Law* 7th ed (Cambridge University Press Cambridge 2014) 39.

79 Charney 1983 *Duke Law Journal* 759.

80 Gamble and Ku 2002 *Law and Policy in International Business* 221.

81 Gross L "The Peace of Westphalia, 1648-1948" 1948 (42) *American Journal of International Law* 29; Ferreira-Snyman MP "The evolution of state sovereignty: A historical overview" 2006 (12-2) *Fundamina: A Journal of Legal History* 9-17.

born.<sup>82</sup> The sovereign nation states were to play a pivotal role in the creation and enforcement of international law.<sup>83</sup>

The period immediately after the signing of the Peace Treaty of Westphalia was characterised by a great deal of uncertainty.<sup>84</sup> In religious matters, the Reformation had weakened the power of the Pope. The Roman Empire was in a state of crisis as it was fragmented into sovereign nation states.<sup>85</sup> Following the Thirty Years War, Europe was in need of reconstruction, both intellectually and politically.<sup>86</sup> With the universal appeal of both the Emperor and the Pope on a decline, a void was created.<sup>87</sup> Humphrey<sup>88</sup> points out that in as far as the international relations of the states were concerned, the world had returned to a complete state of anarchy. The eruption of another war could therefore not be ruled out. As Murphy notes:

The rising power of separate nation-states impressed upon the minds of thoughtful Europeans the necessity of creating a new form of general order that would encompass both Europe and the expanse of the newly discovered worlds beyond. The rising spirit of adventure and commerce meant that the degree of interaction among sovereigns would be intensified. There was fear that the relations between states would be uncontrolled and uninspired by any unifying ideals.<sup>89</sup>

In international relations, the nation-state became the main player with no other entity to rival its power. The international law language addressed itself to issues related to states such as territory, state duties, recognition, and treaties. The powerful state not only became the preoccupation of international law but also the premise upon which it was built. The international community of sovereign states,

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82 See further Ferreira-Snyman 2006 *Fundamina* 1-28; Kreijen G (ed) *State, Sovereignty and International Governance* (Oxford University Press Oxford 2002).

83 Brus M "Bridging the Gap between State Sovereignty and International Governance: The Authority of Law" in Kreijen G (ed) *State, Sovereignty, and International Governance* 3.

84 Nijman *The Concept of International Legal Personality* 31.

85 Nijman *The Concept of International Legal Personality* 32.

86 Nijman *The Concept of International Legal Personality* 32.

87 Gross 1948 *American Journal of International Law* 26-27.

88 Humphrey 1945 *American Journal of International Law* 231.

89 Murphy CF "The Grotian vision of world order" 1982 (76) *American Journal of International Law* 479.

as Kunz points out, became the sociological foundations of international law.<sup>90</sup> Classically defined, international law became a body of law that regulates inter-state relations.<sup>91</sup> So understood, and given the context within which it arose, the core function of international law was to preserve peace among nations.<sup>92</sup> International law doctrines, language and concepts evolved around the state-centred character of world politics.<sup>93</sup>

As part of its evolution, the subject matter of the legal system has also changed.<sup>94</sup> Though still state-centric, the scope of international law has widened to cover, among others, issues such as human rights, development, democracy and international financial systems.<sup>95</sup> The state-centric model of international law, which was premised on the assumption that only states had the power to violate rights of individuals, has had a great influence on the nature and structure of international human rights law. While the *raison d'être* of international law was the regulation of matters pertinent to nation states, international human rights law, on the other hand, preoccupied itself with the need to constrain the state in its use of power against the individual.<sup>96</sup> This state-centric system created, what Viljoen<sup>97</sup> calls, a fundamental paradox in that the individual depends on the state to guarantee their rights, but they also need to defend their rights against the same state.

The post Second World War experience has revealed that it is not only states that can engage in gross violation of human rights of individuals, communities and

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90 Kunz JL "The changing law of nations" 1957 (51) *American Journal of International Law* 78.

91 Dugard *International Law* 1.

92 Shaw *International Law* 22.

93 Shaw *International Law* 32.

94 Menon 1992 *Journal of Transnational Law and Policy* 152.

95 See Shaw *International Law* 33 - 39; Ferreira-Snyman MP *The Erosion of State Sovereignty in Public International Law: Towards a World Law?* (LLD thesis University of Johannesburg 2009) 1 and Menon 1992 *Journal of Transnational Law and Policy* 152.

96 Joseph S "An Overview of the Human Rights Accountability of Multinational Enterprises" in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 75 writes that: "In traditional international law, the essential actors, the entities with rights and duties are States. Unlike traditional international law, the actors in international human rights are not only States, as the prime beneficiaries of international human rights law are individuals. However the primary duty bearer in international human rights law remains the State, which reflects the continued State-centric focus of international law."

97 Viljoen F *International Human Rights Law in Africa* (Oxford University Press Oxford 2007) 5-6. See also Mutua M "Hope and despair for New South Africa: The limits of rights discourse" 1997 (10) *Harvard Human Rights Law Journal* 67.

minorities. The atrocities of the Second World War not only showed the world the negative impact that non-state actors could have on the society, but has highlighted the need to ensure that power in non-state hands is regulated and brought under control through the use of the law.<sup>98</sup> In the era of globalisation, the international ordering of politics has once again experienced a shift in power. The state is no longer the only centre of power. The world is now replete with what Anderson<sup>99</sup> calls “significant sites of private power”, some of which fall under the regulation of international law and some of which escape it. Globalisation, which according to Browne and Nmehielle, has become the co-ordinating principle of the international economic order,<sup>100</sup> has facilitated a growing number of non-state actors whose power can potentially impede or hamper the enjoyment of human rights. Andrew Clapham<sup>101</sup> aptly writes that:

[T]he emergence of new fragmented centres of power, such as associations, pressure groups, political parties, trade unions, corporations, multinationals, universities, churches, interest groups, and quasi-official bodies has meant that the individual now perceives authority, repression, and alienation in a variety of new bodies, whereas once it was only the apparatus of the state which was perceived in the doctrine to exhibit these characteristics. This societal development has meant that the definition of the public sphere has had to be adapted to include these new bodies and activities.

The proliferation of non-state actors and the challenges they pose to the protection of human rights has shifted the focus back to the state-centric model of international law. Given the vast number of non-state actors and the different roles they play in both the national and international sphere, it would be beyond the

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98 For an account of the huge profits made by corporations during the Second World War see Stephens 2002 *Berkeley Journal of International Law* 49-51.

99 Anderson GW *Constitutional Rights after Globalisation* (Hart Publishing Oregon 2005) 18.

100 Browne SD and Nmehielle V “Credit with a conscience: Liability of banks for complicity in human rights violations” 2003 *Speculum Juris* 57.

101 Clapham *Human Rights in the Private Sphere* 137. Alston *The ‘Not-a-Cat’ Syndrome* 4 points out that the United Nations has an editorial rule that requires that the word State be written in capital letters. He writes that “[t]he world is a much more poly-centric place than it was in 1945 and that she who sees the world essentially through the prism of the ‘State’ will be seeing a rather distorted image as we enter the twenty-first century”.

scope of this study to cover all the operations of the multitudes of non-state actors. The one category of non-state actors that provides a good case study for analysis is MNCs. According to Ruggie, MNCs are the most visible embodiment of globalisation.<sup>102</sup> MNCs occupy a rather curious position in the international community. On the one hand, they bring the much needed employment and development to a country while, on the other hand, they have the potential to pose a threat to human rights.<sup>103</sup> Their international operations could make it difficult for national laws under which they have been incorporated, to reach them. In this regard Kinley and Tadaki observe that

the extraterritorial operations of MNCs – the very feature that defines them – are substantially regulated neither by international nor domestic (home state) laws with respect to their impact on human rights.<sup>104</sup>

The inadequacy of national laws to hold MNCs accountable and the lack of accountability in the international legal system have the potential of providing a haven to those MNCs which fail to respect human rights. Conversely, as Deva points out, even if an MNC was keen to respect and follow human rights standards, there are no concrete universal international standards to be followed.<sup>105</sup> This is mainly because conceptually the current available international law standards<sup>106</sup> of accountability are aimed at states and not MNCs. For reasons that will become clear as this study unfolds, it will be argued that there is a need to construct enforceable international law standards against which MNCs too can be held accountable in international law.

While the nation state continues to be the main principal actor in international law, it is increasingly becoming evident that the emergence of non-state actors has implications for the state-centric model for the protection of human rights.<sup>107</sup> The

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102 Ruggie JG “Business and human rights: The evolving international agenda” 2007 (101) *American Journal of International Law* 823.

103 See Van den Herik and Černič 2010 *Journal of International Criminal Justice* 725–727.

104 Kinley and Tadaki 2004 *Virginia Journal of International Law* 938.

105 Deva 2003 *Connecticut Journal of International Law* 18.

106 This will be used interchangeably with norms, codes and rules of international law.

107 Backer LC “Multinational corporations, transnational law: The United Nations’ norms on the responsibilities of transnational corporations as a harbinger of corporate social responsibility in international law” 2006 (37) *Columbia Human Rights Law Review* 294 writes that: “In a world of multiple competing systems of governance, each only partially overlapping over the

once upon a time centre of power, the state, is now “being viewed as increasingly vulnerable, even on its way out” by some scholars.<sup>108</sup> The decline of the state has ramifications for the state-centric model for the protection of rights. As the power of the state declines, the individual is left exposed to other powerful entities. Notwithstanding this decline, as a discipline, international law continues to have a pivotal role to play in international relations. As a matter of fact, the use of international law in international relations is on the rise.<sup>109</sup> International standards in, among others, development, human rights, the protection of the environment, and international trade are set with reference to international law. International law has become the international normative system as opposed to just rules designed to maintain peace for nation states.<sup>110</sup> Though states are no longer the exclusive subjects of international law, in as far as international law is concerned, they continue to be the *dramatis personae* of the legal system.<sup>111</sup>

Because international law is actor-centred, accountability in the legal system is determined with reference to its main actors. An inquiry into whether an entity bears rights and duties under the legal system must start with an inquiry into whether such an entity is a subject or object of international law. Subjects occupy a prominent place in the legal system.<sup>112</sup> Entities can either account directly or indirectly under the legal system. Subjects of international law are addressed directly by the rules of the legal system, while objects are addressed indirectly. The subject-object dichotomy is however not universally accepted among

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others, no one political, social, or economic system can claim monopoly of power over an object of regulation.”

- 108 Schachter O “The decline of the nation-state and its implications for international law” 1997 (36) *Columbia Journal of Transnational Law* 7. For a further discussion on the role of the state see Schmidt VA “The new world order, incorporated: The rise of business and the decline of the nation-state” 1995 (124) *Daedalus* 75-106; Mann M “Nation-state in Europe and other continents: Diversifying, developing, not dying” 1993 (122) *Daedalus* 115-140; Hoffmann S “Obstinate or obsolete? The fate of the nation-state and the case of Western Europe” 1966 (95) *Daedalus* 862-915; Strydom H “From mandates to economic partnership: The return to proper statehood in Africa” 2007 (2) *African Human Rights Law Journal* 68 - 102. This study is however not of the view that the state is on its way out, but agrees with the fact that the power of the state is declining, especially in developing countries.
- 109 Buergenthal 2001 *Leiden Journal of International Law* 267.
- 110 Higgins R *Problems and Process: International Law and how We use It* (Oxford University Press Oxford 1994) 1.
- 111 Cassese A *International Law in a Divided World* (Oxford University Press Oxford 1986) 74; Cheng B “Introduction to Subjects of International Law” in Bedjaoui M (ed) *International Law: Achievements and Prospects* (UNESCO Paris 1991) 23–24.
- 112 Klabbers (*I Can't Get No*) *Recognition* 37.



scholars. Higgins<sup>113</sup> for instance, argues that this view, which is premised on the assumption that specific rules are needed to permit an entity to become a subject of international law, should be rejected. Instead, she is of the view that international law should be seen as a decision-making process consisting of a variety of participants, in which no subjects and objects distinction should be made. Such a view of international law, she argues, will have individuals as participants along with states, international organizations, multinational corporations and private non-governmental groups. On this basis she dismisses the subject-object dichotomy as having no functional purpose.<sup>114</sup> For McCorquodale<sup>115</sup> the subject-object dichotomy is an exclusionary fiction which silences alternative voices. The exclusionary fiction, he argues, privileges and reifies the voices of states in that all potential participants are compared to states and states alone decide the outcome. He proposes a view that sees international law as part of social relations that change over time. States, in this matrix of social relations, will not be the sole participants. Like Higgins, he finds the notion of participation to be more in sync with the realities of the international legal system, as opposed to the subject-object dichotomy. The conceptualisation of non-state actors as participants in the international legal system is gradually gaining momentum in academic circles.<sup>116</sup> Appealing as the concept of participation may be, it has also been criticised as coming at a high price – the loss of legal precision.<sup>117</sup>

The concept of participation also has its own limitations in that it does not seem to take the argument beyond the subject-object debate. Not all entities that participate within international law have the ability to incur legal consequences

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113 Higgins *Problems and Process* 49-50.

114 Higgins *Problems and Process* 49.

115 McCorquodale R "Beyond state sovereignty: The international legal system and non-state participants" 2006 (8) *International law: Revista Colombia de derecho internacional* 123 available at: <http://redalyc.uaemex.mx/pdf/824/82400803.pdf> (accessed on 20 October 2011).

116 See D'Aspremont J (ed) *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law* (Routledge London 2011) and also Noortmann M "Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Brining the Participants Back In?" in Noortmann M and Ryngaert C (eds) *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate Farnham 2010) 154-170.

117 Walter 2007 *Max Planck Encyclopaedia of Public International Law* para 28.

according to the rules of the legal system.<sup>118</sup> In terms of participation in the legal system, only subjects of the legal system participate directly, and objects may or do participate, albeit indirectly.<sup>119</sup> Scholars make a distinction between the concept of participation and that of legal personality.<sup>120</sup> The crux of the distinction between the two concepts lies in the fact that ordinary participation may not necessarily have legal consequences, while legal participation entails participation that is envisaged by the rules of the given legal system. This being the case, it seems that the subject-object distinction is not opposed to the fact that entities, other than states, do participate in the international sphere. What it does instead, is that it sets the boundaries between entities that participate in the international sphere but do not have legal personality and those that do.<sup>121</sup>

### **3 THE CONCEPT OF LEGAL PERSONALITY AND ITS IMPORTANCE IN BOTH MUNICIPAL AND INTERNATIONAL LAW**

The concept of legal personality is a legal fiction which is used to determine who the main actors in a legal system are.<sup>122</sup> Most municipal legal systems have rules that regulate how legal personality is conferred. The application of such rules, “constitute a kind of a precondition to the operation of all other substantive and procedural norms.”<sup>123</sup> The concept *person* is an important one for the law of private persons. Principal participants in a legal system are determined with

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118 See Nowrot K “Reconceptualising International Legal Personality of influential Non-state Actors: Towards a rebuttable Presumption of Normative Responsibilities” in Fleurs J (ed) *International Legal Personality* (Ashgate Farnham 2010) 371–374.

119 See Vázquez 2005 *Columbia Journal of Transnational Law* 927–958.

120 Chesterman S “Oil and water: Regulating the behaviour of multinational corporations through law” 2004 (36) *New York University Journal of International Law and Politics* 309.

121 See Nowrot *Reconceptualising International Legal Personality* 371- 372 making a point that “not all of the various different entities participating in contemporary international relations can be regarded as international legal persons, even if they have some degree of influence on the international society”.

122 Jägers N “Legal Status of Multinational Corporations under International Law” in Addo MK (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999) 262. See also Klabbers J “The Concept of Legal Personality” in Fleurs J (ed) *International Personality* (Ashgate Farnham 2010) 7 where he writes that “[a]s Kelsen has noted with characteristic swagger, the law cannot just think in terms of rights and duties, but also needs to be able to point to someone or something possessing those rights and duties”.

123 Cassese *International Law in a Divided World* 77; Jägers *Corporate Human Rights Obligations* 19 points out that “international personality is considered a prerequisite for operating on the international plane”. See also Klabbers (*I Can’t Get No*) *Recognition* 37 who states that subjects “form a clearing-house between sources and substance”. See also Charney 1983 *Duke Law Journal* 774.

reference to it. The use of this concept determines who those persons in the legal system are, how they come into being and cease to exist, what their rights, duties and capabilities are and what capacities and factors determine their legal status.<sup>124</sup> For instance, in most municipal legal systems, an individual becomes a legal person at birth, while an entity becomes a legal person after having met the prescribed requirements as stipulated by the law concerned.<sup>125</sup> The individual or entity with legal personality under a legal system has the competence to make a claim before judicial or quasi-judicial institutions of that system and can also be held accountable for their actions under that legal system.<sup>126</sup>

The notion of attributing personality to a corporation under municipal law has been conceptually problematic. Over the years, questions were raised as to whether attributing legal personality to a corporation makes an entity a real person, a fictitious person, a juristic person, a moral person or no person.<sup>127</sup> To address these questions, three theories emerged with regard to the nature of a corporation: the fiction theory, the concession theory and the reality theory.<sup>128</sup> The fiction theory conceptualises a corporation as an artificial creation which has been granted legal personality so that individuals can pursue their business interests.<sup>129</sup> The concession theory, on the other hand, views a corporation as a legal entity which has been delegated by the state to perform certain functions.<sup>130</sup> The reality theory conceptualises a corporation as a real entity whose existence is an expression of its own personality.<sup>131</sup> According to Černič, the reality theory brings

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124 Church J and Hosten WJ “Private Law of Persons” in Hosten WJ and Edwards AB et al *Introduction to South African Law and Legal Theory* 2nd ed (Butterworths Durban 1995) 552-553.

125 Cassese *International Law in a Divided World* 77. Cheng *Introduction to Subjects of International Law* 25 writes that “[i]t is true that in all modern societies, it is regarded as axiomatic that all physical persons, by the mere fact of being human individuals, are to be considered subjects of the law, endowed with legal personality under their respective legal systems”.

126 Raič D *Statehood and the Law of Self-Determination* (Kluwer Law International The Hague 2002) 10.

127 Brown WJ “The personality of the corporation and the state” 1905 (21) *The Law Quarterly Review* 365; Radin M “The endless problem of corporate personality” 1932 (32) *Columbia Law Review* 643–644.

128 Černič LJ *Human Rights Law and Business: Corporate Responsibility for Fundamental Rights* (Europa Law Publishing Groningen 2010) 11-12. Also see Iwai K “Persons, things and corporations: The corporate personality controversy and corporate governance” 1999 (47) *American Journal of Comparative Law* 584.

129 Černič *Human Rights Law and Business* 12.

130 Černič *Human Rights Law and Business* 12.

131 Iwai 1999 *American Journal of Comparative Law* 584.

forth two advantages. Firstly, it recognizes the existence of a corporate will, and thus makes it possible to talk of corporate criminal liability. Secondly, it makes it possible to engage in the debate on corporate accountability for fundamental human rights.<sup>132</sup> There is a sense that each of the three theories has an element that links one to the other. As such, a theoretical approach which is rooted only in one theory to the exclusion of other theories will only paint an incomplete picture of the legal personality of a corporation. On this basis, Černič proposes an integrated theory of personality which can draw different attributes from each of the different theories.<sup>133</sup>

On its own, the concept of legal personality does not have much meaning. It is the law that imputes meaning into it.<sup>134</sup> This means that the concept of legal personality derives its meaning from the provisions of the enabling legal system. As Radin<sup>135</sup> asserts, personality so understood refers not to anything in nature but “a group of rights and capacities or at any rate a group of legal relations, and this group owes its existence entirely to the recognition of it by the legal and institutional organization of the community”. The concept of personality was applied to a corporation as a matter of necessity and convenience.<sup>136</sup> To claim the corporate form or legal personality, an entity had to be incorporated in accordance with the laws of a state.<sup>137</sup>

In modern times, the nature of the personality of a corporation in domestic law is no longer contested. It is trite that once a company is incorporated, it becomes a legal person with the capacity to bear rights and duties under the municipal legal system concerned. In most legal systems, to say that a corporation has personality has been accepted as a legal fiction. This however does not rule out the fact that factually an entity called a corporation exists in reality with its own infrastructure, and a physical address. Through this legal fiction, a veil is created between the individuals behind the corporation and the entity itself. Because of this fiction, the law does not take interest in the individuals or persons who constitute the

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132 Černič *Human Rights Law and Business* 12.

133 Černič *Human Rights Law and Business* 12.

134 Iwai 1999 *American Journal of Comparative Law* 584.

135 Radin 1932 *Columbia Law Review* 645.

136 Radin 1932 *Columbia Law Review* 652.

137 Radin 1932 *Columbia Law Review* 654.

corporation, but in the corporation in its own right.<sup>138</sup> In certain instances however the interest of justice may require the law to pierce through the veil and pursue the individuals behind the corporation.<sup>139</sup>

The legal fiction has afforded scholars and the courts an opportunity to be able to treat corporations as persons with their own set of rights and duties under the domestic legal system. Like individuals, corporations get named, can commit crimes,<sup>140</sup> can become good citizens,<sup>141</sup> have a reputation that can be harmed,<sup>142</sup> are moral agents<sup>143</sup> and can be held accountable for their actions.<sup>144</sup> Legal personality is also a business concept which facilitates the business motif of a corporation. Profit maximisation has always been the core of the very existence of corporations. Courts have in the past made bold statements affirming this point. As late as the twentieth century, for instance, a court in the United States of America (USA) emphatically stated that:

A business corporation is organised and carried on primarily for the profit of the stakeholders. The powers of the directors are to be employed for that end. The discretion of directors is to be

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- 138 *Salomon v Salomon & Co Ltd* 1897 AC (HL) paragraph 30 as per Lord Halsbury LC stating: "It seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are." See further paragraph 50 where Lord MacNaghten states that: "The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is still precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. [Company law in the United Kingdom was regulated in accordance with the Company's Act 1862]." The *Salomon v Salomon* case serves as authority for legal personality of a corporation. See Canfield GF "The scope and limits of the corporate entity theory" 1917 (17) *Columbia Law Review* 128–143; Pickering MA "The company as a separate legal entity" 1968 (31) *Modern Law Review* 481–511.
- 139 See Blumberg P "Accountability of multinational corporations: The barriers presented by concepts of the corporate juridical entity" 2001 (24) *Hastings International and Comparative Law Review* 308-311.
- 140 Litowitz, D "Are corporations evil?" 2004 (58) *University of Miami Law Review* 811-841; Stessens G "Corporate criminality: A comparative perspective" 1994 (43) *International and Comparative Law Quarterly* 493–520.
- 141 Esser I-M "Corporate social responsibility: A company law perspective" 2011 (23) *South African Mercantile Law Journal* 317.
- 142 Lewis S "Reputation and corporate responsibility" 2003 (7) *Journal of Communication Management* 356-364.
- 143 Donaldson T *The Ethics of International Business* (Oxford University Press Oxford 1989) 44.
- 144 Friedman L "In defence of corporate criminal liability" 2000 (23) *Harvard Journal of Law and Public Policy* 833.

exercised in the choice of means to attain that end, and does not extend to a change in the end itself.<sup>145</sup>

Like individuals coming together to form a corporation, corporations can also cluster themselves into a group to form an even bigger entity called MNCs.<sup>146</sup> By definition, as it is with corporations in general, MNCs are a business concept not a legal one.<sup>147</sup> The coming together is in most cases driven by business imperatives and not legal concerns. While there is a tendency to collectively refer to this cluster of entities as MNCs, the reality is that collectively the position of these clustered entities is not clearly articulated in law.<sup>148</sup> Notwithstanding their non-existence in law, MNC operations continue to grow.<sup>149</sup> The interplay between these clustered corporations, which in essence is a coming together of entities with different nationalities, becomes important. The fact that corporations have legal personality in municipal law does not automatically grant them international personality under international law as the two legal systems are not the same.<sup>150</sup> Conversely, not having international legal personality in international law does not stop MNCs from having their activities in multiple jurisdictions. As juristic persons of municipal law, MNCs are more and more becoming participants in international relations. In a similar manner that it does with individuals within a state, international law conceptualises corporations as nationals of a state. Given the fact that MNCs are a cluster of corporations of different nationalities, the inherent weakness of how international law conceptualises corporations becomes apparent. In this regard, it is argued, there is a need for a conceptual paradigm shift in international law.

As a national of a state, a corporation enjoys privileges that accrue to individuals in international law, such as diplomatic protection.<sup>151</sup> A precondition for a corporation to enjoy this privilege is that legally there should be a connection between the

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145 *Dodge v Ford Motor Co.* 170 N.W. 668 (Mich.1919) 668 as quoted in Backer 2006 *Columbia Human Rights Law Review* 296 footnote 32.

146 See Vagts 1970 *Harvard Law Review* 740.

147 Vagts 1970 *Harvard Law Review* 746; Rigaux F "Transnational Corporations" in Bedjaoui M (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Dordrecht 1991) 122; Gatto *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar Cheltenham 2011) 38 and 48.

148 Gatto *Multinational Enterprises and Human Rights* 38.

149 Muchlinski PT "Holding multinationals to account: recent developments in English litigation and the company law review I" 2002 (39) *Amicus Curiae* 4.

150 Lauterpacht H "The subjects of the law of nations" 1947 (63) *The Law Quarterly Review* 444, Walter 2007 *Max Planck Encyclopaedia of Public International Law* para 27.

151 The role of the individual in international law will be discussed in Chapter 4 of this study.

corporation and the state seeking to extend diplomatic protection to it.<sup>152</sup> The nationality of a corporation is established in one of two ways: The traditional Anglo-American approach attributes to a corporation the nationality of the place of its incorporation, while the continental system attributes to it the nationality where the principal office of the corporation is located.<sup>153</sup> The International Court of Justice (ICJ) in the *Barcelona* case, for example, has stated that: “The traditional rule attributes the right of diplomatic protection of a corporate entity to the state under the laws of which it is incorporated and in whose territory it has its registered office”.<sup>154</sup> On the face of it, insistence on territory creates a misalignment between MNCs and international law, as international law operates on the basis of nationality which is geographic in definition, while MNCs are international in the sense that their operations traverse a number of geographic locations.<sup>155</sup> Flowing from the principle of nationality of a corporation are, according to Vagts, two consequences: Firstly, through the principle of nationality the state of incorporation claims competence to govern and regulate the internal affairs of a corporation. Secondly, it affords the state of incorporation the right to command allegiance of its corporation.<sup>156</sup> According to Vagts there has also been a move towards defining the nationality of a corporation in terms of stock ownership and management or control.<sup>157</sup>

From the foregoing, it follows that corporations participate in international law as nationals of the state of their incorporation. Even though international law conceptualises corporations in a similar manner that it does individuals, there is a nuanced difference between the two. Corporations, as Alvarez asserts, require the recognition of national law before they can be accorded some participation in the international legal system.<sup>158</sup> Such recognition is conferred upon them through the municipal law requirements of incorporation. Once that is conferred, such a corporation would be deemed to have legal personality under the given legal system, meaning, it would have legal existence in as far as that legal system is

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152 Dugard *International Law* 282.

153 Vagts 1970 *Harvard Law Review* 740.

154 *Barcelona Traction Light and Power Company, Ltd* 1970 ICJ Reports 3 at 42 (hereinafter *the Barcelona Traction case*).

155 Donaldson *The Ethics of International Business* 32.

156 Vagts 1970 *Harvard Law Review* 741.

157 Vagts 1970 *Harvard Law Review* 741.

158 Alvarez 2011 *Santa Clara Journal of International Law* 8.

concerned. Individuals, on the other hand, do not require any recognition. By virtue of being human they are afforded some level of participation in the international legal system without any intervention of the municipal legal system. The only requirement though, is that there should be a connection between the individual and the particular state seeking to extend diplomatic protection to the individual.<sup>159</sup>

In summary, legal personality of corporations in municipal law is granted by the state. Through their own laws, individual states set the requirements that entities seeking legal personality as corporations should comply with, the contours of the legal personality so conferred and the circumstances under which such personality can be terminated. The process of incorporation plays a pivotal role in establishing the nexus between the corporation and the state of incorporation and by extension it gives the corporation some identity under international law, albeit indirectly through the state of incorporation.

#### **4 THE LACK OF ACCOUNTABILITY OF MNCS IN INTERNATIONAL LAW**

The debate on the need to hold corporations accountable has a long history.<sup>160</sup> The role of corporations in relation to the state and religion has gone through various phases over time.<sup>161</sup> Corporate activities have always been conducted in line with the political vicissitudes of the time. At the height of papal domination of the state in the West, it was imperative for corporations to keep their operations in

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159 The concept of statelessness constitutes an exception to this view. Statelessness arises from a variety of challenges some people find themselves in. For a discussion of statelessness and international law see Mandal R and Gray A “Out of the Shadows: The treatment of Statelessness under International Law”. The Chatham House Report of the Royal Institute of International Affairs 2014 available at: [http://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20141029StatelessnessMandalGray.pdf](http://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20141029StatelessnessMandalGray.pdf) (accessed 06 February 2015).

160 See Addo MK “Human Rights and Transnational Corporations – An Introduction” in Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* 4 who dates calls for corporate responsibility and accountability to as far back as Cicero in 44 BC. For a general debate see Joseph S *Corporations and Transnational Litigation* (Hart Publishing Oxford 2004); Alston P *Non-State Actors and Human Rights* (University Press Oxford 2005); Clapham A *Human Rights Obligations of Non-State Actors* (University Press Oxford 2006); Bottomley S and Kinley D (eds) *Commercial Law and Human Rights* (Ashgate Dartmouth Aldershot 2002); Jägers N *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia Antwerp 2002).

161 See Muchlinski PT *Multinational Enterprises and the Law* 2nd ed (Oxford University Press Oxford 2007) 3-44, Stern PJ *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford University Press New York 2011) 3-18 and also Weeramantry CG “Human rights and the global market place” 1999 (XXV) *Brooklyn Journal of International Law* 27-49.



line with the dictates of religion and morality. It was therefore not out of the ordinary for corporations to engage the services of spiritual advisors so as to get counsel on the moral soundness of their activities.<sup>162</sup> This all came to an end when the Peace Treaty of Westphalia was signed, thus ushering in an era of secularisation. Free from the confines of religion, corporations no longer needed to keep their activities in line with the dictates of morality.<sup>163</sup> In their voyage of discovery searching for profit, corporations had the power and freedom to embark on a wide range of activities. Jägers<sup>164</sup> points out that in the seventeenth century large corporations like the English East Indian Company (EIC) and the Dutch East Indian Company (VOC) could occupy land, wage wars and conclude treaties. Recounting the power of these entities, Donaldson writes that:

We are reminded of the British East Indian Company, which hundreds of years ago deployed over forty warships, possessed the largest standing army in the world, was lord and master of an entire subcontinent, had dominion over 250 million people, and even hired its own bishops.<sup>165</sup>

Historically, corporations were of two kinds. There were those that were wholly private and had no connection to the state and those that were controlled by the state.<sup>166</sup> Those with a close connection to the state were chartered companies incorporated for the sole benefit of the sovereign and the state.<sup>167</sup> Some of the chartered companies played a role in the colonial administration of colonial territories in places such as India, Canada, Indonesia and Southern Africa.<sup>168</sup> The state had control and power over the activities of such corporations and could also

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162 Weeramantry 1999 *Brooklyn Journal of International Law* 31-34.

163 Weeramantry 1999 *Brooklyn Journal of International Law* 34.

164 Jägers *Corporate Human Rights Obligations* 20; the *Island of Palmas* case (*Netherlands, USA*) (1928) 2 RIAA 929 at 837-838 (hereinafter the *Island of Palmas* case); Kamminga MT and Zia-Zarifi S "Liability of Multinational Corporations under International Law: An Introduction" in Kamminga and Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* 4 pointing out that in the medieval world corporations served as "quasi-sovereign entities".

165 Donaldson *The Ethics of International Business* 32. See also Stephens 2002 *Berkeley Journal of International Law* 49; Muchlinski PT "Human rights and multinationals: Is there a problem?" 2001 (77) *International Affairs* 31.

166 Ratner 2001 *The Yale Law Journal* 453.

167 Chirwa DM "The long march to binding obligations of transnational corporations in international human rights law" 2006 (22) *South African Journal Human Rights* 78.

168 Ratner 2001 *The Yale Law Journal* 453.

determine their scope and size.<sup>169</sup> The nineteenth century marked a radical change in the relationship as both the state and the corporation obtained legal personality – the state in the international sphere and corporations in the private sphere.<sup>170</sup> Corporations were therefore no longer accountable to states, but to their shareholders.<sup>171</sup> This change, it is argued, marked the genesis of the conceptual accountability challenges dealt with in this study.

Foreign direct investment plays a crucial role in the economy of developing countries.<sup>172</sup> As such, developing countries are constantly competing among themselves to attract foreign direct investment. The geo-political economic world order is structured in such a way that most corporate investors are located in developed countries. In most cases a host state is a developing country in need of foreign direct investment. Ordinarily most corporations are economically more powerful than the host states themselves. Given their weak economic position, even where host states are willing to regulate the activities of corporations, host states as Joseph aptly points out, may lack both the technical expertise to do so and the legal machinery to hold them to account.<sup>173</sup> Corporations have also become strategic in their approach. Some corporations prefer to invest in countries whose human rights record is poor.<sup>174</sup> Considering how mobile corporations are in search of a place to invest, the imbalances of power and the need for foreign direct investment by developing countries, it becomes inevitable that the host state would not be the proper institution to regulate the activities of corporations. Thus, between the home state of incorporation and the host state where corporations ply

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169 Chirwa 2006 *South African Journal of Human Rights* 78, and Stephens 2002 *Berkeley Journal of International Law* 55.

170 Jägers *Corporate Human Rights Obligations* 20; Chirwa 2006 *South African Journal of Human Rights* 78.

171 Chirwa 2006 *South African Journal of Human Rights* 78.

172 Avi-Yonah RS “National regulation of multinational enterprises: An essay on comity, extraterritoriality, and harmonisation” 2003 (42) *Columbia Journal of Transnational Law* 7 submits that: “Despite the economic importance of MNEs, there is a surprising paucity of law governing foreign direct investment (‘FDI’) especially in comparison with the abundance of law governing trade. There is no multilateral legal agreement governing FDI that is similar to the General Agreement on Tariffs and Trade (‘GATT’), no organisation similar to the World Trade Organisation (‘WTO’), and almost no courses in law schools on FDI law.”

173 Joseph *An Overview of the Human Rights Accountability of Multinational Enterprises* 78-79.

174 See Avery C “Business and Human Rights in a Time of Change” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International Hague 2000) 26 quoting an official of Shell Nigeria during the dictatorship in Nigeria saying that: “For a commercial company trying to make investments, you need a stable environment. Dictatorships can give you that.”

their trade through their subsidiaries, there is an accountability vacuum created, which can leave the international operations of corporations without a proper regulating authority.

## **5 FACTORS CONTRIBUTING TO THE ACCOUNTABILITY DEFICIT OF MNCS**

In the literature on the accountability of MNCs for human rights, the lack of accountability can be attributed to a number of factors. This study will limit its focus to the challenges caused by globalisation, the corporate form of MNCs and the doctrinal limitations.

### **5.1 Globalisation and its impact**

On 20 April 2005, the United Nations Commission on Human Rights adopted a resolution requesting that the UN Secretary-General appoint a Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).<sup>175</sup> Pursuant to this mandate, the then Secretary-General of the UN, Kofi Anan appointed Professor John Ruggie on 28 July 2005 with a mandate to, among others, identify and clarify standards of corporate responsibility and accountability with regard to human rights.<sup>176</sup> Ruggie, a Kirkpatrick Professor of International Affairs and Director of the Centre for Business and Government at the Kennedy School of Government at Harvard University, brought a wealth of experience to the mandate.<sup>177</sup> In executing his mandate, Ruggie conducted research and held consultations and workshops.<sup>178</sup> He consulted widely with states, non-governmental organizations, international business associations and individual companies, international labour federations, the UN and other

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175 Office of the High Commissioner for Human Rights, Human Rights and Transnational Corporations and Other Business Enterprises, Human Rights Resolution.2005/69 adopted on 20 April 2005 available at: <http://www.ohchr.org/EN/Issues/Business/Pages/ResolutionsDecisions.aspx> (accessed on 20 July 2014). The 2005 UN initiative will be discussed in detail in Chapter 2.

176 See the UN Media Statement available at: <http://www.un.org/News/Press/docs/2005/sga934.doc.htm> (accessed on 19 January 2011).

177 See <http://www.un.org/News/Press/docs/2005/sga934.doc.htm> (accessed on 19 January 2011). According to the statement, Ruggie had previously served as an Assistant Secretary-General, and was a senior advisor for strategic planning from 1997 to 2001. Among his many roles, Ruggie is credited for having been one of the main architects of the United Nations Global Compact and also for having played a pivotal role at the Millennium Summit of 2000 which led to the adoption of the Millennium Development Goals.

178 Ruggie 2007 *American Journal of International Law* 822.

international agencies, and legal experts. By the time he presented his second report, he had held meetings in Geneva, New York, London, Paris and Washington.<sup>179</sup> In 2011 when he rounded off his mandate, he had held forty seven consultations in all continents and had visited more than twenty countries.<sup>180</sup> In the introduction to his 7 April 2008 report, Ruggie pointed out that “the root causes of the business and human rights predicament lies in the governance gaps created by globalisation”.<sup>181</sup>

Law has played a role in the facilitation of the process of globalisation.<sup>182</sup> The challenge however is that globalisation itself has facilitated the rise of entities such as MNCs which have grown beyond the reach of the same domestic laws that have helped to create them. Conceptually, globalisation has blurred the traditional legal divide between public and private law.<sup>183</sup> Corporations, for instance, are subjects of private law.<sup>184</sup> Anderson<sup>185</sup> has noted two fundamental challenges that globalisation poses to constitutionalism. The first one relates to the fact that globalisation challenges the liberal political theory that asserts that the state is the exclusive or even primary location of politics. Secondly, globalisation challenges the liberal theory that the state is the exclusive or even primary source of law. These challenges have vast implications, especially in as far as they impact on how constitutionalism is understood. Anderson asserts that:

If Constitutional law is concerned with how political power is constituted, and if Constitutional rights are concerned with protecting the autonomy of the individual, then the fact of

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179 Commission on Human Rights, “Interim Report of the Special representative of the General-Secretary on the Issue of Human Rights and Transnational Corporations and Other business Enterprises”, E/CN.4/2006/97 (22 February 2010) para 3.

180 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) para 8 (Introduction to the Guiding Principles).

181 See Commission on Human Rights, “Protect, Respect and Remedy: A framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) para 3.

182 Sham *Legal Globalisation* 75 notes that: “Laws and regulations also help create powerful non-state actors, such as international organisations and corporations, by permitting such actors to come into being and acquire their source of power.”

183 Ochoa 2003 *Boston Third World Law Journal* 58 points out that: “Under a globalizing order that erodes national sovereignty and increases the importance of private actors, a clear delineation between private and public law and their relationship to one another is difficult to discern.”

184 Okeke CN *Controversial Subjects of International Law* (Rotterdam University Press 1973) 207.

185 Anderson *Constitutional Rights after Globalisation* 17.

significant sites of private power questions the relevance of an approach that focuses on the state alone.<sup>186</sup>

Also Shelton<sup>187</sup> explores the impact of globalisation on the law by asking whether globalisation is good for human rights or whether human rights are good for globalisation. Different scholars hold different views on the benefits of globalisation. On the one hand, there are those who view globalisation as enhancing rights, leading to economic benefit and ultimately to political freedom. These benefits have led scholars like Pendleton<sup>188</sup> to argue for a human right to globalisation. Pendleton<sup>189</sup> locates the globalisation debate within the context of the tension between national allegiance and global identity and allegiance. His view is that nationalism has failed. National allegiance, he argues, is anachronistic and wrong. Among others, it threatens survival and makes war possible, and is not different from racism, in that it fails to make nationals to take non-nationals seriously as people and is contrary to Christian and other religious teachings. He views globalisation as offering an escape from nationalism to an expanded concept of global rights and duties.<sup>190</sup> Pendleton sees globalisation as being both a right and a vehicle for what he calls globalisation rights.<sup>191</sup> Globalisation rights are rights such as a right to international security, to trade across national borders, to have non-partisan dispute settlement, free movement of persons across borders and the right to hold multiple nationalities.<sup>192</sup> These globalisation rights, he argues, are the newest category of individual rights similar to natural rights from which human rights developed.<sup>193</sup> There is therefore a connection between a human right to globalisation on the one hand, and globalisation rights on the other, in that the former provides access to the latter.

It can be argued along the same line of Pendleton's reasoning that the world has made strides in moving towards internationally agreed and accepted standards in politics, human rights and culture. People can no longer be deprived of

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186 Anderson *Constitutional Rights after Globalisation* 17-18.

187 Shelton 2002 *Boston College International and Comparative Law Review* 273.

188 Pendleton MD "A new human right—the right to globalisation" 1999 (22) *Fordham International Law Journal* 2052–2095.

189 Pendleton 1999 *Fordham International Law Journal* 2052.

190 Pendleton 1999 *Fordham International Law Journal* 2052.

191 Pendleton 1999 *Fordham International Law Journal* 2079.

192 Pendleton 1999 *Fordham International Law Journal* 2053.

193 Pendleton 1999 *Fordham International Law Journal* 2053.

international standards simply because they belong to a state under a despotic government or belong to a particular culture. It is these international standards that can be viewed as rights flowing from globalisation. Even more important for this thesis is that in legal matters, people regardless of where in the world they may be located, are entitled to remedies that are internationally acceptable in a globalised world. It is globalisation that has opened these possibilities which the international community has agreed to, and it can therefore be argued that the global community is entitled to the benefits that flow from globalisation. In the era of globalisation, the very notion that human rights are universal is contested by scholars.<sup>194</sup> This is so because equally, a case can be made that human rights are relative. Notwithstanding the debates, the view adopted in this study is that the universality of rights derives from the fact that human rights are common to all human beings simply because they are human.<sup>195</sup>

On the other hand, there are scholars who see globalisation as posing a threat to human rights protection. Shelton outlines their argument as follows:

First, local decision-making and democratic participation are undermined when multinational companies, the World Bank, and the IMF set national economic and social policies. Second, unrestricted market forces threaten economic, social, and cultural rights such as the right to health, especially when structural adjustment policies reduce public expenditures for health and education. Third, accumulations of power and wealth in the hands of foreign multinational companies increase unemployment, poverty, and the marginalisation of vulnerable groups.<sup>196</sup>

As a result of globalisation, the traditional powers of the state have been severely affected. At the policy level, the nation state has to comply with international demands and imperatives some of which may even go against its national priorities. The traditional notion of the state as the sole provider of services to the public is no longer applicable. More and more services such as social security, law

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194 See Chapter 5 for a detailed discussion of this tension.

195 The universality of human rights will be discussed briefly in Chapter 5 of this study.

196 Shelton 2002 *Boston College International and Comparative Law Review* 294.

and order and air traffic control are now delivered by corporations.<sup>197</sup> Even where the delivery of public services is still in the hands of a state, such delivery is no longer delivered on the basis of public interest, but based on principles of effectiveness and efficiency.<sup>198</sup> The emergence of the concept of the global economy has meant that the nation state remains vulnerable to economic events not necessarily linked to its policies or political decisions. In this regard, Anderson notes that:

In the context of significant sites of non-state authority in the global economy, the state is no longer able to command, while the commands of other bodies are at times more authoritative.<sup>199</sup>

The shifting of power from the state to the market has meant that the authority of the state is less felt where powerful entities such as MNCs operate. This already creates a problem with regard to accountability as the state, especially in developing countries, even though willing, may not necessarily be able to ensure effective protection of human rights.

## **5.2 The corporate form of MNCs**

The Greeks and the Romans were familiar with the notion of the legal existence of a corporation as a legal person distinct from the actual persons who compose it.<sup>200</sup> In this regard the corporate form becomes the vehicle through which the entity engages in its business activities. Historically there has been a chasm between issues of international human rights and commercial law.<sup>201</sup> The public and private

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197 Anderson *Constitutional Rights after Globalisation* 20-21; Dickinson LA “Government for hire: Privatising foreign affairs and the problem of accountability under international law” 2005 (47) *William and Mary Law Review* 137-235.

198 Anderson *Constitutional Rights after Globalisation* 21.

199 Anderson *Constitutional Rights after Globalisation* 10.

200 Williston S “History of the law of business corporations before 1800” 1888 (2) *Harvard Law Review* 106.

201 See Steinhardt RG “Corporate Responsibility and the International Law of Human Rights: The New *Lex Mercatoria*” in Alston P (ed) *Non-State Actors and Human Rights* (Oxford University Press Oxford) 177-226. See also Redmond P “Transnational enterprise and human rights: Options for standards setting and compliance” 2003 (37) *The International Lawyer* 75 who writes that “[b]oth international law and corporate law substantially ignore the effect of corporate activity upon the enjoyment of human rights; the former does so because of its preoccupation with constraining state abuse of human rights and the latter through the thrall cast by the norms of profit maximisation and primacy of shareholder interest”. See further Weeramantry 1999 *Brooklyn Journal of International Law* 28, where he writes that: “Economic interests and ethical concerns seem, moreover, to have become locked up in separate compartments. They are two parallel worlds which exist side by side with no

divide in law meant that issues of human rights are of a public nature and therefore addressed to states in their dealings with the individual, whereas issues of the corporate profit are of a private nature and therefore left to commercial or corporate law. Commercial law addresses issues related to commerce such as the corporate form, shareholders, tax and competition. It hardly addresses human rights issues. Where issues of human rights are regarded to be of importance, they are addressed through voluntary measures such as codes of conduct and corporate social responsibility clauses, but not out of any legal obligation.

### **5.3 Doctrinal challenges**

Once a company is incorporated, it becomes a legal person with the capacity to bear rights and duties under the municipal legal system concerned. As a juristic person, it can incur debts, sue and be sued and incur liabilities in its name, that is, it becomes subject to the rules of the municipal law concerned in its own right. As indicated above, having legal personality in municipal law, though, does not automatically grant an MNCs international personality under international law as the two legal systems are not the same. While this is the case, the international operations of MNCs straddle the divide between the two legal systems sometimes evading accountability due to some doctrinal limitations<sup>202</sup> of both municipal and international law.

## **6 PURPOSE OF THE STUDY**

The rise in power of MNCs on the international scene over the last half a century has become a point of great concern. That MNCs have the potential to bring forth the much needed foreign direct investment and development is not contested. However, their increased power on the international scene may give rise to an increased potential to violate human rights. Macklem<sup>203</sup> aptly points out that:

The global reach of multinational corporations means that they often operate in jurisdictions in which human rights violations

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necessary interrelationship between them. The whole economic enterprise of the modern world seem thus to be on the way to escaping from societal control, and sometimes even from the grip of the law.”

202 Doctrinal challenges will be discussed in Chapter 2 of this study.

203 Macklem P “Corporate accountability under international law: The misguided quest for universal jurisdiction” 2005 (7) *International Law FORUM du droit international* 281; Muchlinski 2001 *International Affairs* 31-33.



occur, obtain and benefit from subsidized arrangements with governments that commit human rights violations, provide goods and services that result in human rights violations, or organize production in ways that violate human rights of workers.

Despite these potential dangers to human rights, there is still no international mechanism to hold MNCs accountable for their international operations. As pointed out earlier, this study sees public international law as offering a potential tool through which to regulate the activities of MNCs. The setback however is that currently international law rules and norms are silent on the activities of MNCs. Notwithstanding the many developments that have taken place over the years with regard to the international activities of MNCs, states continue to be the direct addressees of international law rules and norms. In as far as activities of MNCs are concerned, international law “says little, and does less, about human rights violations associated with multilateral corporate activity”.<sup>204</sup>

The topic of MNCs and human rights has been part of the international research agenda for the last half a century. Volumes of manuscripts and research articles have been churned out over the same period.<sup>205</sup> Unsurprisingly, there is even a concern that perhaps the subject of MNCs and human rights is a topic whose era has come and gone.<sup>206</sup> On the contrary, this study is of the view that the discourse on this subject is far from over. Clear recent evidence of this lies in what emerged from the mandate of Ruggie. Arguably, the appointment of Ruggie in 2005

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204 Macklem 2005 *International Law FORUM du droit international* 281.

205 See Addo MK *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999); Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000); Bottomley S and Kinley D (eds) *Commercial Law and Human Rights* (Ashgate Dartmouth Aldershot 2002); Jägers N *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia Antwerp 2002); Joseph S *Corporations and Transnational Litigation* (Hart Publishing Oxford 2004); Alston P *Non-State Actors and Human Rights* (University Press Oxford 2005); Clapham A *Human Rights Obligations of Non-State Actors* (University Press Oxford 2006); Muchlinski PT *Multinational Enterprises and the Law* 2nd ed (Oxford University Press Oxford 2007); Gatto A *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar Cheltenham 2011); Deva S *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge London 2012); Deva S and Bilchitz D *Human Rights Obligations of Business: Beyond Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013).

206 Muchlinski *Multinational Enterprises* (iii) where he states in the *Preface and Acknowledgement to the Second* edition of his book that: “The subject of regulating multinational enterprises (MNEs) has grown apace since the publication of the first edition in 1995. I was once asked whether focusing on ‘multinationals’ was not a little ‘passe’.”

constitutes one of the most recent international initiatives by the UN to investigate legal issues relating to corporations and human rights.<sup>207</sup> In his 2011 report to the Human Rights Council, Ruggie observed that

there were many initiatives, public and private, which touched on business and human rights. But none had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge.<sup>208</sup>

The Ruggie mandate has succeeded in providing a point of convergence for the stakeholders. This for a legal system that is based on consensus is an achievement to be lauded. What the framework did not succeed in doing though, is to bridge the conceptual divide between states and corporations. Instead the framework has perpetuated the divide between the private and the public spheres, the state and non-state entities, the direct and indirect mode of accountability. To date, international law has not as yet devised a conceptual tool to bridge the gap. Because of these inherent conceptual gaps, the international legal system is still struggling to effectively hold MNCs to account for their international operations. Further, the gaps have created a distance between the legal system and the people it seeks to protect. In 2013 Bilchitz, addressing the same question of accountability of corporations for human rights, wrote that, “[l]egal principles and rules need to be brought in line with the reality facing many on the ground. How can a system of accountability for human rights violations be developed?”<sup>209</sup> The question posed by Bilchitz, though asked differently by different scholars over the

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207 Bilchitz D “A Chasm Between ‘Is’ and ‘Ought’? A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles” in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 117.

208 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) para 5 (Introduction to the Guiding Principles).

209 Bilchitz D “Human rights accountability in domestic courts: Does the Kiobel Case increase the Global Governance Gap?” 2013 (4) *Tydskrif vir die Suid-Afrikaanse Reg* 803. And Muchlinski PT Holding multinationals to account: recent developments in English litigation and the company law review 1” 2002 (39) *Amicus Curiae* 3 where he writes that, “How and to what extent should MNEs be subject to specialized regulation through laws and rules relating to their activities as cross-border groups?”

years, has been the focus of most studies on the subject of MNCs and human rights in the recent past, and to date there is still no satisfactory solution under both municipal and international law. At a domestic level, new frontiers continue to be explored. For instance, in South Africa, history may be made if the High Court in Johannesburg can agree to a class action lawsuit by hundreds of former mine employees who have contracted silicosis and tuberculosis while in the employ of a number of mining houses.<sup>210</sup>

What has emerged as a common thread running through most studies to date is that they all lament the inadequacy of enforcement mechanisms and lack of redress for victims.<sup>211</sup> There however seems to be disagreement among scholars on how exactly to remedy the inadequacies inherent within both the international and domestic legal systems in relation to MNC human rights violations.

In 2014 the question of the accountability of MNCs was once again brought before the UN when a group of developing states called upon the institution to explore the “elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.”<sup>212</sup> It is anticipated that in subsequent years, the UN will once again pay attention to what has by now become a perennial question for the multilateral institution. Evidently, the relationship between MNCs and human rights continues to be of importance not only to scholars, but the international community as a whole. Until an effective mechanism to hold MNCs is found, this matter will continue to be a subject of research and deliberations. It is in this context, it is proposed, that this study should be viewed and understood.

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210 Evans S “Silicosis case poised to rewrite the law books as David takes on Goliath” 2015-10-16 *Mail & Guardian* 8-9. At the time of writing this thesis, the matter was still pending before the court.

211 Pak NS and Nussbaumer JP “Beyond Impunity: Strengthening the legal accountability of transnational corporations for human rights abuses” *Hertie School of Governance – Working Papers*, No. 45, November 2009 at 33 available at: [http://www.hertie-school.org/fileadmin/images/Downloads/working\\_papers/45.pdf](http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/45.pdf) (accessed on 10 March 2015).

212 Human Rights Council, “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights” UN Resolution A/HRC/RES/26/9 (14 July 2014). See Zhang J “Negotiations kick off on a binding treaty on business and human rights” available at: <https://www.iisd.org/itn/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights/> (accessed on 10 December 2015).

The foregoing debate on corporate accountability for human rights violations has underscored the need to impose obligations on MNCs for their extraterritorial operations. There seems to be a general consensus among scholars on the need to hold MNCs accountable for human rights violations.<sup>213</sup> As for what the locus of that accountability should be is a subject of great debate. Potentially, international law itself offers various avenues for holding MNCs accountable, but there is still no agreement among scholars as to the most efficient and effective approach.<sup>214</sup> In

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213 Bilchitz 2010 *South African Law Journal* 778-779 writes that: “The major unanswered question currently in relation to corporations and human rights is to find a clear method to determine the application of human rights responsibilities to corporations and, in particular, the context of their positive obligations in this regard. A clear normative theory needs to be developed which provides the basis for the attribution of such responsibility”. Jägers *Corporate Human Rights Obligations* 260, having concluded that corporations do have responsibilities for human rights, goes on to state that: “However, corporate responsibility has yet to be transformed into rules and procedures through which corporations can be held directly accountable under international law. This presents a major challenge for human rights proponents in the years to come”. Kinley and Tadaki 2004 *Virginia Journal of International Law* 995 write that “[r]eflecting the state-centric focus of international human rights law all existing regimes are designed to hold states directly accountable for their implementation. In order, therefore, to develop the means by which to ensure that the human rights duties of TNCs are to be regulated on the international plane, it is necessary either to extend existing mechanisms or to develop new ones, or to do both”. Joseph *An Overview of the Human Rights Accountability of Multinational Enterprises* 88 asserts that “[d]irect international regulation of MNEs would constitute a welcome paradigmatic shift away from the state-centric focus of international law”. Stephens 2002 *Berkeley Journal of International Law* 90 notes that “[i]nternational law has already developed applicable standards. The task ahead is to find effective mechanisms to enforce those norms, to ensure that the amorality of profit does not permit corporate human rights abuses to fester for another fifty years”. Reinisch A “The Changing International Legal Framework For Dealing with Non-State Actors” in Alston P (ed) *Non-State Actors and Human Rights* (Oxford University Press Oxford) 82 is of the view that “[d]irect accountability of non-state actors is underdeveloped in human rights instruments, and in international law in general, but it is not wholly excluded, either on the level of substance or that of procedure. At present one certainly cannot speak of an established system of international mechanisms whereby non-state actors are held directly accountable for human rights violations, even though one may recognize an increasing awareness that they are considered to be directly bound by human rights obligations”. An emphatic voice is that of Kamminga MT and Zia-Zarifi S “Liability of Multinational corporations under International Law: An Introduction” in Kamminga and Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* 1 who write that “we are now confident that liability of MNCs under international law is necessary, is possible, and is inevitable”.

214 See, for example, Vázquez 2005 *Columbia Journal of Transnational Law* 927-959; Jägers *Corporate Human Rights Obligations* 175; Chirwa 2004 *Melbourne Journal of International Law* 3; Bilchitz 2010 *South African Law Journal* 778-779; Joseph *An Overview of the Human Rights Accountability of Multinational Enterprises* 75-93; Backer 2006 *Columbia Human Rights Law Review* 286–389; Ruggie 2007 *American Journal of International Law* 819-840; Deva S “Human rights violations by multinational corporations and international law: Where from here?” 2003 (19) *Connecticut Journal of International Law* 1–5; Ratner 2001 *The Yale Law Journal* 448, 538–540; Shelton 2002 *Boston College International and Comparative Law Review* 321; Gatto *Multinational Enterprises and Human Rights*; Duruigbo EA *Multinational Corporations and International law: Accountability and Compliance Issues in the Petroleum Industry* (Transnational Publishers, Inc Ardsley 2003); Černič *Human Rights Law and Business*.

international law, a theory of accountability can either be direct or indirect. In the case of the direct theory of accountability the subject-object debate becomes the starting point of the inquiry. In the case of the indirect theory of accountability, the doctrine of state responsibility becomes important to the inquiry. An argument advanced in this study is that a solution to the accountability deficit lies in bridging the conceptual divide between the private and the public, the state and the non-state and the direct and indirect modes of accountability.

As illustrated above, international law no longer only concerns rules for the regulation of nation states, but has evolved in scope and content to be a normative system for the international community, covering a wide variety of topics, including human rights. Since 1948, international human rights have become important to the extent that even business has had to ensure their respect. In their international operations MNCs sometimes find themselves beyond the reach of national laws while at the same time they are not accountable in international law. This study is of the view that there is a need to create a theory of accountability for MNCs for their international operations and that international law, as a normative system, is better placed to provide that.<sup>215</sup> According to Higgins,<sup>216</sup> a normative system has two components to it. Firstly, there must be a standard of conduct which is regarded by each actor and by the group as a whole as being obligatory, and, secondly, the violation of that obligatory and binding standard of conduct must carry a sanction. A third component this study will argue for is that the efficacy of the second component is dependent on the existence of some institutional mechanism with rules and procedures to deal with recalcitrant actors.

Over the years, international law has responded to world challenges based on “a small handful of its basic principles”.<sup>217</sup> Two of such principles revolve around the concept of international legal personality and the doctrine of state responsibility. The concept of international personality will be of importance to establish whether MNCs can be held directly accountable in international law. This however is not to

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215 See Shelton D “The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations” in Flauss J-F (ed) *International Protection of Human Rights and Victims’ Rights* (Bruylant Bruxelles 2009) 57 where she writes that “Today, the protection of human rights is generally recognised to be a fundamental aim of modern international law”.

216 Higgins *Problems and Process* 1.

217 Bedjaoui M “General Introduction” in Bedjaoui M (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Dordrecht 1991) 3.

negate the equally important indirect relationship through which MNCs can be held to account indirectly through the doctrine of state responsibility in international law. Between the possible direct accountability and the indirect method of holding MNCs to account in international law, it will be argued, lies the solution towards effectively holding MNCs to account. The research question therefore is:

*How can MNCs be held accountable for human rights violations under international law?*

The research question will be dealt with in the following manner:

Chapter 2 sets the context to this study by discussing the rise of MNCs in relation to human rights. The rising power of MNCs in international relations, it will be argued, increases their potential to both enhance and harm human rights. For almost half a century, the international community has struggled to construct a mechanism to hold MNCs accountable for their human rights violations. The debate has over these years been conducted within a matrix of opposites between scholars who want the accountability mechanisms to be international versus those who prefer the mechanisms to be national, those who want the mechanisms to be located within the public sphere versus those who prefer to locate the mechanisms in the private sphere, and finally those who prefer to have voluntary mechanisms for MNCs, as opposed to those who want to have involuntary mechanisms that can be enforced in law. The chapter will also discuss the rising power of MNCs and the challenges posed by such a rise to the traditional methods of accountability. To illustrate the challenges, three jurisdictions will be sampled, the United States of America, the United Kingdom and the European Union. The United States of America was chosen for two reasons. Firstly, it was chosen because of the extraterritorial reach of the Alien Tort Act<sup>218</sup> which has been the basis for most of the cases before American courts. Secondly, a number of cases that have appeared before the United States courts provide a good illustration of the challenges arising from the private international law doctrine of *forum non conveniens*.<sup>219</sup> The United Kingdom which is a member of the European Union has been chosen because English courts in particular have adopted an

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218 Alien Tort Act 23 U.S.C of 1789 will form part of the discussion in Chapter 2 of this study.

219 The doctrine will be discussed further in Chapter 2 of this study.

interpretation that seems to leave the door open for victims of corporate human rights violations. The European Union has been added to the discussion because of its rather radical and innovative approach to the doctrine of *forum non conveniens*.

Chapter 3 discusses the doctrine of state responsibility and accountability in international law. Statehood is the organising principle in international law. The traditional conception of international law asserts that mainly states have duties and obligations under international law. The need to construct a theory of direct accountability for MNCs in international law is not aimed at replacing or negating the law of state responsibility. Indirect accountability in international law continues to be of great importance. As Jäger<sup>220</sup> points out, the law of state responsibility offers an interesting and yet underutilised tool for the protection of human rights. This chapter seeks to discuss the doctrine of state responsibility as a tool for the protection of human rights in as far as MNCs are concerned. In international law, states have duties and responsibilities that they owe to each other. These will, among others, be discussed with reference to the Draft Articles for State Responsibility,<sup>221</sup> *jus cogens* and obligations *erga omnes*.

Chapter 4 discusses the evolution of the concept of legal personality in international law. International law has already conferred limited legal personality on non-state actors like the individual and international organisations. International legal personality to these non-state actors was conferred at different times for different reasons. The chapter will look at factors which were considered in extending legal personality to all those non-state entities enjoying limited legal personality. Since not all subjects of international law are the same, the chapter will further explore the parameters of legal personality so conferred.

Chapter 5 generally, corporations owe their allegiance and existence to national laws. Ordinarily issues of corporate accountability should be addressed through national laws. The international operations of MNCs however have put corporations beyond the reach of municipal legal systems. To date, none of the

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220 Jägers *Corporate Human Rights Obligations* 175; Chirwa 2004 *Melbourne Journal of International Law* 3.

221 Report of the International Law Commission on the Work of its Fifty-third Session, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" UN GAOR 56th Sess., U.N. Doc. A/56/589 (26 November 2001).

attempts to hold MNCs accountable have been effective. This is mainly because some of these initiatives are voluntary and therefore non-binding, and those that have attempted to impose binding obligations such as the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>222</sup> (the Draft Norms) have not been adopted, and therefore have no legal effect. The indirect state-centric mechanisms have also proven to be inadequate. The situation is further compounded by the fact that the absence of an international normative standard against which to measure the protection of human rights has led to uneven and unequal standards of human rights enforcement. This chapter seeks to propose an institutional enforcement mechanism that can effectively hold MNCs to account.

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

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<sup>222</sup> Commission on Human Rights, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).



## CHAPTER 2

### MNCs AND HUMAN RIGHTS IN CONTEXT

#### 1 INTRODUCTION

Corporations are powerful global players of great political and economic significance. For almost half a century, the international community has struggled to construct a mechanism to hold them accountable for their extraterritorial operations. The debate on MNCs and human rights has over these years been conducted within a matrix of opposites. Whether accountability mechanisms should be located at an international or national level, in the public or private sphere or whether such mechanisms should be voluntary or involuntary has been at the core of the debates. As it will become evident in this chapter, MNCs are a complex phenomenon and therefore no single method of accountability will be adequate to address the accountability challenges they pose. This chapter seeks to situate the discussion of the debate by first giving an overview of the rising power of MNCs and then give an illustration of the challenges posed by such a rise to the state-centric methods of accountability.

The chapter will be presented in five sections. That the power of MNCs is internationally on the rise is no longer a matter of mere speculation. This power has in the course of history manifested itself in a myriad of ways. In the first section, the chapter will discuss the power and ability of MNCs to violate rights. The phenomenon of MNCs has brought with it challenges to both the national and international traditional methods of accountability. The second section of the chapter will discuss some of the challenges that MNCs pose to the traditional methods of accountability. In the third section, the chapter will give a snapshot illustration of the jurisprudence that has emerged from the courts in the United States, the United Kingdom and the European Union. This illustration is aimed at highlighting the weaknesses of the state-centric system of accountability and the hurdles these weaknesses create for plaintiffs seeking to hold MNCs to account. Over the last four decades there have been international attempts to create international norms and standards against which MNCs can be measured in as far as human rights are concerned. The fourth part of this chapter will present the

different international initiatives that have been put forward over the four decades. The fifth section will be a conclusion to the chapter.

## 2 THE ABILITY OF MNCS TO VIOLATE HUMAN RIGHTS

MNCs are not just potential violators of human rights; they have a positive social role to play too.<sup>1</sup> They are a major source of investment and job creation; they generate economic growth and reduce poverty and also contribute to the realisation of rights.<sup>2</sup> In the course of history MNCs have positioned themselves as major drivers of development in society. Since the Second World War, the number of corporations has been on the increase. According to Gatto<sup>3</sup> there are about 82000 parent companies worldwide with 810000 foreign affiliates. Most of the parent companies are located in the United States of America, within the European Union and Japan.<sup>4</sup> This being the case, the world is divided between the global North and the global South. The North is developed while the South is still underdeveloped.<sup>5</sup> Typically, to say that a country is developing refers also to its levels of education, its legal and regulatory institutions and its economy.<sup>6</sup> A pattern of investment that has emerged is that parent companies are located in the developed world, while their subsidiaries are mainly in developing countries.<sup>7</sup> On

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- 1 See Subedi S “Multinational Corporations and Human Rights” in Arts K and Mihyo P (eds) *Responding to the Human Rights Deficit: Essays in Honour of Bas de Gaay Fortman* (Kluwer Law International The Hague 2003) 172, Gatto A *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar Cheltenham 2011) 12; Kamminga MT “Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC” in Alston P, Bustelo M and Heenan J (eds) *The EU and Human Rights* (Oxford University Press Oxford 1999) 554; Tzevelekos V “In search of alternative solutions: Can the state of origin be held internationally accountable for investors’ human rights abuses that are not attributable to it?” 2010 (35) *Brooklyn Journal of International Law* 157.
  - 2 Commission on Human Rights, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) para 2.
  - 3 Gatto *Multinational Enterprises and Human Rights* 3. See also Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) para 15 (Introduction to the Guiding Principles).
  - 4 See Branson DM “Holding multinational corporations accountable? Achilles’ Heels in Alien Tort Claims Act litigation” 2011 (9) *Santa Clara Journal of International Law* 227.
  - 5 See Milkias P *Developing the Global South: A United Nations prescription of the Third Millennium* (Algora Publishing New York 2010) 5-8; Soomin L and Shirley S “Eco-imperialism: The global North’s weapon of mass intervention” 2009 (1) *Journal of Alternative Perspectives in the Social Sciences* 846-860.
  - 6 Deva S “Human rights violations by multinational corporations and international law: Where from here?” 2003 (19) *Connecticut Journal of International Law* 9.
  - 7 Bilchitz D “Human Rights Beyond the State: Exploring the Challenges” in Vilhena O, Baxi U and Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press Pretoria 2013) 584.

the face of it, there is nothing wrong with the fact that MNCs are powerful and also increasing in number. In actual fact, given the divisions between developed and developing nations, corporations can become agents of development through foreign direct investment and therefore raise the standard of living of the people in the developing world.<sup>8</sup> To this end Redmond writes that:

Business has a unique capacity to advance human rights goals. It is a powerful vehicle for economic, social, and cultural amelioration, particularly in developing countries via job creation and diffusion of technology, scientific advances, and management skills. Foreign direct investment may both promote economic development in the host country and powerfully affect the enjoyment of a wide range of human rights, from health, food, and improved living standards to rights of free expression and access to information through new technologies.<sup>9</sup>

In the era of globalisation, corporations are generators of international trade and therefore the main actors in foreign investment.<sup>10</sup> Developing countries are all competing to attract foreign direct investment. This contest, as Kamminga observes, is more visible at the annual World Economic Forum in Davos where state presidents and prime ministers all scramble to attract captains of industry to invest in their respective countries.<sup>11</sup> A point of concern, however, is that the area of foreign direct investment is not adequately regulated by law.<sup>12</sup> States in their bilateral treaties are free to design their regulatory environment in a way that can be as appealing as possible to the investors. As a result, some scholars have raised legitimate concerns that in their attempt to attract foreign direct investment, states may be tempted to relax their regulatory environment.<sup>13</sup> This process of relaxing the regulatory environment purely to attract investment has come to be

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8 Kamminga *Holding Multinational Corporations Accountable for Human Rights Abuses* 554.

9 Redmond P "Transnational enterprises and human rights: Options for standard setting compliance" 2003 (37) *The International Lawyer* 70 -71.

10 Van den Herik L and Černič JL "Regulating corporations under international law: From human rights to international criminal law and back again" (2010) 8 *Journal of International Criminal Justice* 725-726.

11 Kamminga *Holding Multinational Corporations Accountable for Human Rights Abuses* 554.

12 Avi-Yonah RS "National regulation of multinational enterprises: An essay on comity, extraterritoriality, and harmonisation" 2003 (42) *Columbia Journal of Transnational Law* 7.

13 Vázquez CM "Direct vs indirect obligations for corporations under international law" 2005 (43) *Columbia Journal of International Law* 931.

known as “a race to the bottom”.<sup>14</sup> A corollary to the concept of the race to the bottom is the “run-away shop concept” where corporations deliberately shop around for countries with lower human rights standards.<sup>15</sup>

The ability of corporations to abuse power is no longer mere speculation; it is a reality that is well documented.<sup>16</sup> These abuses are not limited to a particular category of rights, but cut across all categories of rights from the first generation to the third generation rights.<sup>17</sup> Even where corporations are themselves not directly involved in the violation of human rights, their complicity in human rights violations can take many forms.<sup>18</sup> In March 2006, the question of corporate complicity led the International Commission of Jurists to appoint a panel on Corporate Complicity in International Crimes. The panel consisted of leading lawyers from five continents, representing both the civil and common law traditions. The appointed panel was given the mandate to explore circumstances under which companies and their officials could be held responsible under criminal and/or civil law when they are involved with other actors in gross human rights abuses. In the introduction to their report, the panel noted that:

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14 See Kinley D and Tadaki J “From talk to walk: The emergence of human rights responsibilities for corporations at international law” 2004 (44) *Virginia Journal of International Law* 938 footnote 12; Vázquez 2005 *Columbia Journal of International Law* 931-932; Fauchald OK and Stigen J “Corporate responsibility before international institutions” 2009 (40) *George Washington International Law Review* 1027-1028; Deva S “Acting Extraterritorially to tame multinational corporations for human rights violations: Who should ‘bell the cat’?” 2004 (5) *Melbourne Journal of International Law* 49-51; Deva S “Human rights violations by multinational corporations and international law: Where from here?” 2003 (19) *Connecticut Journal of International Law* 49.

15 Eliasoph IH “A Missing link: International arbitration and the ability of private actors to enforce human rights norms” 2004 (10) *New England Journal of International and Comparative Law* 87.

16 See Kamminga *Holding Multinational Corporations Accountable for Human Rights Abuses* 554-556; Kinley and Tadaki 2004 *Virginia Journal of International Law* 933-934; Joseph S “An Overview of the Human Rights Accountability of Multinational Enterprises” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 78-79, Jägers N “The legal Status of the Multinational Corporations under International Law” in Addo MK (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999) 260-261; Bilchitz *Human Rights Beyond the State: Exploring the Challenges* 582 -584.

17 See Commission on Human Rights, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) para 52; and also Deva 2003 *Connecticut Journal of International Law* 7-8.

18 Clapham A and Jerbi S “Categories of corporate complicity in human rights abuses” 2001 (24) *Hastings International and Comparative Law Review* 339-349.

The international community has been shocked at reports from all continents that companies have knowingly assisted governments, armed rebel groups or others to commit gross human rights abuses. Oil and mining companies that seek concessions and security have been accused of giving money, weapons, vehicles and air support that government military forces or rebel groups use to attack, kill or “disappear” civilians. Private air service operators have reportedly been an essential part of the government programmes of extraordinary and illegal renditions of terrorist suspects across frontiers. Private security companies have been accused of colluding with government security agencies to inflict torture in detention centres they jointly operate. Companies have reportedly given information that has enabled a government to detain and torture trade unionists or other perceived political opponents. Companies have allegedly sold both tailor-made computer equipment that enables a government to track and discriminate against minorities, and earth-moving equipment used to demolish houses in violation of international law. Others are accused of propping up rebel groups that commit gross human rights abuses, by buying conflict diamonds, while some have allegedly encouraged child labour and sweatshops conditions by demanding that suppliers deliver goods at ever cheaper prices. Although these abuses are, unfortunately, not new, what has changed is the renewed insistence *by victims and their representatives on accountability* when companies are involved in gross human rights abuses.<sup>19</sup>

It is clear that the power of corporations to get involved in activities that have a bearing on human rights does not have limits. Just as international human rights law is premised on the need to protect the individual against state power, scholars concerned with the impact of activities of corporations on human rights protection

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19 The report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes titled: Corporate Complicity and Legal Accountability 1. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol1-publication-2009-eng.pdf> (emphasis added) (accessed on 10 July 2012).

have argued that the power of corporations must also be regulated. The rise of the power of MNCs forms the basis for arguing for the need to have a regulatory structure for corporate power.<sup>20</sup> After all, Bilchitz argues, the very logic of human rights is premised on the fact that obligations must be imposed on those agents who constitute a threat to human rights.<sup>21</sup> This is so because the need to protect human rights of individuals does not become less important because the violator is a state or a corporation.<sup>22</sup>

While the power of MNCs is on the rise, state power is on a decline in certain respects.<sup>23</sup> As Kamminga points out, through privatisation, deregulation and liberalisation of their international trade, states have reduced their influence on the daily activities of their own citizens.<sup>24</sup> In certain instances, states have outsourced some of their functions to MNCs.<sup>25</sup> In other instances, as Chirwa observes, state action alone is no longer sufficient to guarantee the enjoyment of rights. About this he writes that

access to essential medicine is not only dependent on the decisions and actions of the state but also on the decisions and policies of pharmaceutical corporations. Banks and other financial institutions play a critical role in ensuring access to housing. With increasing privatisation, access to basic services as water, health,

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- 20 See Nolan J "With power comes responsibility: Human rights and corporate accountability" 2005 (28) *University of New South Wales Law Journal* 581-613; Weissbrodt D and Kruger M "Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights" 2003 (97) *American Journal of International Law* 901.
- 21 Bilchitz D "A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles" in Deva S and Bilchits D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 127.
- 22 McBeth A "Privatising human rights: What happens to the state's human rights duties when services are privatised?" 2004 (5) *Melbourne Journal of International Law* 143 and also Vázquez 2005 *Columbia Journal of International Law* 941.
- 23 See McGinnis JO "The decline of the Western nation state and the rise of the regime of international federalism" 1996 (18) *Cardozo Law Review* 903 where he argues that: "The nation state is in decline, at least among the Western industrialised nations. Decline is a relative term. It does not suggest that the nation state has disappeared, but rather, that it is no longer as defining a feature of geopolitics as it once was, and will likely remain a less controlling feature."
- 24 Kamminga *Holding Multinational Corporations Accountable for Human Rights Abuses* 553.
- 25 See Dickinson LA "Government for hire: Privatising foreign affairs and the problem of accountability under international law" 2005 (47) *William and Mary Law Review* 137-235.

education and electricity is also dependent on the actions and policies of private service providers.<sup>26</sup>

Inevitably questions of accountability would arise because even though an MNC may have taken over state functions, such MNCs are not held to account by the same standards that states are expected to account to in international law.<sup>27</sup> This is where the irony about the concept of international personality becomes stark. Given the subject-object dichotomy, entities need to be subjects of international law so as to be directly accountable under the legal system. Interestingly though, the same entities without legal personality do not need personality to breach the rules of international law.<sup>28</sup>

People's daily activities have also not been spared from the power and influence of MNCs. As Subedi notes, directly or indirectly, MNCs have become so powerful that they dictate the type of food people eat, the medicine they take and the clothes they wear.<sup>29</sup> Through their aggressive marketing strategies, corporations are capable of inducing people into vices which are foreign to what would ordinarily not be part of their lives. Weeramantry<sup>30</sup> recounts how trading companies disrupted the idyllic lifestyle of the people of the South Pacific islands by distributing firearms and inducing them to smoke. To this end, smoking schools were established where free cigarettes were distributed and the youth were enticed into smoking as a source of pleasure and a status symbol. Once the youth were addicted, they were then introduced to the idea of having to pay for the cigarettes. The same strategy was used in relation to firearms. A selected group of young people were introduced to the power of firearms, and were then given some for free. These youth would then go back to the villages to demonstrate the power of their newly found gadgets. Once a want had been created, local people were

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26 Chirwa DM "The doctrine of state responsibility as a potential means of holding private actors accountable for human rights" 2004 (5) *Melbourne Journal of International Law* 2.

27 Kamminga *Holding Multinational Corporations Accountable for Human Rights Abuses* 555.

28 Duruigbo E "Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges" 2008 (6) *Northwestern Journal of International Human Rights* 226.

29 Subedi *Multinational Corporations and Human Rights* 175; Mostajelean B "Foreign alternatives to the Alien Tort Claims Act: The success (or is it failure?) of bringing civil suits against multinational corporations that commit human rights violations" 2008 (40) *George Washington International Law Review* 499.

30 Weeramantry CG "Human rights and the global market place" 1999 (XXV) *Brooklyn Journal of International Law* 42-43.

then introduced to the idea of trading with these corporations using produce from their countries in exchange for guns and cigarettes. Driven by the desire to satisfy their newly acquired wants the people of the South Pacific islands entered into trading deals with corporations from a weakened bargaining position.<sup>31</sup>

The horrors of the Second World War intensified the need to protect human rights internationally.<sup>32</sup> What became clear already then was that states were not the only locus of power. It became apparent that other entities, including MNCs, were equally capable of abusing human rights. As discussed above, the notion that corporations can abuse human rights goes as far back into history. The abuse of power by corporations reached its zenith during the Second World War. The full extent of the participation of corporations during the Holocaust is yet to be revealed. The bit that has already emerged, points to the fact that corporations of all types all participated to their own benefit in the Holocaust. Some corporations benefited directly, while others only benefited indirectly. As Stephens points out, banks and insurance companies made profits from the deposits of the people who were killed during the Holocaust or whose heirs were not aware that their relatives had accounts, or whose family members were unable to supply documentation for their claims.<sup>33</sup> In addition, he contends that other companies exploited the slave labour provided to them by the German army, while pharmaceutical companies supplied medication and chemicals used in the Nazi medical experiments.<sup>34</sup>

During the transition from an apartheid-led government to a constitutional democracy in South Africa, the democratically elected government established the Truth and Reconciliation Commission which sought to establish the truth of what happened under apartheid. The preamble to the Promotion of National Unity and Reconciliation Act<sup>35</sup> which established the Commission, sought to, among others, “establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future”.

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31 Weeramantry 1999 *Brooklyn Journal of International Law* 44.

32 Stephens B “The amorality of profit: Transnational corporations and human rights” 2002 (20) *Berkeley Journal of International Law* 46-48; Ratner SR “Corporations and human rights: A theory of legal responsibility” 2001 (111) *The Yale Law Journal* 477-478.

33 Stephens 2002 *Berkeley Journal of International Law* 49.

34 Stephens 2002 *Berkeley Journal of International Law* 50.

35 34 of 1995.



Pursuant to this mandate, the Commission held special hearings which included political parties, armed forces, the legal profession and the media. The Commission set aside three days to hear the submissions of business and labour.<sup>36</sup> Inevitably, the various submissions covered the different facets and involvement of business in shoring up apartheid. Attendance at the Commission was by invitation and most sectors responded to the call. Of interest to note is that among those who did not heed the call to appear before the Commission, were the multinational oil companies, the biggest investors in South Africa.<sup>37</sup>

The submission by Major Craig Williamson, a former police spy just about sums up not only the role of business but of the broader society thus:

Our weapons, ammunition, uniforms, vehicles, radios and other equipment were all developed and provided by industry. Our finances and banking were done by bankers who even gave us covert credit cards for covert operations. Our chaplains prayed for our victory and our universities educated us in war. Our propaganda was carried by the media and our political masters were voted back into power time after time with ever increasing majorities.<sup>38</sup>

The Commission was alert to the fact that not all businesses were involved with the apartheid government to the same degree. As a result, its analysis of the various submissions was categorized under three headings: the first order involvement, the second order involvement and the third order involvement<sup>39</sup>. The Commission was of the view that all those businesses who were centrally involved in helping with the design and implementation of apartheid policies should be held accountable.<sup>40</sup>

The rising power of MNCs poses another challenge. It is axiomatic that there is a thin line between economic power and political power. History is replete with examples of how MNCs have managed to align their activities with the powerful

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36 11 – 13 November 1997, Johannesburg.

37 See Truth and Reconciliation Commission of South Africa Report (Volume 4) para 5. Available at: <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> (accessed on 08 February 2015).

38 As quoted in the Truth and Reconciliation Commission of South Africa Report (Volume 4) para 22.

39 Truth and Reconciliation Commission of South Africa Report (Volume 4) para 23-36.

40 Truth and Reconciliation Commission of South Africa Report (Volume 4) para 23.

political forces of the time. From the colonial period through to the modern era, the activities of corporations have always reflected the imbalance of power between the home state, which in most cases is a developed state and the host state, which in most cases is developing. In their international operations, MNCs have always relied on the support of their powerful home states.<sup>41</sup> In the absence of international rules and standards to guide them, corporations have been at liberty to be as aggressive as they can in pursuit of profit in the host states. Kamminga<sup>42</sup> makes a distinction between abuses committed by MNCs in collusion with the home state and those committed in collusion with the host state. In the category of corporations colluding with the home states he cites the examples of the overthrow of the governments of Guatemala (1954), Chile (1973) and Congo Brazzaville (1997).<sup>43</sup> For examples of the collusion with the host state, he cites the activities of Shell in Nigeria, British Petroleum in Columbia and the Dabhol Power Company in India. In Nigeria, Shell was allowed to enlist the services of the Mobile Police Force, a paramilitary force, to guard its installations and personnel. The Mobile Police Force was implicated in the massacre of about eighty people in the Umuechem riots of 1990. In Columbia, British Petroleum admitted in 1996 that it had employed the services of the Columbian army at a fee to protect its installations. This was done despite the fact that the army had a poor human rights record. In India, the Dabhol Power Company also paid the local state police to protect it against demonstrators who were demonstrating against the establishment of the plant in their midst. In carrying out their mandate, the police often used excessive force against peaceful local demonstrators.

Typically, most of the violations by MNCs affect huge numbers of people, often leaving a permanent impact on the victims and their families. For instance, overnight, the Bhopal disaster<sup>44</sup> in India reduced Bhopal to a wasteland as livestock and crops were decimated. An estimated 200 000 people were injured and about 2100 lost their lives following a lethal gas leak from one of the plants run by a corporation. The United States Southern District Court was to refer to this

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41 See Ratner 2001 *The Yale Law Journal* 452-457.

42 Kamminga *Holding Multinational Corporations Accountable for Human Rights Abuses* 554-555.

43 United Fruit assisted in the coup in Guatemala, International Telegraph and Telephone Corporation (ITT) in Chile and Elf Aquitaine in Congo Brazzaville. See also Ratner 2001 *The Yale Law Journal* 457.

44 The *Bhopal* case will be discussed below.

as “the most tragic industrial disaster in history”.<sup>45</sup> Commenting on this case, Muchlinski writes that, the “long-term after-effects are expected in persons who were exposed to the gas, and deformities are likely in babies whose mothers were pregnant when exposed to the gas”.<sup>46</sup> In Bangladesh more than a thousand people died when a building with five garment factories collapsed.<sup>47</sup> To date, the cases that have come before the courts in the United Kingdom are of victims, who as a result of their exposure to the activities of corporations, now suffer from illnesses such as throat cancer, mercury poisoning, and silicosis.<sup>48</sup> Others have had their environment damaged by oil spills from plants owned by corporations. The numbers of the victims in the different cases range from one victim to about 30 000.<sup>49</sup> In South Africa, in what may be a ground breaking case, civil society groups have joined hands to launch a class action on behalf of former mine employees who suffer from silicosis.<sup>50</sup> The case commenced on 12 October 2015 in the Gauteng South High Court.<sup>51</sup> The class action is brought on behalf of up to 17 000 former miners who contracted silicosis and tuberculosis while employed by the different mine houses in South Africa. If the class action lawsuit is allowed, it is projected that up to 100 000 litigants may end up litigating against more than 30 mining houses.<sup>52</sup> The sheer numbers and the nature of the ailments mean that the disruptive effect of some of these human rights violations by corporations will be felt by generations to come.

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45 The *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, Indian in December, 1984* 634 F.Supp. 844 (S.D.N.Y.1986) (hereinafter the *Bhopal* case (1986)).

46 Muchlinski PT “The Bhopal case: controlling ultrahazardous industrial activities undertaken by foreign investors” 1987 (50) *Modern Law Review* 545.

47 See Nolan J, Posner M and Labowitz S “Beyond *Kiobel*: Alternative remedies for sustained human rights protection” 2014 *American Journal of International Law* Unbound e-50.

48 See Muchlinski P “Corporations in international litigation: Problems of jurisdiction and the United Kingdom asbestos cases” 2001 (50) *International and Comparative Law Quarterly* 1 – 25.

49 The UK information is sourced from Meeran R “Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States” 2011 (3) *City University of Hong Kong Law Review* 4; Meeran R “Access to Remedy: the United Kingdom Experience of MNC Tort Litigation for Human Rights Violations” in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 380.

50 See Nicolson G “Silicosis: South Africa civil society to push civil action” available at: <http://www.dailymaverick.co.za/article/2015-08-20-silicosis-south-african-civil-society-to-push-class-action/#.VgYjecuqpBc> (accessed on 26 September 2015). At the time of writing this thesis, the matter was still pending before the court.

51 Thandwa L “Battle lines drawn as mineworker lawsuit begins” available at: <http://www.news24.com/SouthAfrica/News/Battle-lines-drawn-as-mine-worker-lawsuit-begins-20151012> (accessed on 16 October 2015).

52 Evans S “Silicosis case poised to rewrite the law books as David takes on Goliath” 2015-10-16 *Mail & Guardian* 8-9.

In comparison to its neighbours in the region, South Africa has a relatively advanced economy. The mining industry has for over the last hundred years been the mainstay of the South African economic might. Men from neighbouring states left their homes and flocked to these mines to eke out a living for themselves and their families back home. Underground, they were exposed to harrowing working conditions, which involved travelling for long distances and being exposed to temperatures of up to 60 degrees centigrade and working for long hours. About this Schneider and Rawoot write that “it can take up to an hour to reach the bottom of the mines, followed by eight hours of crawling through narrow shafts to drill, dig and dredge. Miners often only see the light of day on their way to and from their shacks”.<sup>53</sup> The full scale of the impact of the mining activities on the health of these miners is still not known. What is known now is that the hazardous conditions the miners were exposed to have left them with diseases such as phthisis, silicosis, pneumoconiosis and tuberculosis. The tragedy is that when these miners begin to show signs of ill health, they are just sent home to die, often without any compensation.<sup>54</sup> This is not counting those who have perished in mine accidents over the years.<sup>55</sup> Granted, strides have been made to address the issue of health and safety in the mines, but there are still some challenges.<sup>56</sup> The irony of the situation is that while it was the mines alone that have made profits over the years, it is now the state that has to bear the cost of the miners who have contracted diseases such as silicosis.<sup>57</sup>

The environment too has been affected by the activities of MNCs. In what has been dubbed the largest oil spill in US waters, BP PLC settled the Deepwater Horizon disaster by paying \$18.7 billion. The disaster occurred on 20 April 2010 when the Deepwater Horizon oil rig exploded spilling approximately 210 million gallons of oil in the Gulf of Mexico. Transocean was the owner of the Deepwater

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53 Schneider V and Rawoot I “The lost men of Lesotho” 2014-05-11 *City Press* 12.

54 Schneider and Rawoot 2014-05-11 *City Press* 12.

55 The first mining accident was recorded in 1904 and since then about 54 000 miners have lost their lives in South African mines. See “Occupational Safety” available at: the <http://www.dmr.gov.za/mine-health-a-safety/occupational-safety.html> (accessed on 01 September 2015).

56 See Tshoose C “Placing the right to occupational health and safety within a human rights framework: Trends and challenges for South Africa” 2014 (XLVII) *Comparative and International Law Journal of Southern Africa* 276–296.

57 See Hartley W “Redress for silicosis victims to cost R1.5bn” *Business Day* 2015-06-25 available at: <http://www.bdlive.co.za/business/mining/2015/06/25/redress-for-silicosis-victims-to-cost-r1.5bn> (accessed on 01 September 2015).

rig which was at the time of the disaster on lease to BP. Eleven people died. The payment by BP constituted the largest ever settlement to have been reached by the US state and federal governments with a corporation.<sup>58</sup> Because of the impact the oil spill has had, it would take years for the environment to be properly rehabilitated.<sup>59</sup>

The Shell settlement in Nigeria of \$84 million pales into insignificance when compared with the compensation paid by BP for the Deepwater Horizon oil disaster in the United States of America. The activities of Shell in Nigeria date back to 1958. Already in the early seventies, there were signs of discontent among the Ogoni people, the people directly affected by the operations of Shell. The oil spill of 2008 and 2009 in Bodo, a town in the Ogoniland region, brought the activities of Shell in Nigeria under the international spotlight. According to the United Nations Environment Programme, it will take up to 30 years to rehabilitate the environment once all leakages have stopped.<sup>60</sup>

The foregoing are but examples of the impact of the activities of corporations on the environment and human rights as a whole. That the international community is witnessing a rise of MNCs in power, stature and influence is beyond contest. Most scholars are in agreement that the rise of MNCs should be matched by a greater degree of accountability, especially in the realm of human rights protection. What is contested though is how in the light of such rising power should MNCs be held to account?<sup>61</sup> Whether the locus of accountability should only rest with municipal law or also with international law is still a subject of great debate among scholars. Macklem is of the view that the polycentric nature of MNC activities provides

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58 Sheck J and Barrett D "BP agrees to pay 18.7 billion to settle Deepwater Horizon oil spill claim" available at: <http://www.wsj.com/articles/bp-agrees-to-pay-18-7-billion-to-settle-deepwater-horizon-oil-spill-claims-1435842739> (accessed on 26 September 2015).

59 Deepwater: The Gulf Oil Disaster and the Future of Offshore Oil Drilling (Report to the President by the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, January 2011) 173 available at: <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf> (accessed on 26 September 2015).

60 Environmental Assessment of Ogoniland (UNEP Nairobi 2011) 214 available at: [http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf) (accessed on 26 September 2015).

61 Deva 2003 *Connecticut Journal of International Law* 2 where he states that: "It must be noted that the issue is currently more about *what* and *how* rather than about *why* – why should MNCs, which are established and operate for profit, follow human rights?" (emphasis in the original). Also see Deva S *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge London 2012) 1–16 and also Deva 2004 *Melbourne Journal of International Law* 41.

multiple opportunities to hold them accountable under municipal laws.<sup>62</sup> As indicated earlier, the view adopted in this study is that public international law provides a potential tool to hold MNCs to account for their international operations, and this proposal does not negate the role of municipal law. Such a proposal is bolstered by the challenges that are prevalent in the current system of accountability, to which this study now turns.

### **3 CHALLENGES POSED BY MNCS TO THE CURRENT HUMAN RIGHTS SYSTEM OF ACCOUNTABILITY**

#### **3.1 Nature of MNCs**

For business purposes, a corporation can replicate itself and have a wide range of subsidiaries. The interplay between these clustered corporations, which in essence is a coming together of entities with different nationalities, marks the genesis of a challenge for international law. As discussed in chapter one, the fact that MNCs have legal personality in municipal law does not automatically grant them international personality under international law, as the two legal systems are not the same. Conversely, not having international legal personality in international law does not prevent MNCs from having their activities in multiple jurisdictions. As juristic persons of municipal law, MNCs are more and more becoming participants on the international plane. An added challenge to this is that international law conceptualizes corporations as nationals of a state and yet MNCs, by both definition and operation, straddle territorial divides.

The very nature of a corporation and how it relates to its own shareholders and subsidiaries is legally complex. As indicated in chapter one, once incorporated a company becomes an entity separate from its shareholders with its own rights and duties. In a situation where a parent company decides to have a subsidiary, corporate law makes provision for the concept of limited liability. According to Blumberg,<sup>63</sup> the purpose of the concept of limited liability is two-fold. Firstly, it is designed to protect investors from the debts of the corporation. Secondly, it is

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62 Macklem P "Corporate accountability under international law: The misguided quest for universal jurisdiction" 2005 (7) *International Law Forum du droit international* 289.

63 Blumberg P "Accountability of multinational corporations: The barriers presented by concepts of the corporate juridical entity" 2001 (24) *Hastings International and Comparative Law Review* 302-303.

meant to protect the parent company from incurring the debts of the subsidiary company. It can therefore be said that while the concept of legal personality separates the corporate entity from the individuals who compose it, the concept of limited liability, conversely, separates investors from the debts of the corporation and further protects the parent company from the debts of the subsidiary. The net effect of this is that as the MNC creates subsidiaries, legally it becomes fragmented into little independent units.<sup>64</sup>

For accountability purposes, the very nature of a corporation is itself inherently flawed. A corporation as an abstract entity can only act through the individuals who compose it. The corporate form allows the individuals behind the legal façade of a corporation to pursue profit without being held to account directly for the decisions they make for the corporation.<sup>65</sup> In the event that there are violations of rights, the corporate façade shields the individuals behind a corporation from being held fully accountable. The shield that the façade of the corporate form provides, can have some benefits for those involved in illicit activities. For instance, a 2015 study has found that between the years 1970 and 2008, the African continent has lost \$854 billion in illicit financial flows, which amounts to a yearly average of \$22 billion.<sup>66</sup> Multinational corporations were found to account for the greatest portion of these illicit financial flows.<sup>67</sup> Further, the same study found that the use of shell companies provided individuals with the opportunity to hide their illicit wealth or launder money.<sup>68</sup>

The international operation of MNCs through their subsidiaries often straddles a number of legal systems with different norms and standards.<sup>69</sup> Choosing a place of business by MNCs for its subsidiary is often determined by the benefits that may

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64 Weeramantry 1999 *Brooklyn Journal of International Law* 41; Branson 2011 *Santa Clara Journal of International Law* 228.

65 Bilchitz *Human Rights Beyond the State* 582.

66 Track! Stop it! Get it! Report of the High Level Panel on Illicit Financial Flows from Africa: United Nations Commission for Africa, at 91, available at: [http://www.uneca.org/sites/default/files/publications/iff\\_main\\_report\\_english.pdf](http://www.uneca.org/sites/default/files/publications/iff_main_report_english.pdf) (accessed on 14 February 2015).

67 *Track! Stop it! Get it! Report of the High Level Panel on Illicit Financial Flows from Africa: United Nations Commission for Africa* 3.

68 *Track! Stop it! Get it! Report of the High Level Panel on Illicit Financial Flows from Africa: United Nations Commission for Africa* 46.

69 Johns F "The indivisibility of the transnational corporation: An analysis of international law and legal theory" 1994 (19) *Melbourne University Law Review* 895.

be derived from the weaknesses of a legal or political system of the host state.<sup>70</sup> Studies have shown that human rights violations by corporations are often prevalent in low income countries with weak political systems and poor adherence to the rule of law.<sup>71</sup> Typically, such countries are those that have experienced governance breakdown due to conflicts.<sup>72</sup> The reception of subsidiaries as legal persons in the different jurisdictions varies from state to state.<sup>73</sup> Some states, for example, may choose to recognize the legal personality conferred on the entity by its home state, while others may require the entity to go through some additional formal requirements peculiar to the host state's municipal laws.<sup>74</sup> What is interesting to note though, is that for business purposes, an MNC with subsidiaries has a single brand and reputation.<sup>75</sup> On issues that affect the reputation of the MNC as a whole, a distinction is usually not made between the parent company and the subsidiary. The 2015 Volkswagen (VW) US pollution scandal provides a good illustration of this point.<sup>76</sup> A VW company in the United States of America was exposed for fraudulently falsifying the pollution levels of a particular brand of its diesel cars. It was found that the company manipulated the gas emission levels of about eleven million diesel cars. Software was installed on the eleven million cars so that when the cars were tested for emission levels the system would register lower levels which were not a true reflection of the emission levels of the cars. The CEO of VW in Germany resigned over the scandal and a new one was

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70 Stephens 2002 *Berkeley Journal of International Law* 82.

71 Commission on Human Rights, "Interim Report of the Special representative of the General-Secretary on the Issue of Human Rights and Transnational Corporations and Other business Enterprises", E/CN.4/2006/97 (22 February 2006) para 27.

72 Commission on Human Rights, "Protect, Respect and Remedy: A Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008) paras 47,48 and 49.

73 Backer LC "Multinational corporations as objects and sources of transnational regulation" 2008 (14) *ILSA Journal of International and Comparative Law* 502.

74 For a perspective on the South African position see Schoeman E, Roodt C and Wethmar-Lemmer M *Private International Law in South Africa* (Kluwer Law International Netherlands 2014) 76.

75 The USA and some of the European Continental countries have the same corporate law principles. Variations may exist in how these principles are applied. For more information see Cohn EJ and Simitis C "Lifting the veil' in the company laws of the European continent" 1963 (12) *International and Comparative Law Quarterly* 189-225, and Pickering MA "The company as a separate legal entity" 1968 (31) *Modern Law Review* 481-511.

76 Harder A and Sloat S "Volkswagen CEO resigns as car maker races to stem emissions scandal" available at: <http://www.wsj.com/articles/volkswagen-ceo-winterkorn-resigns-1443007423> (accessed on 29 September 2015).



swiftly appointed. Though the scandal unfolded in the United States of America, its impact was felt more in Germany than anywhere else.<sup>77</sup>

Despite sharing the same name and reputation as a brand, each of the subsidiaries of an MNC is legally considered to be a separate entity with its own liabilities separate and distinct from its parent corporation.<sup>78</sup> To impose liability on the parent company is not entirely impossible, but is an onerous process. Such vicarious liability can be imposed by either piercing the corporate veil or proving that there was an agency relationship between the subsidiary and the parent company. In this regard three requirements have to be met which Blumberg<sup>79</sup> outlines as follows: Firstly, the plaintiff must show that the subsidiary lacked independence and was under the excessive control of the parent company. Secondly, the plaintiff must show that the subsidiary was used by the parent company for fraudulent or unjust means for the benefit of the parent company or its shareholders. Thirdly, the plaintiff must show that the subsidiary is insolvent or unable to satisfy a judgment.

In as far as the law of agency is concerned, the plaintiff needs to prove that there was an agency relationship between the subsidiary and the parent company. Only then would the law view the subsidiary as an agent of the parent company and, therefore, hold it liable. Other than vicarious liability being onerous to prove, it also raises doctrinal and procedural issues especially given the fact that MNCs operate in more than one jurisdiction at the same time.<sup>80</sup> Using the corporate form, MNCs have been able to manage risk by spreading their operations internationally beyond the reach of both the home and host states.<sup>81</sup> To some MNCs, risk management has become part of the strategy to minimize exposure to liability. As Magaisa writes:

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77 Nienaber M “Volkswagen could pose bigger threat to German economy than Greek crisis” available at: <http://www.reuters.com/article/2015/09/23/us-usa-volkswagen-germany-economy-idUSKCN0RN27S20150923> (accessed on 29 September 2015).

78 Blumberg 2001 *Hastings International and Comparative Law Review* 303.

79 Blumberg 2001 *Hastings International and Comparative Law Review* 305–306.

80 These private international law doctrinal and procedural issues will be dealt with in the next sub-section of this chapter.

81 See Backer 2006 *Columbia Human Rights Law Review* 290-291; Johns 1994 *Melbourne University Law Review* 893-923; Rondinell DA “Transnational corporations: International citizens or new sovereigns?” 2003 (14) *Business Strategy Review* 14.

The wave of globalization has increased the conduct of business on a transnational basis. As competition in the market place gets stiff, firms are frantically seeking to exploit new opportunities in different parts of the world. Firms are adopting various strategies in attempts to maximize efficiency and minimize exposure to liability. Indeed, managing liability is now an important part of business strategy. The growth of multinational corporate groups is one response to the potential liability problems that come with operating in multiple jurisdictions.<sup>82</sup>

Conventionally, the plaintiff may sue the MNC in the host country, but as pointed out above, often host countries are weaker in terms of resources to litigate against such powerful companies. A further challenge is that even if the plaintiff were to litigate in the host country, it may be difficult to enforce such a judgment against the subsidiary, which may threaten to discontinue business with the host county. In light of the fierce competition among developing states to attract business, the host state may opt to have the MNC continue business, rather than assisting the individual litigant to litigate against the MNC. As it has become evident earlier in the discussion, MNCs have the potential to translate their economic power into *de facto* political power.<sup>83</sup> This, it is argued, is a constant reality which developing countries are faced with in dealing with MNCs.

### **3.2 Home and host state divide**

The primacy of the role of the state in the protection of human rights is well established.<sup>84</sup> With regard to the activities of MNCs though, it is not clear as to whether this responsibility lies with the home state of incorporation or the host state. By definition, MNCs operate in multiple jurisdictions.<sup>85</sup> The debates on MNCs and their accountability for human rights violations have vacillated between the home and host state. The difficulty in holding MNCs to account is further

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82 Magaisa A “Suing multinational corporate groups for torts in wake of the Lubbe case” available at: [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001\\_2/magaisa/](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2001_2/magaisa/) (accessed on 10 July 2012).

83 Joseph *An Overview of the Human Rights Accountability of Multinational Enterprises* 78.

84 See Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) paragraph 6 (Introduction to the Guiding Principles).

85 See the discussion on Chapter 1 for a description of MNCs.

compounded by the structure through which they operate. For instance, the link between the parent company and the subsidiary is not always easy to determine. As Deva points out, “[t]he organizational structure, modus operandi and sheer influence make them [MNCs] practically immune to conventional methods of regulation”.<sup>86</sup>

The divide between the parent company and its subsidiary raises its own problems. Parent companies are fairly immobile and it is relatively easy to point out the seat of the corporation. For instance, despite having subsidiaries all over the world, Ford is an American company, Volkswagen a German one, Toyota a Japanese one and Nokia a Finish corporation. Ideally, the home state countries should be the hub of accountability.<sup>87</sup> Meeran has argued that at a policy level, it is only fair that a country from which an MNC launches its international activities and which also benefits from the profits made throughout the world should have an interest in the regulation of the activities of MCNs.<sup>88</sup> In reality though, this is not always the case. Alternatively, the regulation can be left to the host states. Arguments for this view are hinged on the fact that MNCs do not just plant their operations within the territory of the host state without negotiating the terms and conditions with the host state. Deva is of the view that pre-entry negotiations that take place between an MNC and the host state “are fundamental to whether or not MNCs operate as responsible corporate citizens”.<sup>89</sup> While the view by Deva may be appealing, in reality the business activities of MNCs operate within a matrix of political, economic and legal considerations. A combination of these factors point to the fact that already at this early stage, host states are negotiating with MNCs from a weakened position of power. Leaving the MNCs to account to a host state can therefore be problematic. For developing countries the challenges are even more pronounced. As most of the host states are developing countries which in most cases are not as powerful as the MNCs, such states may not have the

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86 Deva 2004 *Melbourne Journal of International Law* 39. See also Weeramantry 1999 *Brooklyn Journal of International Law* 28 who writes that: “The whole economic enterprise of the modern world seems thus to be on the way to escaping from societal control, and sometimes even from the grip of the law”.

87 Joseph *An Overview of the Human Rights Accountability of Multinational Enterprises* 79.

88 Meeran R “Liability of Multinational Corporations: A critical Stage in the UK” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 262.

89 Deva S *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge New York 2012) 26.

necessary resources to deal with MNCs.<sup>90</sup> A further compounding factor may be the fact that the host state may not have the political will to deal with such MNCs given the economic benefits that may flow from the very presence of such a corporation in the particular host state. As discussed earlier, the challenges are so pronounced to an extent that a state may even be more willing to lower the applicable standards so as to attract foreign direct investment.<sup>91</sup>

The foregoing discussion has raised a number of complexities regarding the regulation of the activities of MNCs. It has become evident that as MNCs' operations become international, they also become independent of government control.<sup>92</sup> For a legal system that is state-centric, the independence from government control should be of great concern. To this end, Bilchitz warns that, "a growing concern in our world is the way in which our societies have set up structures that, in many ways, have taken on a life of their own and become ends in themselves".<sup>93</sup>

The divide between the home state of incorporation and the host state provides a vacuum which has the potential to serve as a haven for MNCs which are not too keen to be regulated by states. Further, litigating against MNCs raises both procedural and doctrinal issues which may be frustrating to plaintiffs. Above all, suing MNCs in a foreign country depends on a number of political, economic and legal variables. Home states' judicial systems may adopt a lenient approach to *forum non conveniens*,<sup>94</sup> in which case the goodwill of the home state may play a role in facilitating access to justice for the plaintiffs. Conversely, some host states may be opposed to their own citizens litigating against corporations in a foreign land.<sup>95</sup> All these complexities point to the hurdles that a plaintiff has to go through.<sup>96</sup> Different common law jurisdictions<sup>97</sup> have different approaches to the

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90 Joseph *An Overview of the Human Rights Accountability of Multinational Enterprises* 78-79.

91 See the discussion on page 49 above.

92 Ratner 2001 *Yale Law Journal* 643.

93 Bilchitz *Human Rights Beyond the State: Exploring the Challenges* 581.

94 *Forum non conveniens* is discussed in the next paragraph below.

95 See Alcock S "Kader Asmal joins fight to hear case in SA" 2010-01-15 *Mail & Guardian* 12; Duruigbo 2008 *Northwestern Journal of International Human Rights Law* 246.

96 See Meeran *Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations* 378-402; Meeran 2011 *City University of Hong Kong Law Review* 1-41; Byers M "English Courts and Serious Human Rights Violations abroad: A preliminary Assessment" in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International Hague 2000) 241-249; Nollkaemper A

doctrine of *forum non conveniens*. The following is a snapshot overview of the approaches in the United States of America, the United Kingdom and the European Union.

### 3.2.1 The American jurisprudence on *forum non conveniens*

Generally, a court in the United States will not hear a matter before it unless it has both the subject matter jurisdiction of the claim and personal jurisdiction over the defendant.<sup>98</sup> Jurisdiction provides the basis for the involvement of a particular court in the matter before it. If the court has no subject matter jurisdiction and personal jurisdiction, the matter will be dismissed. The doctrine of *forums non conveniens* affords the presiding judge the discretion to dismiss a case, if an appropriate alternative forum exists.<sup>99</sup> The discretion is exercised within set parameters as outlined by the court in the *Gulf Oil Corp v Gilbert* case.<sup>100</sup> The doctrine is based on a principle that there “exists at least two forums in which the defendant is amenable to the process; the doctrine furnishes criteria for choice between them”.<sup>101</sup> The discretion lies with the court in which the plaintiff has instituted a claim.<sup>102</sup> In exercising this discretion, the court must take heed of the following: Firstly, the court must, *inter alia*, weigh issues such as convenience for witnesses and the ends of justice.<sup>103</sup> In principle, the court may dismiss a claim

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“Public International Law in Transnational Litigation against Multinational Corporations: Prospect and Problems in the Courts of the Netherlands” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 265–305; Betlem G “Transnational Litigation Against Multinational Corporations before Dutch Civil Courts” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 283-305 and Black V “Conditional *forum non conveniens* in Canadian courts” 2013 (39) *Queen’s Law Journal* 41–81.

97 *Forum non conveniens* is a common law doctrine. See Duval-Major J “One-way ticket home: The Federal doctrine of *forum non conveniens* and the International plaintiff” 1992 (77) *Cornell Law Review* 650; Rogge MJ “Towards transnational corporate accountability in the global economy: Challenging the doctrine of *forum non conveniens* in *In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*” 2001 (36) *Texas International Law Journal* 299, *Spiliada Maritime Corporation v Consulex Ltd (Spiliada)* [1986] 3 ALL ER 843 at 853 (hereinafter *the Spiliada Maritime Corporation case*).

98 See Stephens B “Corporate Accountability: International Human Rights Litigation against Corporations in the US Courts” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 220-221.

99 See Stephens B *Corporate Accountability: International Human Rights Litigation against Corporations in the US Courts* 226.

100 *Gulf Oil Corp v Gilbert* 330 US 501 (1947) (hereinafter *Gulf Oil Corp case*).

101 *Gulf Oil Corp case* at 507.

102 *Gulf Oil Corp case* at 508.

103 *Gulf Oil Corp case* at 508.

where the plaintiff has chosen a forum not because it is convenient, but because the plaintiff wants to harass the defendant or take advantage of favourable law. Secondly, the court must consider the private interest of the litigating parties before it. Private interests would therefore entail a consideration of availability of evidence, such as, evidence material, witnesses, site inspection, cost-effective measures and issues related to the enforceability of the judgment. Meaning that it would be futile to proceed with a case within a jurisdiction where the judgment will not be enforced. Thirdly, the court has to consider also issues of public interest related to the chosen forum, such as the case load of the court which the plaintiff has chosen. In addition, the court should also consider the fact that the jury system is a service which members of the community render to the judiciary. In relation to the jury, the rationale is that the jury should not be burdened with issues to which members of the local community have no connection to.<sup>104</sup> The test was later crystallised in the *Piper Aircraft Co v Reyno*,<sup>105</sup> which affirmed the view that the application for *forum non conveniens* by the defendant would still succeed, even where the claimant alleges that the substantive law that would be applied in the alternative forum is less favourable to the one in the chosen forum.

Corporations in the United States of America have not shied away from invoking the doctrine as “a first in the line of defence”.<sup>106</sup> The *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984* case provides a good illustration of this fact.<sup>107</sup> About 2 100 people died and a further 200 000 were injured in Bhopal, when methyl isocyanate, a lethal gas, was released from a chemical plant operated by Union Carbide India Ltd (UCIL). Overnight, the winds blew the deadly gas into an impoverished and densely populated area of Bhopal. The plaintiffs were both the citizens and the Government of India. The defendants were UCIL, a company incorporated in terms of the laws of India and its parent company, Union Carbide Corporation (UCC), which was based in New York, the United States. UCC owned 50.9% of the stock of UCIL, 22% of the shares were

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104 *Gulf Oil Corp* case at 508.

105 *Piper Aircraft Co v Reyno* 454 U.S. 252 (1981) (hereinafter *Piper Aircraft* case).

106 Rogge MJ “Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of *Forum Non Conveniens* in *In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*” 2001 (36) *Texas International Law Journal* 299.

107 *Bhopal* case (1986) at 842.

owned and controlled by the Indian government and the balance was owned by citizens of India.

Following the disaster, numerous cases were filed both in India and different federal courts in the United States. The magnitude of the disaster was such that on 29 March 1985 the Indian government enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act 21 of 1985, which granted it the exclusive right to represent the victims in India or elsewhere.<sup>108</sup> On 8 April 1985 the Indian government filed a complaint in the Southern District Court of New York on behalf of all victims of the Bhopal disaster. The rationale for bringing the matter to a US court was based on the fact that the Indian courts were not adequately equipped to handle the Bhopal litigation.<sup>109</sup> UCC applied for a motion to dismiss the action on the basis of *forum non conveniens*. The court embarked upon a detailed and thematic analysis of the doctrine of *forum non conveniens* and found India to be the appropriate forum.

The analysis of *forum non conveniens* inevitably has an impact on political issues and the court was alert not to perpetuate the imperial mentality of one sovereign nation imposing its views on a developing nation. Of interest to note is what the court said in relation to the regulation of UCC:

The Indian government, which regulated the Bhopal facility, has an extensive and deep interest in ensuring that its standards for safety are complied with. As regulators, the Indian government and individual citizens even have an interest in knowing whether extant regulations are adequate. This court, sitting in a foreign country, has considered the extent of regulation by Indian agencies of the Bhopal plant. It finds that this is not the appropriate tribunal to determine whether the Indian regulations were breached, or whether the laws themselves were sufficient to protect Indian citizens from harm. It would be sadly paternalistic, if

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108 *Bhopal case* (1986) at 844.

109 *Bhopal case* (1986) at 847.

not misguided, of this court to attempt to evaluate the regulations and standards imposed in a foreign country.<sup>110</sup>

On appeal,<sup>111</sup> the court of appeal also approved of the court *a quo*'s decision on the adequacy of the Indian judicial system which was found to be "developed, independent and progressive".<sup>112</sup> A further consideration was that the "Indian courts would be in a superior position to construe and apply applicable laws and standards, than would courts of the United States".<sup>113</sup> Further, the majority of witnesses and documentary proof bearing on causation were located in India.

On weighing the public and private interest factors, the court considered the fact that most of the documentary evidence was entirely in Hindi or other Indian languages and most of the witnesses could not speak English.<sup>114</sup> Should there be a need to do inspection *in loco*, the court opined, the Indian court would be better placed to do that.<sup>115</sup> The court further took into consideration the fact that at the time of the accident there was not even one American who was employed by the plant, all employees were Indian. The private and public interest enquiry was summed up by the Appeal Court as follows:

After a thorough review, the district court concluded that the public interest concerns, like private ones, also weigh heavily in favour of India as the *situs* for trial and disposition of the case. The accident and all the relevant events occurred in India. The victims, over 200 000 in number, are citizens of India and located there. The witnesses are entirely Indian citizens. The Union of India has a greater interest than the United State in facilitating the trial and the victims' claim.<sup>116</sup>

The question of choosing the correct forum constitutes one of the greatest hurdles a plaintiff seeking to sue in the American courts would face. The challenge is such that even if the plaintiffs were to qualify under the provisions of some statute, that

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110 *Bhopal case* (1986) at 864.

111 *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*. 809 F.2d195 (2nd Cir.1987) (hereinafter the *Bhopal appeal case* (1987)).

112 *Bhopal appeal case* (1987) at 199.

113 *Bhopal appeal case* (1987) at 199.

114 *Bhopal appeal case* (1987) at 201.

115 *Bhopal appeal case* (1987) at 201.

116 *Bhopal appeal case* (1987) at 201.



alone would not deter the defendant from objecting to the jurisdiction of the proceedings based on the doctrine of *forum non conveniens*.<sup>117</sup> In theory, courts in the United States of America are accessible to foreign plaintiffs, but this does not translate into justice itself being accessible. As the discussion above illustrates, the litigants may still find themselves entangled in protracted court processes relating to procedural issues. This is the case even where there is a statute in place granting the plaintiff access to American courts. For instance, a foreign plaintiff may have access to American courts based on the provisions of the Alien Tort Act.<sup>118</sup> For almost 200 years the ATCA was not often applied. It was only in 1980 that it was once again invoked in the *Filártiga v Peña-Irala* case.<sup>119</sup> The case involved citizens of the Republic of Paraguay. Americo Peña-Irala a former Paraguayan official was charged in the United States of America with the wrongful death of Joelito Filártiga by torture, a crime which is prohibited under international law. All the material facts of the case occurred in Paraguay and there was nothing that connected the parties to a court in the United States of America, except that Peña-Irala was on a visit to New York when the proceedings against him commenced. In bringing the matter to the United States, the Filartigas relied on the provisions of the ATCA. The ATCA provides that “[t]he district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.<sup>120</sup> The district court dismissed the claim by the Filartigas.<sup>121</sup> It was only on appeal that the court recognised the fact that victims of international human rights could sue in American courts, even for violations that occurred outside the United States of America.<sup>122</sup> Since *Filártiga*, the ATCA has been invoked in a number of cases involving a wide variety of defendants including corporations.<sup>123</sup>

The first invocation of the provisions of the ACTA against a corporation was in the *Doe v Unocal Corp* case.<sup>124</sup> The claim related to the sequence of events following

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117 See Bhopal case (1986) at 845; *Gulf Oil Corp* case at 507.

118 Alien Tort Act 23 U.S.C of 1789 (hereinafter referred to as the ATCA).

119 *Filártiga v Peña-Irala*, 630 F.2nd 876 (2d Cir.1980) (hereafter the *Filártiga* case).

120 Section 1350. Emphasis added.

121 Eastern District of New York. *Filartiga v. Pena-Irala*, No. 79-C-917 (E.D.N.Y., filed Apr. 6, 1979).

122 The *Filártiga* case (1980).

123 See *Stephens Corporate Accountability: International Human Rights Litigation against Corporations in the US Courts* 209–229.

124 963 F.Supp.880 (C.D.Cal 1997) (hereinafter referred to as the *Doe* case). See *Kiobel v*

the 1988 military takeover in Burma. In the early 1990s it was alleged, that a number of international oil companies including Unocal and Total, began negotiating with the military government to construct Yadana oil pipe in Burma. In 1993 Unocal formally entered into an agreement with the military to participate in the project. According to the agreement, the military undertook to, among others, clear the forest, level the ground, and provide labour materials and security for the project.<sup>125</sup> In the course of executing its part of the agreement, the military forcefully removed farmers from their villages, confiscated their property and forced inhabitants to clear forest, level the pipeline route, build headquarters for pipeline employees, prepare military outposts and carry supplies and equipment. It was alleged that due to this forced relocation, many villagers lost their homes and were deprived of the use of their crops and livestock. Women and young girls were targets of rape and other sexual offences by the military. It was the view of the plaintiffs that when Unocal entered into an agreement with the military, they knew or should have known the history of the military government in relation to human right violations of customary international law, including the use of forced relocation and forced labour.<sup>126</sup> The claim by the plaintiffs was that Unocal was complicit in the human rights violations committed by the military against its people. Unocal moved to have the matter dismissed on the basis of lack of subject matter jurisdiction. The federal district court held that private actors can be held liable for violation of international law even where there is no state action and Unocal's motion was not granted.<sup>127</sup>

In the 2002 decision, the Court of Appeal confirmed the view that private actors can be held liable for violations of international law.<sup>128</sup> However, the status of this decision is not clear as the court had ordered that the matter be heard *en banc*.<sup>129</sup>

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*Royal Dutch Petroleum Co* 621 F 3d 111 (2010) 4 and Knutson L "Aliens, apartheid and us courts: is the right of apartheid victims to claim reparations from multinational corporations at last recognized?" 2010 (7) *Sur International Journal on Human Rights* 182 for the view that *Doe v Unocal Corp.*, 963F.Supp.880 (C.D.Cal 1997) (hereinafter the *Doe* case) was the first time that the provisions of the ATCA were invoked against a corporate defendant.

125 The *Doe* case at 885. For a detailed discussion of the case see Rosencranz A and Louk D "Doe v. Unocal: Holding corporations liable for human rights abuses on their watch" 2005 (8) *Chapman Law Review* 135–152.

126 The *Doe* case at 885.

127 The *Doe* case at 885.

128 *Doe v Unocal* 395 F. 3d 932 (9 th Cir. 2002) (hereinafter the *Doe* appeal case).

129 *Chambers R* "The *Unocal* Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses" available at:

This never happened as Unocal reached a confidential settlement, before the case could proceed.<sup>130</sup>

The court has pointed out in the *Doe v Unocal Corp* case<sup>131</sup> that all what the ATCA requires is that (1) there must be a claim by an alien, (2) such a claim must allege tort, (3) in violation of international law. Given its extraterritorial reach and notwithstanding the fact that it may be dated, the ATCA has for some time served as a beacon of hope for plaintiffs seeking to pursue MNCs in American courts. Granted, the ATCA was not designed to be a remedy to all human rights challenges.<sup>132</sup> It was designed to address American challenges of the eighteenth century. In actual fact, it is remarkable that 200 years later, the ACTA is still used as a potential tool to provide some remedy even to victims of human rights violations committed by corporations.

Despite the ATCA's promising provisions, courts are at liberty to either apply the law of the place where the abuse took place, or decide in favour of a forum other than the United States.<sup>133</sup> Sometimes when applicants pursue MNCs in the home state of incorporation, they do so because the legal system back in the state of origin is inadequate in that it does not provide proper remedies. It is argued, that to then apply the law of the host country may in some cases result in a travesty of justice. Kinley and Tadaki<sup>134</sup> are of the view that the ATCA suffers from three limitations. The first limitation is the court's restrictive interpretation of human rights which fall within the ambit of the ATCA. While acknowledging the fact that actionable grounds of the ATCA may cover *jus cogens*,<sup>135</sup> the two authors are

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<http://userpages.umbc.edu/~davisj/unocal.pdf> (accessed on 29 October 2014). See also Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 255. For more on courts sitting *en banc* see: Wasby SL "Why sit *en banc*?" 2012 (63) *Hastings Law Journal* 747–801.

130 Rosencranz and Louk 2005 *Chapman Law Review* 152.

131 The *Doe* case at 890.

132 See Nolan J, Posner M, and Labowitz S "Beyond *Kiobel*: Alternative remedies for sustained human rights protection" 2014 *American Journal of International Law Unbound* e-49.

133 *Bhopal* case (1986) 842; *Bhopal* appeal case (1987) at 195 and Stephens *Corporate Accountability: International Human Rights Litigation against Corporations in US Courts* 223.

134 Kinley D and Tadaki J "The emergence of human rights responsibilities for corporations at international law" 2004 (44) *Virginia Journal of International Law* 940-941.

135 The view that that *jus cogens* norms apply to corporations is gradually becoming acceptable. What is clear is that there is no international instrument that forms the basis for extending *jus cogens* norms to cover corporations. Instead, the extension is merely based on deductive reasoning by scholars. Clapham A "The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court" in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under*

concerned that the ATCA “almost wholly excludes, economic, social, and cultural rights, such as the rights to health, education, housing, and a clean and healthy environment, and protection from cultural denigration – rights which are most prone to abuse by TNCs”. The second concern relates to the requirement of state action. Outside *jus cogens* norms, the ATCA can only be applicable to non-state actors where there is a nexus between their action and that of the home state. A major challenge in this regard is that the ATCA does not cover acts of corporations where they are acting alone or where there is no nexus between their actions and that of the state. The third concern relates to the need to establish personal jurisdiction of the defendants in all matters brought under the ATCA. Where the lawsuit is against MNCs, the two authors are of the view that it is not always easy to establish the connection between the foreign corporation and the forum.

In the last fifteen years, courts in the United States of America have grappled with the question whether the scope of international law has broadened to cover corporate liability. Part of the debate included whether corporate liability falls within the ambit of the provisions of the ATCA. The *Kiobel v Royal Dutch Petroleum Co* case provides a good illustration of the debates.<sup>136</sup> The case related to a claim against Royal Dutch Petroleum Company incorporated in the Netherlands, Shell Transport and Trading Company p.l.c incorporated in the United Kingdom and their joint subsidiary Shell Petroleum Development Company of Nigeria, Ltd (SPD) incorporated in Nigeria. The claimants were Nigerian

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*International Law* (Kluwer Law International The Hague 2000) 189 writes with reference to the European Court of Human Rights that: “To a limited extent, individuals have rights under international law and a limited international personality. Corporations can seize the Court under the same conditions as individuals and therefore they also enjoy limited international personality.” Ramasastry A “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* 96 and Hansen RF “The international legal personality of multinational enterprises: Treaty, custom and the governance gap” 2010 (10) *Global Jurist* 40-41 adopt a similar view. Kinley and Tadaki 2004 *Virginia Journal of International Law* 970-971 premise their argument on the fact that *jus cogens* encompass rights such as the right to life from which no derogation by states is allowed. Given the universality of *jus cogens* norms, the two authors argue that it is therefore appropriate to impose the obligation on corporations to respect the same rights. See also Stephens 2002 *Berkeley Journal of International Law* 71-72 who adopts a view based on the universal application of universal human rights norms which apply to both state and non-state entities alike. Courts in the USA have also grappled with this issue. See *Presbyterian Church of Sudan v Talisman Energy, Inc*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) at 308 where the court held that “numerous Second Circuit cases, as well as cases from courts outside the Second Circuit, make it clear that corporations can be held liable for *jus cogens* violations”.

136 621 F. 3d 111 - Court of Appeals, 2nd Circuit 2010 (hereinafter the *Kiobel* Second Circuit Court decision).

nationals who had fled to the United States as political asylum seekers. The claim was brought under the ATCA alleging that the three corporations violated international law by aiding and abetting the Nigerian government in committing a wide range of violations, namely, (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the right to life, liberty, security, and association; (6) forced exile; and (7) property destruction.<sup>137</sup> It was alleged that the defendants provided the Nigerian forces with “food, transportation, and compensation, as well as by allowing the Nigerian military to use the respondents’ property as a staging ground for attack”.<sup>138</sup>

The Second Circuit Court dismissed the application on the basis that the law of nations does not recognize corporate liability. In this regard, the majority decision reached the conclusion that

no corporation has ever been subjected to *any* form of liability (whether criminal, civil or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernable, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot, as a result, form the basis of a suit under the ATS [ATCA].<sup>139</sup>

Delivering his separate decision, which in essence agreed with the majority’s dismissal of the case but not the reasoning, Leval J wrote that the decision of the majority, “deals a substantial blow to international law and its undertaking to protect fundamental human rights”.<sup>140</sup> He castigated the reasoning of the majority decision as being, “illogical, misguided, and based on misunderstanding of precedent”.<sup>141</sup> Leval J premised his dismissal of the claim on the basis that the

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137 *Kiobel* Second Circuit Court decision at 123.

138 *Kiobel* Second Circuit Court decision at 123.

139 *Kiobel* Second Circuit Court decision at 148–149. Emphasis in the original.

140 *Kiobel* Second Circuit Court decision at 149.

141 *Kiobel* Second Circuit Court decision at 151.

factual allegations by the claimants did not succeed in pleading a violation of the law of nations.<sup>142</sup>

By *certiorari* the matter came before the Supreme Court of the United States to consider the question whether the law of nations recognises corporate liability.<sup>143</sup> Having listened to oral arguments, the court directed the parties to consider an additional question: “Whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States”.<sup>144</sup> This additional question overshadowed the original question in that it became the basis of the decision of the court.

Delineating the issue before it, the court was of the view that the issue before it was not whether the claimants had a proper claim under the ATCA, but whether a claim may reach conduct occurring in the territory of another state.<sup>145</sup> Relying on the presumption against extraterritorial application, Royal Dutch Petroleum argued that the ATCA does not have that reach.<sup>146</sup> If there is no clear intention or indication by the legislature to rebut it, it was argued, this principle remains applicable. To rebut the presumption, a statute must have a clear indication of extraterritoriality, which the ATCA was found not to have.<sup>147</sup> The claimants argued that even if the presumption applies, “the text, history and purpose of the ATCA” rebuts it.<sup>148</sup> The purpose of the presumption is to assist courts not to adopt an interpretive approach of domestic law that carry foreign policy consequences not clearly articulated by the political branches. The effect of the presumption is that courts need to tread with caution in matters that involve foreign policy.<sup>149</sup>

The matter was dismissed based on the fact that all the material facts occurred outside the United States. The court went on to say that even where the claims

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142 *Kiobel* Second Circuit Court decision at 154.

143 *Kiobel v Royal Dutch Petroleum Co* 133 SCt 1659 (hereinafter referred to as the *Kiobel Supreme Court decision*). For a detailed analysis see Bilchitz D “Human Rights Accountability in Domestic Courts: Does the *Kiobel* case increase the Global Governance Gap? 2013 (4) *Tydskrif vir die Suid-Afrikaanse Reg* 794 -805.

144 *Kiobel* Supreme Court decision at 1662.

145 *Kiobel* Supreme Court decision at 1664.

146 *Kiobel* Supreme Court decision at 1664.

147 *Kiobel* Supreme Court decision at 1665-1666.

148 *Kiobel* Supreme Court decision at 1665.

149 *Kiobel* Supreme Court decision at 1664-1665, and 1669.

have some link with the United States, “they must do so with sufficient force to displace the presumption against extraterritorial application”.<sup>150</sup> Even more relevant for this study, is that the court was of the view that where corporations are involved, “it would reach too far to say that mere corporate presence suffices”.<sup>151</sup> Once again, deferring to the political branch, the court was of the view that if congress were to determine otherwise with regard to corporations, then a statute more specific than the ATCA would be needed.<sup>152</sup> Incidentally, the Corporate Code of Conduct Act<sup>153</sup> of Cynthia McKinney sought to serve a similar purpose. The Act was creatively drafted and sought to target US corporations that employed more than twenty employees in a foreign country to adhere to its provisions.<sup>154</sup> Not much came of the Act as it was never put to the vote.<sup>155</sup>

Like in the Circuit Court<sup>156</sup> above, a minority decision was also delivered which disagreed with the reasoning of the majority decision, but still arrived at the same conclusion with the majority decision. Breyer J<sup>157</sup> also reached a conclusion that there is no sufficient connection with the United States of America and, therefore, the claim had to fail. According to Breyer J, having an office in New York is not sufficient to establish connection with the United States.<sup>158</sup>

It is argued that this restrictive interpretation adopted by the court, has no doubt reversed the gains of the ATCA since it was brought to life in the *Filátiga* and the *Doe* cases above. In addition, the court has created some uncertainties around the use of the ATCA by foreign plaintiffs within US courts. Despite the uncertainties, the question of whether corporations can be held liable under the ATCA is yet to be decided with certainty. Perhaps some of these uncertainties will be settled in

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150 *Kiobel* Supreme Court decision at 1669.

151 *Kiobel* Supreme Court decision at 1669.

152 *Kiobel* Supreme Court decision at 1669.

153 H.R. 4596, 106th Congress 2D Session (2000).

154 The Act is available at: <https://www.congress.gov/106/bills/hr4596/BILLS-106hr4596ih.pdf> (accessed on 29 October 2014).

155 For a detailed discussion see Broecker C “Better the devil you know”: Home state approaches to transnational corporate accountability” 2008 (41) *New York University International Law and Politics* 202–206; Deva S “Acting extraterritorially to tame multinational corporations for human rights: Who should ‘bell the cat’” 2004 (5) *Melbourne Journal of International Law* 37–65.

156 *Kiobel* Second Circuit Court decision.

157 *Kiobel* Supreme Court decision at 1670-1678.

158 *Kiobel* Supreme Court decision at 1678.

future litigation, but as Blichitz sounds a warning, “only the bravest of litigants are likely to venture into these uncharted waters”.<sup>159</sup>

The South African cases before the American courts illustrate the challenges of pursuing MNCs in their home state of incorporation. From South Africa, victims of apartheid launched an application against Barclays Bank, Ford Company, General Motors Corporation (GM), International Business Machines Corporation (IBM) and Daimler AG in the American courts. The claim was brought against these companies for their alleged complicity with the apartheid government of South Africa in violating human rights. The allegations<sup>160</sup> were that IBM actively implemented apartheid by producing race-based identity documents, which documents were used by the apartheid government to strip black people of their nationality and citizenship; restricted their freedom of movement in and out of South Africa and facilitated the geographic segregation against black people.<sup>161</sup> Daimler and Ford manufactured in whole, or in part, security vehicles such as the Hippos, Casspirs and Buffels for the apartheid state, which vehicles were used by the security forces to suppress opposition to the apartheid system. The employees of Daimler and Ford, who participated in activities opposed to the apartheid system such as unions and community organisations and expressed anti-apartheid views, were subjected to dismissal, arrest, intimidation and torture in collaboration with the security forces.<sup>162</sup> It was further alleged that Barclays purposefully and/or knowingly participated in the apartheid government’s goal of separating the races geographically by systematically denying black employees the opportunities to work in or transfer to offices in predominantly white areas.<sup>163</sup>

The South African cases bear all the hallmarks of the hurdles that plaintiffs suing in the home state have to go through. For over ten years, that is, from 2002 to 2015 the South African cases have been moving from one hurdle to another within the American legal system.<sup>164</sup> While these processes were pending before the

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159 Bilchitz 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 801.

160 See the *Ntsebeza Complaint* Available at: <http://hrp.law.harvard.edu/areas-of-focus/alien-tort-statute/in-re-south-african-apartheid-litigation/> (accessed on 23 October 2013).

161 *Ntsebeza Complaint* para 7.

162 *Ntsebeza Complaint* para 8.

163 *Ntsebeza Complaint* para 10.

164 See *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454 (S.D.N.Y.2014), *Balintulo v Daimler AG*, 727 f.3d 174 (Cd Cir.2013)



courts, the two Kiobel decisions above were delivered. On the 27 July 2015, the United States Court of Appeals for the Second Circuit finally dismissed the application when it ruled that the plaintiffs did not allege sufficient conduct to displace the ATCA's presumption against extraterritoriality.<sup>165</sup> Perhaps a future test case which alleges sufficient conduct to displace the ATCA's presumption against extraterritoriality will afford the courts an opportunity to pronounce on whether corporations can be held accountable under the ACTA. In the absence of one, the door of holding MNCs accountable within the US courts remains half-open.

Often when transnational litigation studies are conducted, inevitably the focus is mainly on the United States of America. The interest in the United States of America has to a large degree been influenced by the extraterritorial reach on the ATCA, which has no equal in other jurisdictions. With the weaknesses of the ATCA beginning to emerge, it becomes imperative to look elsewhere for possible avenues to hold MNCs accountable. This study now turns to the United Kingdom.

### 3.2.2 The Jurisprudence of the courts of the United Kingdom on *forum non conveniens*

Courts in the United Kingdom have also had an opportunity to pronounce on the doctrine of *forum non conveniens*. Within the Scottish legal system, the doctrine of *forum non conveniens* has a history going back to 1873.<sup>166</sup> Since then, the test to grant a stay of proceedings has evolved. The doctrine was recognised in England in the seventies<sup>167</sup> and was accepted into English law by the House of Lords in the case of *Spiliada Maritime Corporation case*.<sup>168</sup> The appellants were a Liberian Corporation that owned *Spiliada*, a vessel that sailed under a Liberian flag. The management of the corporation was partly run from Greece and partly from England. The respondents plied their trade in British Columbia. The dispute was about a claim for damages caused by the loading of wet sulphur by the

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165 See *Balintulo v Motor Co* 14-4104 (L).

166 See Janis MW "The doctrine of *forum non conveniens* and the Bhopal case" 1987 (34) *Netherlands International Law Review* 193.

167 See *The Atlantic Star, Atlantic Star (owners) v Bona Spes (owners)* [1973] 2 ALL ER 175, *MacShannon v Rockware Glass Ltd* [1978] 1 ALL ER 625.

168 *Spiliada Maritime Corporation case* 843.

respondents on the appellant's vessel. The sulphur was loaded in Vancouver and was destined to India. A clause of the bills of lading stated that "no matter where issued, (the bills of lading) shall be construed as governed by English law and as if the vessel sailed under the British flag".<sup>169</sup> The case was an appeal by *Spiliada Maritime Corporation* to have the matter heard in the English court. Consulex was opposed to this as it wanted the matter to be heard in Canada.

A determination of which forum is more appropriate than the other is done with reference to a wide number of factors.<sup>170</sup> The court explored a number of issues and then set out a two-part test enquiry on granting a stay of proceedings on the basis of *forum non conveniens*. Firstly, the onus is on the defendant to show that there is a forum more appropriate than the English forum where the dispute can be heard. In the words of Lord Goff of Chieveley: "The burden resting on the defendant is not just to show that England is not a natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum."<sup>171</sup> The court will explore the factors that establish the connection with the other forum.<sup>172</sup> Once the defendant has discharged the onus, the burden then shifts to the plaintiff. The second part of the test is that the plaintiff must show the court that even though the dispute can be properly heard in the alternative forum, special circumstances do exist that show that substantial justice cannot be obtained in the alternative forum. On analysis, the first part of the test makes a practical enquiry on convenience for the parties to the litigation and their witnesses, costs and the applicable law (in the *Spiliada* case, the bills of lading or contract).<sup>173</sup> The second part of the test enquires into substantive issues of justice, because even if a closer connection between the dispute and alternative forum can be established, the court must establish "objectively by cogent evidence"<sup>174</sup> that the plaintiff will not obtain justice in the other forum.

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169 *Spiliada Maritime Corporation* case at 847.

170 *Spiliada Maritime Corporation* case at 846 as per the separate concurring decision of Lord Templeman where he writes that, "the factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion."

171 *Spiliada Maritime Corporation* case at 855.

172 *Spiliada Maritime Corporation* case at 856.

173 *Spiliada Maritime Corporation* case at 856.

174 *Spiliada Maritime Corporation* case at 856.

The *Spiliada* test has had an impact on subsequent cases brought in English courts against MNCs. There has been a number of cases that were brought before the UK courts against MNCs. This study will only discuss two of these cases to illustrate the approach followed by the UK courts. As it will be evident in the discussion below, the two cases were chosen because they embody the challenges that are faced by the plaintiffs in pursuing corporations in their home state. The first case is the *Connelly v RTZ Corporation plc and Another*.<sup>175</sup> The facts are set out in the majority decision of Lord Goff of Chieveley.<sup>176</sup> The plaintiff, Edward Connelly, came to South Africa from Scotland in 1971 when he was 21 years old. Between 1977 and 1982, he worked for Rossing Uranium Ltd (RUL) a uranium mining company which carried its business in Namibia. RUL was a subsidiary of RTZ an English company with its registered office in London. Upon his return to Scotland, it was discovered that Connelly was suffering from cancer of the larynx. His lawyers in Scotland wrote to RTZ raising the question of compensation. In its reply, RTZ said that the claim should be referred to RUL Namibia where the insurers denied liability. Back in Namibia the Legal Assistance Centre lodged a claim for compensation on behalf of Connelly under the Workmen's Compensation Act, but the claim was rejected.

Connelly obtained a legal Aid certificate to bring the claim against RTZ in the High Court in London. RTZ applied for a stay on the basis that Namibia was the appropriate forum for the action. To decide on the appropriate forum, the court had recourse to the two-staged test set out in the *Spiliada* case. Firstly, the court had to consider whether there is another forum which is more appropriate to hear the matter than the English one. It was accepted that RUL had discharged the onus of proving that there exists another forum.<sup>177</sup> Connelly agreed that Namibia was the appropriate forum, but argued that in Namibia there was no form of assistance available to pursue such an action. The court looked at factors which point to the other forum as the appropriate one. The judge granted a stay of proceedings. Connelly's lawyers then entered into a conditional fee arrangement as a way of

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175 [1997] 4 ALL ER 335 (hereinafter referred to as the *Connelly* case).

176 *Connelly* case at 337-338.

177 *Connelly* case at 344.

ensuring that their client attains justice, after which they made an application to lift the stay of proceedings. Leave to appeal was granted based on the fact that lawyers for Connelly had entered into a conditional fee arrangement.<sup>178</sup> The court then considered the test set out in the *Spiliada* case and held that:

There is every reason to believe that this case calls for highly professional representation, by both lawyers and scientific experts, for achievement of substantial justice, and that such representation cannot be achieved in Namibia. In these circumstances, to revert to the underlying principle, the Namibian forum is not one in which the case can be tried more suitably for the interests of all the parties and for the ends of justice.<sup>179</sup>

Court processes are by nature tedious and often take a long time. *Forum non conveniens* applications can take even longer partly because of the nature of the proceedings whereby parties “litigate in order to determine where they shall litigate”.<sup>180</sup> In the case of Connelly, it was discovered in 1986 that he was suffering from cancer of the larynx. Two years later, his lawyers initiated communication with RTZ Corp regarding compensation.<sup>181</sup> Following unsuccessful attempts to claim compensation from the Workmen’s compensation in Namibia, Connelly initiated legal proceedings against RTZ in England in 1994. The matter was in England because the allegation was that “RTZ had devised RUL’s policy on health, safety and the environment, or alternatively had advised RUL as to the contents of the policy”.<sup>182</sup> From 1994 to July 1997 when the House of Lords delivered its verdict for the interlocutory application, the matter has been moving from one forum to another. Even then, it was evident that had the court not considered the fact that financial aid does contribute to substantive justice, Connelly’s application would have reached the end. With *forum non conveniens* applications, it all depends on whether the court takes a stricter view of the doctrine of or not. Connelly’s managed to be heard again, because of the patience

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178 See *Connelly* case at 339.

179 *Connelly* case at 347.

180 *Spiliada Maritime Corporation* case at 846 per Lord Templeman.

181 *Connelly* case at 337.

182 *Connelly* case at 338.

of his legal team whose creativity allowed them to explore further strategic avenues to get the case heard again. As Meeran points out, access to justice may *inter alia* be denied simply because the plaintiff does not have funding for lawyers.<sup>183</sup>

In the *Lubbe and Others v Cape PLC* case<sup>184</sup> the respondent was a registered company in England, which owned subsidiary companies in South Africa, whose core business was the mining and processing of asbestos related products. The plaintiffs had brought an application before the court alleging that, prior to 1979, the defendant while knowing of the injurious effect of asbestos, had failed, as parent company, to take appropriate steps to adopt measures of safety through its subsidiary company. As a result of this omission, the plaintiffs allege that they suffered injury either through exposure, or by merely living near the contaminated area. At the time of the application, the defendant had ceased business operations in South Africa. Of all the plaintiffs, there was only one who was a British citizen, the rest were South Africans most whom were “black and of modest means”.<sup>185</sup> The claim was made against the defendant as a parent company. The core of the claim was that the defendant breached a duty of care which it owed to those working for its subsidiaries or living near its plant of operations.<sup>186</sup> Despite the fact that the defendants had discontinued business in South Africa, Cape PLC applied for a stay of proceedings on the basis of *forum non conveniens* by arguing that South Africa was a more appropriate forum. The court *a quo* granted a stay on the basis that South Africa was the appropriate forum even though the plaintiffs had argued that Legal Aid would not be granted if they were to proceed in South Africa.<sup>187</sup> Further submissions were made and the court once again granted a stay. There was a second appeal, which appeal was also dismissed on the basis that South Africa is an appropriate forum.<sup>188</sup> On the third appeal the court assessed the history of the various applications made by the plaintiff in this

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183 Meeran R “Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations” in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 382.

184 [2000] 4 All ER 268 (hereinafter referred to as the *Lubbe* case).

185 *Lubbe* case at 270.

186 *Lubbe* case at 271.

187 *Lubbe* case at 272.

188 See *Lubbe* case at 272.

matter.<sup>189</sup> The court considered a wide range of issues including the fact that the respondents no longer had any business connections in South Africa and then allowed the plaintiff's appeal. The decision of the second court of appeal to grant a stay was overturned by a majority decision of the House of Lords to which there was no dissent.<sup>190</sup>

In the event that the defendant successfully raises the plea of *forum non conveniens* at all levels of the appeal process, the plaintiff who is still interested in pursuing the matter further would have to institute the claim in an alternative forum. As discussed above, *forum non conveniens* processes are sometimes protracted as justice delayed may often result in justice denied.<sup>191</sup> Financially this can also have a negative impact on the lawyers of the claimants. As Meeran notes, the longer the cases drag on, the more this would have financial implications for the lawyers of the claimants. Lawyers for MNCs would not even feel the impact as they would still receive their remuneration regardless of the outcome of the case.<sup>192</sup> Often, a stay of proceedings on the basis of *forum non conveniens* marks the end of the litigation.<sup>193</sup> As discussed earlier, since most of these violations happen in developing countries where there are weak systems and poor adherence to the rule of law, for claimants having to go back to host countries, may also mean being exposed to challenges such as persecution,

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189 See *Lubbe* case at 273.

190 *Lubbe* case at 282.

191 Meeran R "Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations" in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 385 who writes that in the course of the *forum non conveniens* litigation of the *Lubbe* case, about 1000 of the 7 500 claimants died.

192 Meeran *The United Kingdom experience of MNC tort litigation for human rights violations* 395.

193 See Duval-Major 1992 *Cornell Law Review* 672; and *Dow Chemical Company v Castro Alfaro* 786 S.W2d 674 (Supreme Court of Texas 1990) where Justice Dogget remarked that: "The doctrine is favoured by multinational defendants because a *forum non conveniens* dismissal is often outcome determinative, effectively defeating claims and denying the plaintiff recovery ... [it] is in reality, a complete victory for the defendant... Empirical data available demonstrate that less than four percent of cases dismissed under the doctrine ... ever reach trial in a foreign court. A *forum non conveniens* dismissal will usually end the litigation altogether, effectively excusing any liability of the defendant." See also the *Royal Dutch Petroleum Company, And Shell Transport And Trading Company, P.L.C.*, 226 F.3d 88 (2000) paras 105-106 where it was said that: "Dismissal on the grounds of *forum non conveniens* can represent a huge setback in the plaintiff's efforts to seek reparations for acts of torture. Although a *forum non conveniens* dismissal by definition presupposes the existence of another forum where the suite may be brought, ... dismissal nonetheless requires the plaintiff to start all over in a court of another nation, which will generally require the plaintiff to obtain new counsel, as well as perhaps new residence."

delays and lack of funding.<sup>194</sup> In this regard, the innovative approach by the European Union to the doctrine of *forum non conveniens*, to which this study now turns, is to be lauded.

### 3.2.3 The doctrine of *forum non conveniens* in the European Union

Since its formation, the number of states joining the European Union has been on the rise. Currently there are twenty-eight member states, six are still on the list of candidates and two are potential members.<sup>195</sup> Membership to the Union is by application. To become a member of the Union, a country needs to meet certain set criteria. A prospective member must demonstrate, *inter alia*, that they will comply with all the standards and rules of the Union.<sup>196</sup> In addition, prospective members must have

- stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- a functioning market economy and the capacity to cope with competition and market forces in the EU, and
- the ability to take on and implement effectively the obligations of membership including adherence to the aims of political, economic and monetary union.<sup>197</sup>

The Union has not completely displaced national governments as that would be in contrast with the principle of subsidiarity. The principle of subsidiary determines that power should be exercised in a manner that favours local control.<sup>198</sup> There is a sense of complementarity between national governments and the Union in that states have jurisdiction in their own territories and therefore have the power to regulate their matters in accordance with their own municipal laws. Inevitably this

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194 Meeran R *Liability of Multinational Corporations: A Critical Stage in the UK* 255; Meeran *The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations* 382.

195 See “European Union” available at: [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm) (accessed on 30 October 2014).

196 “Enlargement” available at: [http://ec.europa.eu/enlargement/policy/conditions-membership/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm) (accessed on 30 October 2014).

197 “Enlargement” [http://ec.europa.eu/enlargement/policy/conditions-membership/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm).

198 Marquardt PD “Subsidiarity and sovereignty in the European Union” 1994 (18) *Fordham International Law Journal* 616-625.

leads to tensions from time to time.<sup>199</sup> Community legal norms of the region though have a direct effect within member states.<sup>200</sup> This as Weiler points out means that:

Community legal norms that are clear, precise, and self-sufficient (not requiring further legislative measures by the authorities of the Community or the Member States) must be regarded as the law of the land in the sphere of application of Community law.<sup>201</sup>

In this regard, matters of jurisdiction are regulated by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968.<sup>202</sup> Article 2 provides that “persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State”. In as far as corporations are concerned, Article 53 states that “the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile”. A company’s domicile shall be where it has its statutory seat, or central administration or principal place of business.<sup>203</sup> Article 60(2) makes provision for the situation in the United Kingdom and Ireland where the statutory seat means “the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place”.

In the *Owusu v Jackson*<sup>204</sup> case, the European Court of Justice was afforded an opportunity to make a pronouncement on *forum non conveniens* based on the Brussels Convention. The dispute related to a swimming accident that took place in Jamaica where Mr Owusu, a British national, became a tetraplegic after hitting his head against a submerged sand bank. According to court papers, another English holiday-maker had been involved in a similar accident two years earlier and was also rendered tetraplegic. The claim was filed in the United Kingdom

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199 See Denan D *Ever Closer Union: An Introduction to European Integration* 3rd ed (Lynne Rienner Publishers Boulder 2005) 1-7.

200 See *Van Gend en Loos v Nederlandse Administratis der Belastingen (Van Gend en Loos)* Case 26/62 [1963] ECR 1–16.

201 Weiler JHH “The transformation of Europe” 1991 (100) *The Yale Law Journal* 2413.

202 Hereinafter referred to as the Brussels Convention.

203 Brussel Regulation 1 at para 60.

204 *Owusu v Jackson* [2005] ECR 1383 (hereinafter referred to as the *Owusu* case).



against Mr Jackson, also a British national, who had let the holiday resort in Jamaica to Mr Owusu, and a number of Jamaican companies. In a claim for breach of contract Mr Owusu argued that the contract which gave him access to a private beach had an implied term that the beach would be reasonably safe or free from hidden dangers.<sup>205</sup> The claim in tort against Jamaican companies was two-fold. Firstly, that they had failed to warn swimmers of the hazards constituted by the submerged sand bank, and secondly that they had failed to heed the earlier accident.<sup>206</sup> Mr Jackson and other defendants argued that the court should not exercise its jurisdiction as Jamaica was the suitable forum.

The court made reference to an earlier decision of an English Court of Appeal<sup>207</sup> in which it was said that it is possible for an English court applying the doctrine of *forum non conveniens* to decline to exercise the jurisdiction conferred on them by Article 2 of the Brussels Convention. This the court held, was bad in law.<sup>208</sup> The court made a number of pronouncements, two of which are worth highlighting. The first one is that Article 2 of the Brussels Convention is mandatory and therefore no derogation is allowed, except where such derogation is expressly allowed by the Convention.<sup>209</sup> Secondly, that the Brussels Convention

precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.<sup>210</sup>

On the strength of the Brussels Convention and the decision of the European Court of Justice, *forum non conveniens* does no longer constitute a hurdle to a foreign plaintiff within the European Union. Though not extraterritorial in reach, the

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205 *Owusu* case para 11.

206 *Owusu* case para 13.

207 *In re Harrods (Buenos Aires) Ltd* [1992] Ch 72.

208 *Owusu* case para 16.

209 *Owusu* case para 37.

210 *Owusu* case para 46.

Brussels convention constitutes a sign of hope for prospective plaintiffs within the Union.

The position adopted by the European Union provides some hope for plaintiffs wishing to hold MNCs to account within the European Union. In light of Article 2 of the Brussels Convention and the *Owusu* decision, *forum non conveniens* will no longer constitute a hurdle in the members of the European Union. Already the advantages are now visible as trials are no longer delayed by interlocutory proceedings.<sup>211</sup>

The challenge though is that this is only applicable within one region of the world. If plaintiffs have to sue in other parts of the world, such as Canada and the United States, *forum non conveniens* is still applicable. This may therefore translate into an untenable situation where whether one gets justice or not may depend on where in the world one finds oneself. There is therefore a need for binding universal standards which will not address the situation on a case-by-case basis, but address the issue of providing access to plaintiffs on an international level.<sup>212</sup> Such standards would relate to regulatory standards, enforcement and *locus standi*. In the past four decades, the international community has without success attempted to construct an international regulatory framework for corporations. It is to such efforts that this study now turns.

## **4 INTERNATIONAL ATTEMPTS TO DEAL WITH THE POWER AND INFLUENCE OF MNCS**

### **4.1 *The UN appoints a Group of Eminent Persons***

At the height of colonisation, there was a very thin line between economic and political power of MNCs. The European home states and their MNCs acted in unison as they plundered the resources of the colonised territories.<sup>213</sup> In the late 1960s, most of the developing countries raised concerns about the interference of

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211 Meeran *The United Kingdom experience of MNC tort litigation for human rights violations* 385-386.

212 Meeran *Liability of Multinational Corporations: A Critical Stage in the UK* 262.

213 See Ratner 2001 *The Yale Law Journal* 453-454.

some of the powerful corporations in their domestic political affairs.<sup>214</sup> Developing countries called for some international regulation and supervision of the activities of corporations.<sup>215</sup> The process of addressing these concerns was set in motion on 02 July 1972 when the Economic and Social Council of the United Nations (UN) adopted Resolution 1721 (LIII),<sup>216</sup> requesting the Secretary General of the UN to establish a Group of Eminent Persons, with a three-fold mandate. The mandate was to study the role of multinational corporations and their impact on the process of development, especially that of developing countries, and their implications for international relations. Secondly, the mandate was to formulate conclusions which may possibly be used by governments in making their sovereign decisions regarding policy, and thirdly to submit recommendations for appropriate international action.

Twenty eminent persons were appointed and were assisted by two consultants. In terms of documents, the Group benefited from a study of the Department of the Economic and Social Affairs of the United Nations Secretariat titled, *Multinational Corporations in World Development*,<sup>217</sup> which study was specially meant to facilitate their deliberations. This study of the United Nations Secretariat was presented in four parts dealing with (I) concepts and dimensions, (II) the nature of multinational corporations, (III) the impact and tensions and (IV) mapping out a programme of action. To accomplish its mandate, the Group held three plenary sessions, heard testimonies from fifty leading personalities from government, business, trade unions, special and public interest groups and universities. Two years later, the Group of Eminent Persons presented their report<sup>218</sup> which, among others, recommended the establishment of a Commission on Multinational Corporations and a UN Centre on Multinational Corporations that will be entrusted

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214 Chirwa 2006 *South African Journal of Human Rights* 78; Bilchitz 2010 *South African Law Journal* 756.

215 Chirwa 2006 *South African Journal of Human Rights* 78.

216 See United Nations Economic and Social Council: The impact of multinational corporations on the development process and on international relations, Report of the Secretary — General, E/5500 (14 June 1974). Reproduced in 1974 (13) *International Legal Materials* 791-799 at 791.

217 See *Multinational Corporations in World Development* available at: <http://unctc.unctad.org/data/e73iia11a.pdf> (accessed on 16 October 2014).

218 See United Nations Economic and Social Council: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, E/5500/Add.I (24 May 1974). Reproduced in 1974 (13) *International Legal Materials* 800-869.

with the development of a policy related to MNCs. The second recommendation related to the setting up of a Commission to put together a Code of Conduct for MNCs.

Of interest to note, is that the Group of Eminent Persons was aware that the problem of MNCs required a long-term solution that may in the long run require “the conclusion of a general agreement on multinational corporations having the force of an international treaty and containing provisions for machinery and sanctions.”<sup>219</sup> The proposal however was shelved just as it was raised, as the Group went on to state that: “We recognise that it is premature to propose serious negotiations on such an agreement and the machinery necessary for its enforcement. This requires careful and extended preparation and discussion”.<sup>220</sup> Pursuant to the recommendations of the Group of Eminent Persons, the Commission on Transnational Corporations and the United Nations Centre on Transnational Corporations (UNCTC) was established in 1974. The UNCTC with its main offices in New York was the focal point for all matters related to MNCs and foreign direct investment. The work of the UNCTC was then moved for a brief period to the United Nations Department of Economic and Social Development (1992 to 1993). After 1993 the Programme on Transnational Corporations was transferred to the United Nations Conference on Trade and Development (UNCTAD) in Geneva and is now being implemented by UNCTAD's Division on Investment, Technology and Enterprise Development.<sup>221</sup>

Regarding the Code of Conduct, the Group of Eminent Persons was alert to the conceptual difficulties related to the notion of codes in general in that the term can be ambiguous in meaning.<sup>222</sup> The first ambiguity lies in the fact that a code can refer to laws, decrees and rules which are already adopted or being enforced. Secondly, a code can refer to a set of rules established for negotiations in

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219 United Nations Economic and Social Council: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, E/5500/Add.I (24 May 1974). Reproduced in 1974 (13) *International Legal Materials* at 833.

220 United Nations Economic and Social Council: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, E/5500/Add.I (24 May 1974). Reproduced in 1974 (13) *International Legal Materials* at 833.

221 See “The United Nations Centre on Transnational Corporations” available at: <http://unctc.unctad.org/asp/index.aspx> (accessed on 16 October 2014).

222 United Nations Economic and Social Council: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, E/5500/Add.I (24 May 1974). Reproduced in 1974 (13) *International Legal Materials* at 833.

international negotiations and a country can choose to adhere to and apply the rules. The third category, which is the one preferred by and advocated for by the Group of Eminent Person is where a code refers to a “consistent set of recommendations which are gradually evolved and which may be revised as experience or circumstances require”.<sup>223</sup> An important point to note is that the Group of Eminent Persons was aware of the fact that such codes, though not compulsory in character, would “act as an instrument of moral persuasion, strengthened by the authority of international organisations and the support of public opinion”.<sup>224</sup> Pursuant to the recommendation, on 05 December 1974 by Resolution 1913 (LVII) a Commission on Transnational Corporations was created. The function of the Commission was two-fold:

- (a) To undertake work which may assist the Economic and Social Council in evolving a set of recommendations which would set a basis for a code of conduct dealing with transnational corporations;
- (b) To undertake work which would assist the Economic and Social Council in considering possible arrangements or agreements on specific aspects to transnational corporations with a view to studying the feasibility of formulating a general agreement and, on the basis of a decision of the Council, to consolidating them into a general agreement at a future date.

At the first meeting of the Commission, the drafting of a code of conduct was given top priority.<sup>225</sup> Despite the Group of Eminent Persons having opted for a code of conduct which is voluntary, broader issues of the relationship between corporations and human rights continued to be a subject of debate. The discussions encompassed the typical perennial issues that always appear when the debate on MNCs arises. According to the report of the Secretariat, some countries were of the view that the code should be voluntary, while others held a view that it should be mandatory. Others were of the view that the code should

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223 United Nations Economic and Social Council: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, E/5500/Add.I (24 May 1974). Reproduced in 1974 (13) *International Legal Materials* at 833.

224 United Nations Economic and Social Council: Report of the Group of Eminent Persons to Study the Role of Multinational Corporations on Development and on International Relations, E/5500/Add.I (24 May 1974). Reproduced in 1974 (13) *International Legal Materials* at 833.

225 See the United Nations Economic and Social Council: Transnational Corporations: Issues involved in the drafting of a code of conduct, E/C.10/17 (20 July 1976) para 10.

cover the conduct of both states and corporations, while others were of the view that it should only be for corporations.<sup>226</sup> As the negotiations progressed, the gulf between interested parties widened. Due to disagreements between developing countries insisting on a legally binding instrument and developed countries insisting on a voluntary mechanism, the Draft Code was not adopted.<sup>227</sup> Having occupied the activities of the Commission since 1974, the negotiations to have a code of conduct for MNCs were eventually suspended in July 1992.<sup>228</sup>

#### **4.2 The Organisation for Economic Cooperation and Development (OECD) Guidelines**

Two years after the creation of the Commission on Transnational Corporations, the OECD countries embarked on its own attempt to set international standards for MNCs.<sup>229</sup> The OECD Guidelines for Multinational Enterprises<sup>230</sup> (the Guidelines), though not legally binding, are recommendations by governments of the thirty-four OECD member states plus Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania on how their national corporations should conduct their affairs in host states. The Guidelines cover a variety of issues including disclosure of information, employment and industrial relations, combating bribery, bribe solicitation and extortion, science and technology, competition and the environment. The Guidelines “provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognized standards.”<sup>231</sup> In 2000 the Guidelines were revised to include a provision that MNCs should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.<sup>232</sup> The 2000 insertion has since remained part of the subsequent provisions of the Guidelines. Though the Guidelines are non-binding on

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226 See the United Nations Economic and Social Council: Transnational Corporations: Issues involved in the drafting of a code of conduct, E/C.10/17 (20 July 1976) para 12.

227 Bilchitz 2010 *South African Law Journal* 756.

228 Muchlinski PT “Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International Hague 2000) 101.

229 Since they were adopted, the Guidelines have been updated four times, with the most recent draft dated 25 May 2011.

230 Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed on 27 June 2011).

231 Para 1 of the Preface to the Guidelines.

232 General Policies II(2) of the Guidelines available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed on 04 January 2012).

corporations, the commitment of OECD member states to ensure human rights observance is encouraging.<sup>233</sup> Through the Guidelines, adhering states *inter alia* declare that they will co-operate with each other and with other actors to strengthen the international legal and policy framework in which business is conducted.<sup>234</sup>

Despite their non-binding nature, the Guidelines have been hailed for having influenced the development of the language on corporate social responsibility and for representing “a rare example of governments seeking to address the management of multinational corporations directly in a multilateral setting”.<sup>235</sup> On their weaknesses, Chirwa<sup>236</sup> writes that the Guidelines have not succeeded in changing corporate behaviour. This weakness he attributes to the fact that the Guidelines are limited in their normative framework and do not have any enforcement mechanisms. A further weakness relates to the scope of the Guidelines as they only apply to OECD member states and the additional states that have voluntarily expressed interest in them. Some scholars hold a view that the Guidelines need to be revised further because in their current form they have fallen behind other voluntary standards.<sup>237</sup>

#### **4.3 Tripartite Declaration of Principles Concerning Multinational Enterprises**

Following a series of meetings since 1972 in search of international standards for corporations, the governing body of the International Labour Organisation (ILO), comprising of governments, employers and workers, approved the Tripartite Declaration of Principles Concerning Multinational Enterprises in November 1977.<sup>238</sup> The Declaration was adopted by the ILO at its 204th Session in Geneva and was amended at its 279<sup>th</sup> Session in November 2000. The Declaration covers

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233 See Karl J “The OECD Guidelines for Multinational Enterprises” in Addo MK (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999) 89.

234 Principle 8 of the Preface.

235 Bilchitz 2010 *South African Law Journal* 757.

236 Chirwa 2006 *South African Journal of Human Rights* 84-85.

237 Commission on Human Rights, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 46.

238 “The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy” available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_101234.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf) (accessed on 05 July 2012).

mainly workplace-related rights such as equality of opportunity and treatment, security of employment, a minimum age of employment, and conditions and benefits of work, among others.<sup>239</sup> Adherence to the Declaration is voluntary as its provisions are only to be observed on a voluntary basis.<sup>240</sup> In the negotiating phase of the Principles, workers and governments of developing countries wanted a treaty, but employers wanted a voluntary declaration.<sup>241</sup> Though not legally binding on corporations, Chirwa<sup>242</sup> regards the Declaration as a “potent acknowledgment by business enterprises that they have human rights obligations”. As for the weaknesses, Bilchitz<sup>243</sup> is concerned that apart from labour rights, the Declaration does not specify other human rights obligations of corporations and does not have strong monitoring mechanisms.

#### **4.4 The UN Global Compact**

Under the stewardship of the then UN Secretary-General Kofi Anan, the UN launched the Global Compact in 2000.<sup>244</sup> The Global Compact consists of ten principles which deal with human rights, labour standards, the environment and anti-corruption measures. On human rights, the Global Compact states that “business should support and respect the protection of internationally proclaimed human rights”<sup>245</sup> and, secondly, “business should make sure that they are not complicit in human rights abuses”.<sup>246</sup> The Global Compact is voluntary and participating companies are expected to incorporate the ten principles into their operations and publish their support for the Global Compact.<sup>247</sup> Participating companies report annually on measures they have taken to contribute to the values enshrined in the Global Compact. Companies that fail to comply are

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239 The Declaration as amended in 2000 is available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_101234.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf) (accessed on 10 February 2013).

240 See [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/documents/publication/wcms\\_101234.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf) (accessed on 05 July 2012) at para 7.

241 Chirwa 2006 *South African Journal of Human Rights* 86.

242 Chirwa 2006 *South African Journal of Human Rights* 88.

243 Bilchitz 2010 *South African Law Journal* 758.

244 The United Nations Global Compact. Available at: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed on 12 July 2011).

245 Principle One *Why Human Rights are important for Business* states that: “As part of its commitment to the Global Compact, the business community has a responsibility to uphold human rights both in the workplace and more broadly within its sphere of influence.”

246 Principle Two.

247 See Chirwa 2006 *South African Journal of Human Rights* 89.



removed from the website of the Global compact. As De Schutter notes, in the year 2011 more than 2 000 companies had been removed for failure to comply with the reporting requirements.<sup>248</sup> It is no exaggeration to say that the Global Compact has had a universal appeal.<sup>249</sup> Despite its success, the Global Compact has flaws which Bilchitz<sup>250</sup> outlines as follows: Firstly, it is non-binding and has no force in international law, secondly the provisions are vague and expressed in an abstract language, thirdly, the Compact relies on the goodwill of the companies and does not have any monitoring mechanisms and, finally, it is often merely used by companies as a public-relations exercise.

#### **4.5 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights**

In 1998, the UN Sub-Commission on the Promotion and Protection of Human Rights resuscitated the need to explore possibilities of drafting a code of conduct for corporations based on human rights standards. A working group was set up with a mandate to draft binding norms for human rights and MNCs, explore possibilities of establishing a monitoring mechanism for MNCs that will also be able to sanction MNCs and award compensation where there has been an infringement.<sup>251</sup> In 2003 the working group produced the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>252</sup> (the Draft Norms). The norms are written in a treaty-like language and have only twenty-three provisions.<sup>253</sup> The provisions include *inter alia* the right to equal opportunity and non-discriminatory treatment, rights to security of persons, rights of workers, obligations with regard to consumer protection and obligations with regard to environmental protection. In keeping with the state-centric nature of international law, the norms place the primary

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248 De Schutter O "Foreword: Beyond the Guiding Principles" in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) xvii.

249 Bilchitz 2010 *South African Law Journal* 759.

250 Bilchitz 2010 *South African Law Journal* 759; Chirwa 2006 *South African Journal of Human Rights* 91-92.

251 See Chirwa 2006 *South African Journal Human Rights* 93.

252 Available at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En). (Accessed on 27 June 2011).

253 Ruggie JG "Business and human rights: The evolving international agenda" 2007 (101) *American Journal of International Law* 820.

responsibility for the protection of human rights on states. Business obligations are outlined as an addition to state responsibility and not as a replacement.<sup>254</sup>

Thus far, it has become clear that imposing obligations on business will not be universally accepted. The Draft Norms have polarised the debate even more.<sup>255</sup> On the positive side, the Draft Norms have been hailed as representing a restatement of international legal principles applicable to business.<sup>256</sup> This being the case, the Draft Norms have not been adopted and therefore “rest in a legal no-man’s land”.<sup>257</sup> While acknowledging the fact that the norms have made strides in outlining human rights responsibilities for business and suggesting possible mechanisms for enforcement, Bilchitz<sup>258</sup> is of the view that the Draft Norms only impose few specific obligations. In some instances, he argues, there is only a catch-all clause and in certain instances the Draft Norms impose obligations on corporations which have not been accepted by all states. He goes on to argue that the proposed enforcement mechanisms of the Norms are only rudimentary.

That corporations have human rights obligations under international law is not a universally held view. The Draft Norms were not adopted, mainly because they sought to impose direct obligations on corporations under international law. The main arguments raised against the Draft Norms were that:<sup>259</sup> (1) The Draft Norms represents a major shift away from voluntary adherence by business to international human rights standards and the need for this shift has not been demonstrated; (2) the style of the Draft Norms is unduly negative towards business; (3) The recognition of legal obligations on business to “promote, secure

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254 The Preamble states: “Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.”

255 See Commission on Human Rights, “Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights”, UN doc.E/CN.4/2005/91 (15 February 2005).

256 Weissbrodt D and Kruger M “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights” 2003 (97) *American Journal of International Law* 901.

257 Bilchitz 2010 *South African Law Journal* 766.

258 Bilchitz 2010 *South African Law Journal* 767-768.

259 Commission on Human Rights, “Report of the United Nations High Commission on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights”, UN doc. E/CN.4/2005/91 (15 February 2005) para 21 (a) – (i).

the fulfilment of, respect, ensure respect of and protect human rights” is baseless and a misstatement of international law - only States have legal obligations under international human rights law; (4) the human rights content of the Draft Norms is vague and inaccurate; (5) The legal responsibilities on business identified in the Draft Norms go beyond the standards applying to states; (6) The Draft Norms require business to undertake balancing decisions more appropriate to the role of Governments; (7) The imposition of legal responsibilities on business could shift the obligations to protect human rights from Governments to the private sector and provide a diversion for states to avoid their own responsibilities; (8) The implementation provisions of the Draft Norms are burdensome and unworkable; and that (9) The Draft Norms duplicate other initiatives and standards, particularly the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration.

#### **4.6 UN Special Representative on Issues of Human Rights and Transnational Corporations and Other Businesses**

The failure to adopt the Draft Norms did not dampen the UN initiatives in exploring international standards for corporations. As discussed in chapter one, in 2005 the United Nations Commission on Human Rights adopted a resolution requesting that the UN Secretary-General appoint a Representative on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.<sup>260</sup> For this, Ruggie became the face of the mandate. Having been appointed after the failure to adopt the Draft Norms, and aware of the concerns that led to the non-adoption of the Draft Norms, there was no way that Ruggie was going to steer the discussions to the same direction of imposing direct obligations on MNCs. Instead, Ruggie designed a conceptual and policy framework that is premised on the differentiated but complimentary responsibilities of the obligations of the state and those of corporates. The framework hinged on three principles, namely: The state’s duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect rights; and the need for more effective access to remedies.<sup>261</sup> As for what he meant by respect, Ruggie wrote,

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260 See the discussion in Chapter 1 of this study.

261 Human Rights Council, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 9.

that “to respect means essentially not to infringe on the rights of others – put simply, to do no harm”.<sup>262</sup> The concept of due diligence is central to this responsibility to respect. By due diligence Ruggie refers to steps which a company must take “to become aware of, prevent and address adverse human rights impacts”.<sup>263</sup> He went on to state that the corporate responsibility to respect constitutes what the society expects of business.<sup>264</sup>

By locating the obligation of corporations to respect human rights in the realm of social expectations, the Ruggie mandate has shifted the focus away from binding obligations. While this view represents but one of the possible ways to hold MNCs to account, it is not the only authoritative view on international law. The challenge though, is that given the international stature of the Ruggie mandate, this view may be construed as encapsulating the up to date international position on MNCs.<sup>265</sup> Without negating the state-centric nature of international law, it is important to point out that the view above captures only one aspect of the debate on business and human rights. For instance, there have been some developments in international law, particularly since the Second World War. One of the most important documents to have emerged shortly after the Second World War is the Charter of the United Nations.<sup>266</sup> The Charter as Weissbrodt and Kruger argue “is both the most prominent treaty and repository of seminal human rights”.<sup>267</sup> Normatively, the Charter serves as the foundation for the emergence of important human rights instruments such as the Universal Declaration of Human Rights (the UDHR)<sup>268</sup> and the so-called International Bill of Rights, to name a few.<sup>269</sup> The UNDR not only provides an interpretation of the rights set out in the

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262 Human Rights Council, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 24.

263 Human Rights Council, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 56.

264 Human Rights Council, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 9.

265 Blichitz *A Critique of the Normative Foundations of the SRSG’s Framework and the Guiding Principles* 117.

266 United Nations, Charter of the United Nations, 1 UNTS XVI (1945), (entered into force 24 October 1945), (hereinafter the Charter of the United Nations).

267 Weissbrodt and Kruger 2003 *American Journal of International Law* 913.

268 The Universal Declaration of Human Rights, GAOR, 3d Sess., U.N. Doc A/810 (10 December 1948), (hereinafter the UDHR).

269 See Buergenthal T “The normative and institutional evolution of international human rights” 1997(19) *Human Rights Quarterly* 703-709. The so-called International Bill of Rights refers to the International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), (entered into force 23 March 1976) (hereinafter the ICCPR) and the International Covenant on Economic,

Charter but also encapsulates some of the provisions that have reached the status of customary international law.<sup>270</sup> The UDHR states in its preamble that

[t]he General Assembly proclaimed the Declaration as a common standard of achievement for all peoples and nations, to the end that every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.<sup>271</sup>

Despite the language of the UDHR being state-centric, some scholars have argued for an inclusive reading of its provisions. In his much-quoted statement Henkin states that “[e]very individual includes juridical persons. *Every individual and every organ of society* excludes no one, company, no market, and no cyber space. The Universal Declaration applies to them all”.<sup>272</sup> The inclusive interpretation by Henkin, widens the scope of corporate obligations for human rights under international law.

The international initiatives above, point to the fact that corporations need to have obligations which are clearly articulated. Corporations are private in nature and operate within a private sphere. The state-centric approach looks to states for the regulation of these corporations. The difficulty though is that states operate under certain political and economic constraints that may hinder their ability to discharge their obligations. The situation is further compounded by the wave of privatization of services that ordinarily fall within the domain of states and liberalization.<sup>273</sup> With state regulation at best inadequate and at worst non-existent, the non-binding and voluntary initiatives have been directed at MNCs themselves. For instance, when the Global Compact<sup>274</sup> was drafted, it asked companies to “support and enact,

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Social and Cultural Rights, 993 UNTS 3 (1966), (entered into force 03 January 1976) (hereinafter the ICESCR).

270 Weissbrodt and Kruger 2003 *American Journal of International Law* 913.

271 The UDHR.

272 Henkin L “The Universal Declaration at 50 and the challenge of Global Markets” (1999) 25 *Brooklyn Journal of International Law* 25 (emphasis in the original text).

273 See Alston P “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Alston P *Non-State Actors and Human Rights* (Oxford University Press Oxford 2005) 17-19.

274 As discussed in Chapter 1.

within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption”.<sup>275</sup> The notion that corporations have their own “sphere of influence” is in itself an indication of the sensitivity to avoid conflating the responsibilities of corporations with those of states. This sensitivity also featured as part of the conceptual framework of the Ruggie mandate. According to Ruggie, the sphere of influence is a “useful metaphor for companies in thinking about their human rights impacts beyond the workplace and in identifying opportunities to support human rights, which is what the Global Compact seeks to achieve”.<sup>276</sup> In his view, the concept conflates two different meanings of influence.<sup>277</sup> The first meaning refers to where the activities of the company or relationships are causing harm to human rights. The second one refers to whatever leverage a company may have on other actors that are causing harm. The concept of the sphere of influence is itself not without its own difficulties, though. As Alston points out, it creates the impression that there is a set of rights that are exclusively for states and those that are for corporations. Further, it raises difficulties on how the rights are to be delineated between the state and the corporation.<sup>278</sup> Despite its complexities, this division of obligations between the state and the corporations continued to be articulated in the 2003 Draft Norms. The preamble to the Norms states that

[e]ven though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.<sup>279</sup>

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275 United Nations Global Compact, available at: <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> (accessed on 10 July 2012).

276 Commission on Human Rights, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 67.

277 Commission on Human Rights, “Protect, Respect and Remedy: A Framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 68.

278 Alston *The ‘Not-a-Cat’ Syndrome* 13-14.

279 Commission on Human Rights, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”, E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

Like the Global Compact, the Draft Norms are also constructed around the notion of obligations for corporations “within their respective sphere of activity”.<sup>280</sup> Among the list of the obligations imposed on corporations to promote, secure the fulfillment of and respect are the right to equal opportunity and non-discriminatory practices, right to security of persons, rights of workers, respect of national sovereignty and human rights, rights of consumers and the right to environment. Though both the Global Compact and the Draft Norms are non-binding, their significance lies in the fact that they embody the possible vision of where international human rights law may be heading. There is definitely a sense that the international community seeks to impose some human rights obligations on corporations. What seems to be unclear, though, is the mechanism under which this should be done. As to what the nature of such mechanisms should be has led to a polarized debate among scholars who advocate for a soft-law approach and a hard-law approach.<sup>281</sup> Each side of the spectrum sees some advantages for each of the approaches. Proponents of soft law<sup>282</sup> argue that soft law guidelines have some legal value as it impacts on the international law-making process by providing the premise on which customary international law may develop, and which may eventually lead to the conclusion of a binding treaty.<sup>283</sup> Because of their flexibility, soft law approaches can cope better with uncertainty and are easier to negotiate especially in instances where there is an urgent need for legal clarity.<sup>284</sup> In addition, a soft law instrument offers a solution as it can be negotiated in a relatively short period of time and implemented immediately, because its applicability is not dependent on the ratification by states. Conversely, proponents of a hard law approach to legal regulation argue in favour of a binding

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280 Article 1 of the Draft Norms.

281 The very idea of making a distinction between the two raises interesting debates. See Klabbers J “Reflections on Soft International Law in a Privatized World” available at: [http://www.helsinki.fi/eci/Publications/Klabbers/JKSoft\\_law\\_and\\_public.pdf](http://www.helsinki.fi/eci/Publications/Klabbers/JKSoft_law_and_public.pdf) (accessed on 13 July 2015) who interrogates the rationale for making this distinction.

282 Generally, the concept of soft law is used in reference to non-binding and voluntary measures such as declarations or resolutions. See Dugard *International Law: A South African Perspective* 4th ed (Juta Cape Town 2011) 33, Shaffer GC and Pollack MA “Hard vs. soft law: Alternatives, compliments, and antagonists in international governance” 2010 (94) *Minnesota Law Review* 706–799, Chinkin CM “The challenge of soft law: Development and change in international law” 1989 (38) *International and Comparative Law Quarterly* 850-866 and Klabbers [http://www.helsinki.fi/eci/Publications/Klabbers/JKSoft\\_law\\_and\\_public.pdf](http://www.helsinki.fi/eci/Publications/Klabbers/JKSoft_law_and_public.pdf) (accessed on 15 February 2016).

283 Černič JL “Corporate human rights obligations at the international level” 2008 (16) *Willamette Journal of International Law and Dispute Resolution* 167.

284 Shaffer and Pollack 2010 *Minnesota Law Review* 719.

commitment, with a clear understanding of consequences in the event of a breach.<sup>285</sup> For over four decades, the debates in relation to MNCs accountability have been struggling to evolve out of the soft law approach into the hard-law approach.

## 5 CONCLUSION

The ability of MNCs to violate human rights is well documented. The international mechanisms to hold MNCs to account have not managed to get out of the conceptual rut. In an ideal world, plaintiffs seeking to hold MNCs to account have an option to pursue corporations either in their home state of incorporation or in the host state where they ply their trade. This chapter, however, has demonstrated that both approaches are not without their challenges. Pursuing MNCs in the host country, the challenge is that the plaintiff may discover that the host state does not have enough resources to meet both the political and economic might of MNCs. On the other hand, pursuing MNCs in their home state of incorporation, the plaintiff is likely to be faced with two challenges. Firstly, the plaintiff would either have to be financially resourced to be able to pierce through the corporate veil. Assuming that the plaintiff does not go through the route of piercing the veil, the plaintiff would be faced with procedural challenges such as *forum non conveniens*. What has become clear in this chapter is that the current regulatory environment for MNCs has its own challenges, and secondly, the international mechanisms that have been put in place over the last four decades have been hampered by the fact that they are all voluntary. This study is of the view that the rising power of MNCs and their potential ability to violate human rights requires a non-voluntary system of accountability.

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285 Shaffer and Pollack 2010 *Minnesota Law Review* 717-718.



## CHAPTER 3

### INDIRECT ACCOUNTABILITY OF MNCs IN INTERNATIONAL LAW

#### 1 INTRODUCTION

It was pointed out in chapter one that the two concepts of accountability and responsibility, though sometimes used interchangeably by scholars, are not necessarily the same in international law. State responsibility in international law literature is used in order to establish legal accountability. Traditionally, both these concepts of accountability and responsibility have been used with reference to obligations which states owe to each other in international law. The classical position in international law is that only states and a limited number of non-state actors can be held directly accountable in international law. Corporations are not states and do not fit into the latter category and can therefore only be held accountable indirectly through the medium of the state under international law. In this regard, the doctrine of state responsibility becomes important in that it sets out, the obligations states owe to each other, the circumstances under which state responsibility can arise and the conditions under which the doctrine of state responsibility can be invoked for the conduct of private actors, such as MNCs.

The concept of MNCs embodies different categories of corporations, with nuanced differences between them. The first section will give a brief outline of the different categories of international corporations, with a view to setting out the background to the discussion of the doctrine of state responsibility in the private sphere. International law is a rules-based system and accountability in international law is determined with reference to the rules of the legal system. The second section of this chapter seeks to discuss the contours of accountability as prescribed by the rules of international law. The third section will present an overview of the doctrine of state responsibility in international law. The discussion will encompass circumstances under which the doctrine of state responsibility can be invoked and will also discuss the obligation to make reparation. The fourth section will discuss the work of the International Law Commission on the Draft Articles on State Responsibility in international law (Draft Articles).<sup>1</sup> In the fifth section the chapter

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1 Report of the International Law Commission on the Work of its Fifty-third Session, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" UN GAOR 56th Sess.,

will discuss state responsibility in the private sphere. The discussion will also include some of the limitations of the doctrine of state responsibility in dealing with MNCs. The last section of the chapter will conclude.

## 2 THE DIFFERENT CATEGORIES OF CORPORATIONS

The very notion of an international corporation is a complex one with nuanced differences. To this end, Mann<sup>2</sup> makes a distinction between three categories of international corporations. The first category consists of corporations which are national in character, but have international businesses. Typically, these are private juristic persons established by private persons to further the private profit interest of their shareholders.<sup>3</sup> The operations of these private corporations will to a large extent depend on the business imperatives of the company. Some authors have referred to such entities as uninational corporations. Technically, these corporations are not MNCs.<sup>4</sup> Uninational corporations are not necessarily international corporations, but international businesses.<sup>5</sup> A typical example would be MTN, a South African business which operates its business in twenty one countries in the Middle East and Africa.<sup>6</sup> What characterises these corporations as being uninational is mainly ownership. Ownership of most MNCs is uninational. Whether as an MNC or a uninational, a corporation can operate in multiple jurisdictions through their subsidiaries. A point to make in this regard is that in terms of domestic law,<sup>7</sup> and international law endorses the same view, a parent company and its subsidiary are never treated as one.<sup>8</sup> Regulation of these uninational corporations is mainly left to the municipal laws of the home state or

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U.N. Doc. A/56/589 (26 November 2001).

2 Mann FA "International corporations and national law" 1967 (42) *British Yearbook of International Law* 145.

3 See Voon T "Multinational enterprises and state sovereignty under international law" 1999 (21) *Adelaide Law Review* 222.

4 See Muchlinski PT *Multinational Enterprises and the Law* 2nd ed (Oxford University Press Oxford 2007) 5.

5 See Mann 1967 *British Yearbook of International Law* 146.

6 "MTN Global Footprint" available at: <https://www.mtn.com/MTNGROUP/About/Pages/Footprint.aspx> (accessed on 12 October 2014).

7 See the discussion in Chapter 2 of this study.

8 *Barcelona Traction Light and Power Company, Ltd* 1970 ICJ Reports 3 at 34 (hereinafter *the Barcelona Traction case*) where the court stated that, "The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights".

state of incorporation. A plaintiff who pursues a home state corporation would *inter alia* still need to go through the parent-subsiary hurdle.

The second category consists of corporations whose international character stems from a treaty signed by states in a joint venture. These corporations are national in character. Corporations of this nature are incorporated nationally, but are international in operation. About these corporations Mann writes that “such companies owe their conception, though not their birth, to treaties concluded between States in law and are national in character”.<sup>9</sup> A company so incorporated will ordinarily assume the nationality of the state of incorporation.

The third category consists of inter-governmental corporations which are not only conceived through a treaty, but are also created by one and are regulated by international law.<sup>10</sup> Inter-governmental corporations are often formed to serve a public purpose. These state-created corporations operate in multiple jurisdictions and do not have many dealings with national law.<sup>11</sup> As such, these inter-governmental corporations do not have nationality as they operate outside the realm of national law.<sup>12</sup> Like in the case of international organizations,<sup>13</sup> the legal personality of inter-governmental companies will to a large degree be outlined in their constitutive documents. These are recognized by international law as they are established in terms of a treaty or convention.<sup>14</sup>

In the period after the Second World War, a practice emerged among most nations, especially in as far as air travel was concerned, to pull resources together and establish one airline.<sup>15</sup> Such airlines came to be known as “multi-flag airlines”, because they were flying flags of the different founding member states, as though they were national airlines.<sup>16</sup> A typical example of this kind of a corporation from the African continent is the now defunct Air Afrique, which was an initiative of over

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9 Mann 1967 *British Yearbook of International Law* 145.

10 Mann 1967 *British Yearbook of International Law* 148.

11 See Ijalaye DA *The Extension of Corporate Personality in International Law* (Oceana Publications New York 1978) 57-71; Mann 1967 *British Yearbook of International Law* 148.

12 Mann 1967 *British Yearbook of International Law* 150.

13 International organisations will form part of the discussion in Chapter 4 of this study.

14 Vagts DF “The multinational enterprise: A new challenge for transnational law” 1970 (83) *Harvard Law Review* 740; Mann 1967 *British Yearbook of International Law* 148.

15 See Thornton RL “Governments and Airlines” 1971 (25) *International Organisations* 541–553.

16 See Barrett DM “Multi-flag airlines: A new breed in world business” 1969 (4) *Columbia Journal of World Business* 7-14.

ten West African States.<sup>17</sup> Air Afrique had its headquarters in Abidjan, Ivory Coast.<sup>18</sup> This kind of a corporation should however not be confused with a situation where heads of state enter into a treaty of co-operation and later a corporation is formed pursuant to the treaty by one of the signatories to the treaty in question.

The nuanced differences complicate the MNC phenomenon even further. Complex as the phenomenon may be, there are still some characteristics which may clarify the nature of an MNC. In this regard, the OECD Guidelines, opted not to define what MNCs are but went on to say that:

These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.<sup>19</sup>

The description above presents both prospects and challenges to the state-centric model of accountability. It is through the state of incorporation that a corporation gets its identity in international law and such an identity is established through a nexus that exists between the state of incorporation and the corporation. The fact that MNCs are established in more than one country becomes problematic in that the nationality of the corporation will not be easy to establish. This is so because, often, an MNC is a product of a conglomeration of corporations of different

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17 Onishi N "Troubles tarnish a once-shining African airline" 2001-06-20 *New York Times* available at: <http://web.archive.org/web/20140621132549/http://www.nytimes.com/2001/06/20/world/troubles-tarnish-a-once-shining-african-airline.html?pagewanted=all> (accessed on 12 November 2014).

18 The airline was established in terms of Article 1 of the Treaty on Air Transport in Africa: Establishment of Air Afrique (Yaoundé 1961) Cir 98-AT /19.

19 The OECD Guidelines for Multinational Enterprises. Para 4. Available at <http://mneguidelines.oecd.org/2011Concepts&Principles.pdf> (accessed on 28 December 2015).

nationalities joined together for a strategic business purpose.<sup>20</sup> In this regard, the very creation of an MNC creates a misalignment between municipal law and international law. The misalignment emanates from the fact that international law has very little dealings with how municipal law regulates the incorporation of business entities, and when these corporations do conglomerate to form an MNC, international law has “no comfortable, tidy receptacle for such an institution”.<sup>21</sup> In light of this misalignment, even the definition of MNCs that scholars propose is not an international law one, but an economic one.<sup>22</sup> Deva, for instance, defines an MNC as “an economic entity, in whatever legal form, that owns, controls, or manages operations, either alone or in conjunction with other entities, in two or more countries”.<sup>23</sup>

What is clear from Deva’s definition is that corporations are somehow linked. The link however is not a legal one, but an economic one. No matter how scattered the entities may be, in terms of economics, the fact that there is a common or central control is what holds the different units together.<sup>24</sup> This is where another misalignment with international law emerges. Through the nationality principle, international law sees an MNC as made up of components, as opposed to a centrally controlled unified entity.<sup>25</sup> It will become evident in this chapter that the element of control becomes important with regard to the doctrine of state responsibility, particularly where the state is involved.

Though there are different nuances in the forms of corporations discussed above, what is a common factor in all of them is the involvement of the state at the different stages of the operation of the different corporations. The home state is involved at the level of incorporation and the host state when receiving such a corporation in the form of foreign direct investment within its territory. The state of incorporation sets the minimum requirement that a corporation has to meet so as

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20 See Vagts 1970 *Harvard Law Review* 740. Also see Legwaila T “The nature of a headquarter company: A comparative analysis” 2013 (46) *De Jure* 801.

21 Vagts 1970 *Harvard Law Review* 740.

22 Muchlinski *Multinational Enterprises and the Law* 5.

23 Deva S “Human rights violations by multinational corporations and international law: Where from here?” 2003 (19) *Connecticut Journal of International Law* 6; Muchlinski *Multinational Enterprises and the Law* 5.

24 Deva 2003 *Connecticut Journal of International Law* 6; Hansen RF “The international legal personality of multinational enterprises: Treaty, custom and the governance gap” 2010 (10) *Global Jurist* 8-9.

25 See Hansen 2010 *Global Jurist* 83.

to be conferred with domestic legal personality - as a result a nexus is created between the state of incorporation and the corporation. A corporation so incorporated is viewed by international law as a national of the state of incorporation.

Sometimes the home state is the one that champions the business ventures beyond its own territorial borders by negotiating and facilitating business deals for their home corporations.<sup>26</sup> Often when heads of state go on a diplomatic visit to foreign countries, they are accompanied by a whole host of captains of industry who seek opportunities to extend their businesses.<sup>27</sup> It is no exaggeration to say that often the underlying expectation is that better diplomatic relations will yield better economic prospects.<sup>28</sup> As discussed in chapter two of this study,<sup>29</sup> even as MNCs expand their trade to other countries, they still go through pre-entry negotiations with the host state. In the absence of political and economic considerations, the pre-entry negotiations become crucial in setting the parameters of the operations of an MNC. Whether in the home state or host states, the regulatory environment of corporations is determined by states and this is by no means an insignificant role in both domestic and international law.

Notwithstanding this pivotal regulatory role played by states, the involvement of states in the affairs of corporations has its own limits. Economic globalisation thrives where there is little state involvement in the affairs of the economy. In addition, in the era of globalisation states have outsourced, privatised and contracted out some of the services that ordinarily fall within their scope of competence, to private actors. Services which were traditionally of a public nature such as health, education and the running of prisons, have now become

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26 McCorquodale R and Simons P "Responsibility beyond borders: State responsibility for extraterritorial violations by corporations of international human rights law" 2007 (70) *Modern Law Review* 598 - 601.

27 For an illustration of this point see Hayes S "The importance of president Obama's Africa trip" *U.S. News and World Report* (2013-06-24) available at: <http://www.usnews.com/opinion/blogs/world-report/2013/06/24/obama-visits-africa> (accessed on 14 November 2014) and also "China, South Africa upgrade relations to 'comprehensive strategic partnership'" available at <http://capetown.china-consulate.org/eng/xwdt/t726883.htm> (accessed on 14 November 2014).

28 See "Good diplomatic relations should yield good economic benefits: Zuma" available at: <http://www.sabc.co.za/news/a/949d0880475071d0a516a5da2831d264/Good-diplomatic-relations-should-translate-into-economic-spin-off:-Zuma-20151502> (accessed on 16 February 2015).

29 See the discussion in Chapter 2 of this study.

privatised.<sup>30</sup> This begs the question: where does this leave the doctrine of state responsibility when a state privatises some of its functions? Commentators are of one voice in arguing that such a state would still have certain obligations arising from the services rendered by the privatized corporation.<sup>31</sup> In his 2011 report, Ruggie has emphatically stated that the fact that a state has privatised its services does not necessarily mean that it is absolved from its international human rights obligations.<sup>32</sup> Equally, the fact that a state is held responsible for a particular violation committed by a private actor, does not exonerate the private entity concerned.<sup>33</sup>

However, not all acts of state officials and private actors give rise to state responsibility. There are instances when state officials act in their private capacity and such acts cannot be attributed to a state. Lawson illustrates this through an example of a police official who goes home with his state issued weapon and finds his wife with a lover. If in a fit of rage the official kills the lover in a private act, such an act would not be considered an act of the state.<sup>34</sup> This, however, is not the same as saying that such an act would not be punishable in law. State responsibility in this example, would arise where a state fails to exercise due diligence to ensure that private actors do not commit human rights violations.<sup>35</sup> The rationale for not attributing every conduct to the state is that citizens must be at liberty to execute their daily activities without the state interfering in their affairs.<sup>36</sup> For state responsibility to arise, certain conditions, which will be discussed below, must first prevail.

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30 McCorquodale R and Simons 2007 *Modern Law Review* 607; McBeth A "Privatising human rights: What happens to the state's human rights duties when services are privatised?" 2004 (5) *Melbourne Journal of International Law* 133–142.

31 See McBeth 2004 *Melbourne Journal of International Law* 133-154.

32 See Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Respect, Protect and Remedy' Framework" A/HRC/17/31 (21 March 2011) para 5 (Commentary to the Guiding Principles).

33 McBeth 2004 *Melbourne Journal of International Law* 142.

34 Lawson R "Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' meet the Challenges of the 21st Century?" in Castermans-Holleman M, Van Hoof F and Smith J (eds) *The Role of the Nation-State in the 21st Century Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (Kluwer Law International The Hague 1998) 95-96.

35 Chirwa DM "The doctrine of state responsibility as a potential means of holding private actors accountable for human rights" 2004 (5) *Melbourne Journal of International Law* 17. The concept of due diligence will be discussed below.

36 Wolfrum R "State Responsibility for Private Actors: An Old Problem of Renewed Relevance" in Ragazzi M (ed) *International Responsibility Today: Essays in Memory of Oscar Schachter*

In a similar manner, the conduct of private corporations will generally not give rise to state responsibility. Even where the entity is state owned or the state is a major shareholder, this fact alone will not give rise to state responsibility.<sup>37</sup> As will be discussed below, certain conditions must first prevail before state responsibility can arise. Once again, this does not at all mean that the state is absolved from its obligations. The mere fact that a state nationalises or privatises its own services would not necessarily have any impact on its obligations. Where services are privatised, a state may not interfere in the delivery of such services, but the same state may not abdicate its oversight responsibility to monitor and ensure that such services are rolled out to all those in need in accordance with set standards.<sup>38</sup> Admittedly, a state that is directly responsible for providing services would not have the same obligations as the one that has outsourced such services. Inevitably, the character of the obligations would vary.<sup>39</sup>

Whether the services are privatized or nationalised, the state remains the locus of responsibility in international human rights law. As Ratner and Tadaki assert, international human rights law depends on domestic law implementation for its provisions, “not only with respect to a state’s own actual or potential violations of individual rights (vertical application), but also, importantly, with respect to actions between private actors (horizontal application)”.<sup>40</sup> In this regard, the law of state responsibility becomes of utmost importance. If anything, the law of state responsibility bridges the gap between the home state of incorporation and the host state, where MNCs ply their trade, in that the obligations, though varied in content and character, are imposed on both categories of states. As discussed above, the doctrine of state responsibility unfolds within an environment regulated by rules. It is these rules that determine the contours of the doctrine.

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(Martinus Nijhoff Publishers Leiden 2005) 425.

37 McCorquodale and Simons 2007 *Modern Law Review* 606.

38 McBeth 2004 *Melbourne Journal of International Law* 138.

39 McBeth 2004 *Melbourne Journal of International Law* 153.

40 Kinley D and Tadaki J “From talk to walk: The emergence of human rights responsibilities for corporations at international law” 2004 (44) *Virginia Journal of International Law* 937.



### 3 INTERNATIONAL LAW AS A RULES-BASED SYSTEM

The very science of international law is founded on rules.<sup>41</sup> The conception of law as a body of rules lies at the heart of positivism. Since these rules emanate from states, a positivistic conception of international law views states as the foundation of the whole legal system. It is states that create the rules of the legal system.<sup>42</sup> In turn, the rules bind mainly states - and this is the basis for the classical view of international law. The Permanent Court of International Justice (PCIJ) has in this regard stated that:

International law governs relations between independent States. The rules of law binding upon states therefore emanate from their free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims.<sup>43</sup>

Initially, the rules were meant to deal with the question of self-help in general.<sup>44</sup> Up until the turn of the twentieth century, it was permissible for states to use force to compel another state to pay debts owed to its national.<sup>45</sup> The move away from self-help, as Sohn points out, distilled itself into two main rules.<sup>46</sup> The first one was that the state became responsible for what happened within its territory and for its citizen's conduct on the high seas. The second one was that the foreigner's home state was entitled to reparations for any injury to its citizens. In light of these two

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41 For a general discussion see Sohn LB "Generally accepted' international rules" 1986 (61) *Washington Law Review* 1073-1080; Vázquez CM "Direct vs indirect obligations for corporations under international law" 2005 (43) *Columbia Journal of International Law* 932-947.

42 See Anghie A "Finding the peripheries: Sovereignty and colonialism in nineteenth century international law" 1999 (40) *Harvard International Law Journal* 13 and Humphrey JP "On the foundations of International law" 1945 (39) *American Journal of International Law* 233.

43 *Lotus Case (France v Turkey)* 1927 PCIJ Reports, Series. A no. 10 at 18 (hereinafter referred to as the *Lotus case*).

44 Sohn LB "The new international law: Protection of the rights of individuals rather than states" 1982 (32) *American University Law Review* 2.

45 Sucharitkul S "State responsibility and international law liability under international law" 1996 (18) *Loyola of Los Angeles International and Comparative Law Review* 824.

46 Sohn 1982 *American University Law Review* 2.

rules, an offending state had an obligation to make reparation for injuries suffered by nationals of other states.<sup>47</sup>

It is against the backdrop of these rules that the doctrine of state responsibility emerged as a tool for dealing with violations of international law.<sup>48</sup> As an entity, a state can only act through its officials or nationals.<sup>49</sup> However, as was already mentioned, not every act of state officials will give rise to the doctrine of state responsibility. For the doctrine of state responsibility to arise, the conduct must satisfy one of the requirements outlined in the Draft Articles.<sup>50</sup>

The doctrine of state responsibility arises only within a very limited scope as prescribed by the rules of international law. Generally, the rules of international law are of two kinds. International law scholars make a distinction between primary rules of international law and secondary ones.<sup>51</sup> These rules are state-centric in that the primary rules of international law are addressed to states, and under secondary rules, only states can incur responsibility for breaching the rules of international law.<sup>52</sup> The primary rules encompasses customary or treaty-based rules, which lay down obligations for states, while secondary rules establish when a breach of primary rules by a state may have occurred and further establish the consequences that arise from such a breach.<sup>53</sup> On the distinction between the two sets of rules, Dugard writes that substantive rules require states to act in a particular way, or abstain from certain actions in their relations with each other, or encompass rules relating to how they should treat nationals of other states.<sup>54</sup> The distinction between the two sets of rules was to be helpful to the International Law Commission (ILC) in its work on state responsibility. In the Commentary to the Draft Articles, Crawford writes, that

[t]he distinction between primary and secondary rules of responsibility, was indispensable. Without such a distinction, there

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47 Sucharitkul 1996 *Loyola of Los Angeles International and Comparative Law Review* 823.

48 Sucharitkul 1996 *Loyola of Los Angeles International and Comparative Law Review* 823.

49 Wolfrum *State Responsibility for Private Actors* 424; Lawson *Out of Control* 94.

50 The Draft Articles will be discussed in section 4.2 below.

51 Linderfalk U "State responsibility and primary-secondary rules terminology: The role of language for an understanding of the international legal system" (2008) 78 *Nordic Journal of International Law* 53-72.

52 Vázquez 2005 *Columbia Journal of International Law* 932-933.

53 Linderfalk 2009 *Nordic Journal of International Law* 55; Lawson *Out of Control* 97.

54 Dugard *International Law: A South Africa perspective* 4th ed (Juta Cape Town 2011) 270.

was a constant danger of trying to do too much, in effect, of telling states what kinds of obligations they can have. However difficult it may be to draw in particular cases, the distinction allowed the framework of State law responsibility to be set out without going into the content of these obligations.<sup>55</sup>

Despite this being the case, it should be noted that it is not always easy to make a clear distinction, as the two sets of rules do overlap in practice.<sup>56</sup> Notwithstanding this overlap, it is commonly accepted by scholars that the doctrine of state responsibility forms part of the secondary rules of international law.<sup>57</sup>

Further, the rules of international law can either be regulative or constitutive in nature.<sup>58</sup> The distinction between the two lies in the fact that a regulative rule identifies conduct or a state of affairs that is proscribed or permitted. The constitutive rule, on the other hand, confers legal qualities on acts, persons and a state of affairs. Constitutive rules do this by, among others, delimiting respective territories of two neighbouring states and specifying the extension of a treaty term.<sup>59</sup> The interplay between the different categories of rules plays a pivotal role *vis-a-vis* the doctrine of state responsibility in international law. If there is no breach of the primary rules of international law, then the doctrine of state responsibility cannot be invoked.<sup>60</sup> Non-invocation of state responsibility means that there will be no legal accountability in international law.

Legal accountability in international law is determined with reference to the rules of the legal system. In light of the private-public divide in international law, the classical view holds that the public sphere is the domain for states, while the private sphere is mainly the terrain for non-state actors.<sup>61</sup> Corporations operate

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55 Crawford J *The International Law Commission's Articles on State Responsibility: Introductions, Text and Commentaries* (Cambridge University Press Cambridge 2002) 15.

56 Quirico O "Ius Cogens: A Puzzle" in Szabó M (ed) *State Responsibility and the Law of Treaties* (Eleven International Publishing The Hague 2010) 101.

57 Linderfalk 2009 *Nordic Journal of International Law* 54.

58 Linderfalk 2009 *Nordic Journal of International Law* 59.

59 For further examples see Linderfalk 2009 *Nordic Journal of International Law* 59-60.

60 See Brunnée J "International legal accountability through the lens of the law of state responsibility" 2005 (36) *Netherlands Yearbook of International Law* 25-26.

61 For a critique of this dualism see Chinkin C "A critique of the public/private dimension" 1999 (10) *European Journal of International Law* 387-395, Charlesworth H "Worlds Apart: Public/Private Distinctions in International Law" in Thornton M (ed) *Public and Private: Feminist Legal Debates* (Oxford University Press Oxford 1995) 243-282.

mainly in the private sphere. Whether the rules of international law extend to corporations as well, is a subject of great debate among scholars.<sup>62</sup> International law has evolved to an extent that both states and non-state actors do enjoy rights under international law, but according to the classical view, it is only states that have obligations under the legal system.<sup>63</sup> A determination of what obligations states owe to each other is done with reference to the rules of international law. Classically, legal accountability in international law is mainly about how states account to each other in terms of positive international law rules.<sup>64</sup> A vexing question, according to Ratner, is what types of human rights abuses by private actors do states have a duty to prevent and remedy then?<sup>65</sup>

Regional human rights bodies have had an opportunity to adjudicate on the state's obligation to protect human rights in the private sphere. These, according to Clapham, have required the state to set in place policies to prevent and punish private violence; to ensure adequate protection from forced labour in the context of trafficked domestic help; to ensure that press freedom does not disproportionately infringe on respect for private life; to regulate entities that pollute and infringe on rights to enjoy ones home and family life; to prevent employers from engaging in anti-union practices; and to ensure that concessions given to corporations do not undermine the enjoyment of the right to food, housing, and safe environment.<sup>66</sup> What this list highlights, is that regional human rights bodies have cast wide the net of positive obligations to protect human rights in the private sphere. Such positive obligations emanate from the doctrine of state responsibility to which the discussion now turns.

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62 Vázquez 2005 *Columbia Journal of Transnational Law* 943. For more on this debate see Chapter 4 of this study.

63 Vázquez 2005 *Columbia Journal of Transnational Law* 932 - 933.

64 Brunnée 2005 *Netherlands Yearbook of International Law* 23.

65 Ratner SR "Corporations and human rights: A theory of legal responsibility" 2001 (111) *Yale Law Journal* 471.

66 Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 347.

## 4 STATE RESPONSIBILITY IN INTERNATIONAL LAW

### 4.1 *An overview of the doctrine*

The law of state responsibility is a fundamental principle of international law.<sup>67</sup> In essence, the law of state responsibility is to international law what the law of delict is to municipal law.<sup>68</sup> The fundamental basis for the law of state responsibility is that states owe each other certain obligations. A corollary to this principle is that a breach of an obligation involves an obligation to make reparation. The PCIJ has in this regard stated that

it is a principle of international law, and even general conception of law, that any breach of an engagement involves an obligation to make reparation in an adequate form.<sup>69</sup>

State obligations may either be treaty based or may flow from the general obligations owed towards all states.<sup>70</sup> Typically, the treaty-based obligations would flow from the rules relating to consent. From a positivistic point of view, state consent constitutes the very foundation of international law. The rationale behind consent is that states are only bound by those agreements and decisions to which they have freely consented. In this regard, the act of signing or consenting to treaties would constitute one of the typical forms of the expression of the free will of the state. Despite a claim that international law norms are equal in status, in effect a hierarchy of these norms has emerged from practice.<sup>71</sup> Both *jus cogens* and obligations *erga omnes* have courted controversy in international law.<sup>72</sup> The former are peremptory norms from which no state can derogate. The latter are obligations which a state owes to the international community as a whole, and the enforcement of which the international community has an interest in.

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67 Shaw MN *International Law* 7th ed (Cambridge University Press Cambridge 2014) 566.

68 Dugard *International Law* 269.

69 *Chorzów Factory (Claim for Indemnity)* (1928) PCIJ, Series A, no 13 at 21.

70 Dugard *International Law* 269.

71 Dugard *International Law* 24 - 25.

72 Byers M "Conceptualising the relationship between *jus cogens* and *erga omnes* rules" 1997 (66) *Nordic Journal of International Law* 211. For objections to the concept of peremptory norms see Orakhelashvili A *Peremptory Norms in International Law* (Oxford University Press Oxford 2006) 32-35 and also Dugard J *Recognition and the United Nations* (Grotius Publications Cambridge 1987) 137-162.

*Jus cogens* consist of peremptory norms such as prohibitions against slavery, genocide, racial discrimination, torture and the denial of self-determination.<sup>73</sup> What is apparent from this list is that the content of *jus cogens* is made up of human rights issues.<sup>74</sup> Obligations *erga omnes*, on the other hand, are obligations which a state owes to the international community as a whole, and the enforcement of which the international community has an interest in.<sup>75</sup> If obligations *erga omnes* are of interest to the international community as a whole, it follows that if violated, these obligations would give rise to a general right of standing to the international community as a whole.<sup>76</sup> A treaty becomes void if at the time of its conclusion it is in conflict with a peremptory norm of international law.<sup>77</sup>

As mentioned above, theoretically, a conception of international law as consisting of a set of rules is deeply rooted in positivism. A positivistic conception of international law places a premium on state consent in that states are only bound by rules to which they have consented. The positivistic conception has been a dominant view in international law over the centuries. The concept of *jus cogens* constitutes a deviation from the dominant view in that it is rooted in the natural law conception of international law.<sup>78</sup> Natural law or law of nature was conceived and developed by the Greeks and later by the Romans. Classical international law writers such as Francisco de Vitoria (1480-1546) a Dominican priest, Francisco Suarez, a Jesuit priest (1548-1617) and Hugo Grotius, a Dutch humanist (1583-1645), relied on the natural law theory to argue for the universal appeal of international law.<sup>79</sup> The central tenet of natural law is that there are certain laws whose content is from nature and as such should have a universal appeal. The underlying assumption is that such universal appeal should prevail regardless of whether states have consented to it, or not.

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73 See Dugard *International Law* 38 -39; *Barcelona Traction* case at 33.

74 See Bianchi A "Human rights and the magic of *jus cogens*" 2008 (19) *European Journal of International Law* 491-508.

75 *Barcelona Traction* case at 33.

76 Byers 1997 *Nordic Journal of International Law* 211.

77 Article 53 of the Vienna Convention on the Law of Treaties of 1969 available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed on 15 May 2012).

78 See Dugard *Recognition and the United Nations* 137.

79 See Ferreira-Snyman "The evolution of state sovereignty: A historical overview" 2006 (12-2) *Fundamina: A Journal of Legal History* 6-7 and also Shaw *International Law* 20.

The use of the concept of *jus cogens* went into a hiatus and was only revived by the International Law Commission in its work on the Vienna Convention on the Law of Treaties.<sup>80</sup> Article 53 of the Vienna Convention<sup>81</sup> states that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community as a whole as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.

In the event that a new peremptory norm of international law emerges, the Vienna Convention states that “any treaty which is in conflict with that norm becomes void and terminates”.<sup>82</sup> The codification of Article 53 has been interpreted by some scholars as representing the “positivisation” of natural law.<sup>83</sup> Despite its long association with natural law and its codification in the Vienna Convention, the concept of *jus cogens* continued to receive attention mainly from scholars and very little mention in the courts. It was only in 2006 that the concept received judicial recognition from the International Court of Justice (ICJ).<sup>84</sup>

With regard to obligations *erga omnes*, the ICJ has stated that:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former

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80 Dugard *Recognition and the United Nations* 138.

81 The Vienna Convention on the Law of Treaties of 1969 (the Vienna Convention). Available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed on 11 June 2011).

82 Article 64 of the Vienna Convention.

83 Bianchi 2008 *European Journal of International Law* 492.

84 *Armed Activities on the Territory of the Congo* (DRC v Rwanda), Jurisdiction and Admissibility, 2006 ICJ Reports 4 at 29 – 30, 50 - 51.

are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>85</sup>

According to Orakhelashvili, the rationale for peremptory norms of international law is to ensure that the interests of the international community as a whole prevail over the conflicting interests of individual states and groups of states.<sup>86</sup>

The use of the expression “international community” is a settled one in international law.<sup>87</sup> This being the case, many scholars do not explain what they mean by international community and yet, when analysed closely, this concept may need further clarity or contextualisation.<sup>88</sup> As Greig points out, the community referred to can solely be that of states, or a broader community, including international governmental and non-governmental organisations.<sup>89</sup> There is a sense that scholars and international tribunals use the concept with reference to a community which is solely made up of states.<sup>90</sup> It can also be argued though, that within the realm of human rights, the concept cannot just be limited to states to the exclusion of non-state actors. To exclude non-state actors will not only be anachronistic, but will be out of sync with the latest developments internationally.<sup>91</sup> McCorquodale is of the view that the use of the concept should extend beyond states, mainly because how states treat their nationals within their territories is no longer a matter that concerns states alone, but also the broader international community, including individuals.<sup>92</sup> In this regard Deva uses the concept to

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85 *Barcelona Traction* case at 32.

86 Orakhelashvili *Peremptory Norms in International Law* 67.

87 Greig D “‘International Community’, ‘Interdependence’ and All that ... Rhetorical Correctness?” in Kreijen G (ed) *State, Sovereignty, and International Governance* (Oxford University Press Oxford 2002) 530.

88 See Dugard *Recognition and the United Nations* 140-141. It is not clear in the discussion by Dugard whether the concept includes non-state actors or it is mainly about the community of states.

89 Greig *International Community* 531.

90 See *Case Concerning United State Diplomatic and Consular Staff in Tehran* 1980 ICJ Reports 3 (hereinafter the *United State Diplomatic* case) at 43 where it was stated that “[t]he attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court”. Unless stated otherwise, reference to this concept in this thesis will include both states and non-state actors.

91 Crawford J “Responsibility to the international community as a whole” 2001 (8) *Indiana Journal of Global Legal Studies* 313- 314.

92 McCorquodale R “Beyond state sovereignty: The International legal system and non-state participants” 2008 (8) *International Revista Colombiana de Derecho Internacional* 118.



encompass international institutions, nation-states, MNCs, non-governmental organisations (NGOs), the media, consumers and the academia.<sup>93</sup> In a similar manner this study will adopt an inclusive approach.

Under international human rights law state obligations generate four levels of duties, that is, the duty to respect, to protect to promote and to fulfil human rights.<sup>94</sup> These obligations are not confined to the geographical territorial limits of a state, but extend beyond its boundaries.<sup>95</sup> As long as jurisdiction can be established, the obligation will arise. The jurisprudence that has emerged on these obligations points to the fact that jurisdiction can only be established for acts outside the state's territory, with reference to the principle of effective control.<sup>96</sup> In this regard McCorquodale and Simon note that

a state can be found to be in violation of its obligations under international human rights treaties for actions taken extraterritorially, in relation to anyone within the power, effective control or authority of that state, as well as within an area over which that state exercises effective control.<sup>97</sup>

In the event that there has been a breach of an international law obligation either through an act or omission and such a breach can be attributed to a state, then the doctrine of state responsibility can be invoked.<sup>98</sup> The doctrine of state

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93 Deva 2003 *Connecticut Journal of International Law* 1 footnote 3.

94 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) at para 44 (hereinafter the SERAC case); Chirwa 2004 *Melbourne Journal of International Law* 11; Narula S "The right to food: Holding global actors accountable under international law" 2006 (44) *Columbia Journal of Transnational Law* 707-708, McBeth 2004 *Melbourne Journal of International Law* 135.

95 McCorquodale and Simons 2007 *Modern Law Review* 602-603.

96 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Merits, 1986 ICJ Reports 14 at 21 (hereinafter the *Nicaragua* case) Nicaragua claimed that the United States of America was responsible for military and paramilitary activities in and against it. It was alleged that the United States had been giving support to the *contras*, a rebel group in Nicaragua whose subversive activities had caused Nicaragua a lot of damage and had claimed many lives. The argument advanced by Nicaragua was that the United States Government is effectively in control of the *contras*, in that "it devised their strategy and directed their tactics, and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua". The ICJ held that: "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed" (at 54).

97 McCorquodale and Simons 2007 *Modern Law Review* 605.

98 De Aréchaga EJ and Tanzi A "International State Responsibility" in Bedjaoui M (ed) *International Law: Achievements and Prospects* (UNESCO Paris 1991) 347.

responsibility employs a language akin to that used in the law of obligations in that once there is a breach, the matter is narrowed down to the affected parties only. In the case of the doctrine of state responsibility, it becomes a matter between the state to which an act or omission can be attributed, and the state which has been wronged by the breach.<sup>99</sup> This was the view adopted by the PCIJ in the *Phosphate* case where it was stated that when a state commits an internationally wrongful act against another state, international responsibility is established between the two states.<sup>100</sup> The doctrine of state responsibility was later codified following the work of the International Law Commission (ILC).

#### **4.2 Towards the codification of international law on state responsibility**

The General Assembly of the United Nations is empowered to initiate studies and make recommendations to, among others, encourage the progressive development of international law and its codification.<sup>101</sup> Pursuant to this mandate, the General Assembly established the ILC. The subject of state responsibility has been on the agenda of the ILC for a greater part since the inception of the Commission.<sup>102</sup> Having commenced its work in 1956, the ILC only managed to complete its first reading of an entire set of the Draft Articles on State Responsibility in 1996. It was only in 2001 that the ILC adopted the complete Draft Articles on second reading.<sup>103</sup> The 59 Draft Articles are presented in four parts, dealing with (1) the internationally wrongful act of a state; (2) the content of the international responsibility of a state; (3) the implementation of the international responsibility of a state; and (4) general provisions. With an exception of few additions, particularly with regard to state responsibility for the violation of peremptory norms, the Draft Articles, as Dugard asserts, represent a codification of rules of international law on state responsibility.<sup>104</sup> Conversely, Scobbie is of the view that the Draft Articles do contain some provisions which amount to the

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99 De Aréchaga and Tanzi *International State Responsibility* 347.

100 *Phosphate in Morocco* (Preliminary Objections) PCIJ Reports Series A/B No. 74 (1938) at 22 (hereinafter the *Phosphate in Morocco* case). Of course the situation becomes different when there is a breach of peremptory norms of international law.

101 Article 13(a) in the Charter of the United Nations.

102 For a detailed background see Crawford *The International Law Commission's Articles on State Responsibility* 1-60.

103 Report of the International Law Commission on the Work of its Fifty-third Session, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" UN GAOR 56th Sess., U.N. Doc. A/56/589 (26 November 2001).

104 Dugard *International Law* 272.

progressive development of international law that goes beyond the codification of existing custom.<sup>105</sup> Judicially, the Draft Articles have been cited with approval by international tribunals.<sup>106</sup> Three concerns regarding the Draft Articles are worth noting though. The first one is that the Draft Articles have adopted a state-centric approach to international law. This, in an era where non-state actors, such as MNCs, have increased in both number and stature, has a potential to create challenges. Secondly, the Draft Articles have not been adopted as a treaty and are therefore not binding.<sup>107</sup> Thirdly, the Draft Articles took too long to be put together to an extent that it can be argued that they became outdated even before they were adopted. This is so because over the period that the ILC has been busy with the Draft Articles, the international legal system has evolved to include other actors. Weiss, for instance, points out that while the ILC's exclusive concern with states may have been appropriate at the beginning of its work, it does not reflect the international system of the twenty-first century.<sup>108</sup>

Article 1 of the Draft Articles on state responsibility provides that “every internationally wrongful act of a state entails the international responsibility of that state”. This provision has been interpreted to be a statement of the basic principle that a breach of international law by a state entails its international responsibility.<sup>109</sup> It was pointed out above that the law of state responsibility resembles that of delict in municipal law. In municipal law, the law of delict clearly spells out the various elements of wrongfulness. In a similar mode, the Draft Articles set out elements of an internationally wrongful act. A state can only incur international responsibility for its own wrongful acts or those committed by non-state actors under certain specified circumstances.

Article 2 states that:

There is an internationally wrongful act of a state when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

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105 Scobbie I “The invocation of responsibility for the breach of ‘obligations under peremptory norms of general international law’” (2002) 13 *European Journal of International Law* 1202.

106 Dugard *International Law* 272.

107 Chirwa 2004 *Melbourne Journal of International Law* 5.

108 Weiss EB “Invoking state responsibility in the twenty first century” 2002 (96) *American Journal of International Law* 799.

109 Crawford *The International Law Commission's Articles on State Responsibility* 77.

(b) Constitutes a breach of an international obligation of the State.

The two central components of an internationally wrongful act are that (1) there must be a wrongful act of a state which constitutes a breach of an international obligation and (2) such an act must be attributable to the state under international law. In the *US Diplomatic and Consular Staff* case, the ICJ adopted the same view that in order to establish the responsibility of Iran, it must first determine the degree to which the acts complained of could be regarded as imputable to the Iranian State. Secondly, there must be a determination of whether such acts were compatible or incompatible with the obligations of Iran under international law.<sup>110</sup> Put differently, the breach complained of must be a breach of an international obligation and that breach must be attributable to the state in international law. The emphasis on international law is not incidental because the question of conformity of national legislation with international law is generally a matter of international law.<sup>111</sup> Of course there are exceptions to this as it is the case in South Africa, where the Constitution provides that “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.<sup>112</sup> Notwithstanding the exceptions, the general approach is that where there is a conflict between national legislation and international law in determining whether there is a breach of an international obligation or not, international law would prevail. In this regard, Section 233 of the South African Constitution states that, “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.<sup>113</sup>

As to which conduct can be attributable to a state, Article 4 states that:

1. The conduct of any state organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and

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110 *United States Diplomatic case* at 3.

111 *Norwegian Loans (France v Norway)* 1957 ICJ Reports 9 at 37.

112 Section 232 of the Constitution of the Republic of South Africa, 1996.

113 Section 233 of the Constitution of the Republic of South Africa, 1996.

whatever its character as an organ of the central government or of a territorial unit of the state.

2. An organ includes any person or entity which has that status in accordance with the internal law of the state.

MNCs are not organs of state and therefore do not fit into this category. In his final report, Ruggie has referred to business as “specialized organs of society”.<sup>114</sup> To accommodate entities like MNCs, the Draft Articles have made provision for actions of entities or persons whose conduct do not fall within the ambit of the provisions of Article 4. Article 5 provides that:

The conduct of a person or entity which is not an organ of state under Article 4 which is *empowered by the law of that state to exercise elements of the governmental authority* shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.<sup>115</sup>

Article 5 can be interpreted to encompass entities such as para-statal which are not organs of state, but are empowered by law to exercise governmental authority.<sup>116</sup> If an MNC happens to exercise governmental authority, its conduct can give rise to state responsibility under this provision, provided that it is “empowered” to exercise elements of governmental authority. In this regard, Article 8 becomes important as it provides that:

The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact *acting on the instructions of, or under the direction or control of,* that state in carrying out the conduct.<sup>117</sup>

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114 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) Preamble to the Guiding Principles titled General Principles).

115 Emphasis added.

116 Crawford *The International Law Commission’s Articles on State Responsibility* 100; Dugard *International Law* 273.

117 Article 8 of the Draft Articles. Emphasis added.

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the *Prosecutor v Tadic* case has pronounced that

in order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.<sup>118</sup>

According to Chirwa, this means that private actions of security companies contracted to provide security to prisons as well as private airlines exercising delegated power relating to immigration control, can give rise to state responsibility.<sup>119</sup> The rationale seems to be simply this: that as long as it can be established that the corporation was acting on “the instructions of, or under the direction of or control of the state”, state responsibility would arise. As Cassese points out, the three tests for “acting on the instructions,” “under the direct control of”, or “under the control of”, are not cumulative, but are disjunctive.<sup>120</sup> It seems that the question of the degree of control a state should have for state responsibility to arise is not settled as yet.<sup>121</sup> As a result it is not clear whether the state should have an “effective control” or whether the “overall control” of the state over the entity would suffice. The ICJ seems to favour the “effective control” test as opposed to the “overall control” test.<sup>122</sup>

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118 *Prosecutor v Tadic* case IT-94-1-A at para 131 (hereinafter the *Tadic* case) available at: <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (accessed on 19 May 2013).

119 Chirwa 2004 *Melbourne Journal of International Law* 6.

120 Cassese A “The Nicaragua and Tadić tests revisited in light of the ICJ judgment on genocide in Bosnia” 2007 (18) *European Journal of International Law* 650.

121 See Cassese 2007 *European Journal of International Law* 649 – 668.

122 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) 2007 ICJ Reports 43, at 171 stated that, “the ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf”.

In the context of South Africa, state owned entities are easy to identify.<sup>123</sup> As discussed earlier, the fact that a state has shares in a corporation may in certain instances not necessarily give rise to state responsibility. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the *Prosecutor v Tadic* case has indicated that the degree of control may vary according to the factual circumstances of each case.<sup>124</sup>

The Draft Articles also address a situation of persons who, though not empowered to exercise government authority, find themselves exercising it all the same. The conduct of such a person may also be considered an act of state, if that person is in fact exercising government authority in the absence of the official authorisation.<sup>125</sup> Another category of persons or organs considered is one where persons or organs of state empowered to exercise governmental authority and such persons or organs of state act in that capacity and exceed authority or act in contravention of the instructions given. Such conduct will be considered to be that of the state in international law.<sup>126</sup> The latter provision, according to Dugard, means that state responsibility extends to *ultra vires* acts committed by officials.<sup>127</sup> Conversely, some scholars argue that a state cannot be held responsible for acts and omissions committed by individuals who have the status of organs of state, but are acting in their private capacity.<sup>128</sup> The example above of a police man who kills his lover would fall in this category. The test they argue is whether the agent, even though acting *ultra vires* appears to be acting in the course of exercising his official duties or holding himself out as having such authority. The significance of the distinction lies in the fact that it determines whether the state should be held directly or indirectly responsible for such conduct.<sup>129</sup>

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123 For a list of state owned entities in South Africa see "State-owned Enterprises" available on <http://www.gcis.gov.za/content/resourcecentre/contactdirectory/government-structures-and-parastatals> (accessed on 12 November 2014).

124 *Tadic* case at para 117.

125 Article 9 of the Draft Articles.

126 Article 7 of the Draft Articles.

127 Dugard *International Law* 273.

128 De Aréchaga and Tanzi *International State Responsibility* 358.

129 De Aréchaga and Tanzi *International State Responsibility* 358-359.

Another category that the Draft Articles have contemplated relates to conduct which is not an act of state as provided for by Article 4 or is not empowered by the law of the state as required by Article 5. Such conduct may still be considered an act of state under international law “if and to the extent that the State acknowledges and adopts the conduct in question as its own”.<sup>130</sup> A state can also breach an international obligation when an act of that state is not in conformity with what is required of it by its own international obligation, regardless of its origin or character.<sup>131</sup>

It is evident that the Draft Articles provide for a narrow and limited scope within which state responsibility may arise particularly in relation to the activities of MNCs. Generally, activities of MNCs do not fall within the ambit of the Draft Articles and will therefore not give rise to state responsibility. Further, state responsibility does not automatically arise each time there is a breach. It has to be invoked in accordance with the rules of international law.

#### **4.3 Invocation of state responsibility**

If the doctrine of state responsibility is limited in scope (in that it is rules- based), even more limited are the provisions that deal with invocation. Generally, legal processes only take effect when initiated by the aggrieved party or complainant. The same applies to international law processes in relation to the doctrine of state responsibility. In this regard the concept of invocation becomes important. Scobbie laments the fact that despite invocation being such an important concept, the Draft Articles do not define what the concept means.<sup>132</sup> In the commentary on the Draft Articles Crawford states that

invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a

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130 Article 11 of the Draft Articles. See also the *United State Diplomatic* case at 36.

131 Article 12 of the Draft Articles.

132 Scobbie 2002 *European Journal of International Law* 1205.



claim against another State or the commencement of proceedings before an international court or tribunal.<sup>133</sup>

Invocation serves as the key that unlocks international law processes and remedies. Just as state responsibility arises based on a nexus between the breach and the state, invocation also follows the same pattern in that there is a need to establish the nexus between the injured state and the breach. In this regard Article 42 provides that: A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed:

- (a) to that State individually;
- (b) a group of States including that State, or the international community as a whole, and the breach of the obligation;
  - (i) specifically affects that State; or
  - (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

In terms of Article 48, a state, other than the injured one, may invoke state responsibility for the breach of an international obligation if

- (a) the obligation breached is owed to a group of states including that State, and (b) is established for the protection of a collective interest of the group; or the obligation breached is owed to the international community as a whole.

Article 42(a) may be directed to obligations that may have arisen out of bilateral treaties whereby an individual state would have obligations to a particular state.<sup>134</sup>

In this case it would make sense that only the injured party would be empowered to invoke state responsibility as obligations may have been specific to its needs. Article 48, however, also seems to be directed towards multilateral treaties and

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133 Crawford *The International Law Commission's Articles on State Responsibility* 256.

134 See Scobbie 2002 *European Journal of International Law* 1204.

obligation arising from obligations *erga omnes*. This is so because in multilateral treaties a state has obligations that it owes to a specific group of states, whereas with regard to obligations *erga omnes* states have obligations that they owe to the international community as a whole. The Draft Articles deal with serious breaches of peremptory norms of general international law in a separate chapter.<sup>135</sup> In terms of Article 41, states are “to cooperate to bring an end through lawful means” to any serious breach of a peremptory norm of general international law.<sup>136</sup>

The Draft Articles have also contemplated situations under which a claim premised on a breach of state responsibility may not be invoked. Under Article 44, state responsibility may not be invoked if (1) the claim is not brought in accordance with any applicable rule relating to the nationality claims and (2) the claim is one to which the rule of exhaustion of local remedies applies and any effective local remedy has not been exhausted. In terms of Article 45, the responsibility of a state may not be invoked if the injured state has validly waived the claim and (2) the injured state is considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim. While time is of the essence, there is no authority to give an indication of how soon a claim should be lodged. The matter is solely left to the discretion of the Court to determine.<sup>137</sup>

A state entitled to invoke state responsibility may request the performance of reparation from the state in breach.<sup>138</sup> Reparation may take the form of restitution, compensation and satisfaction, either singly or in combination.<sup>139</sup> The view of the PCIJ is that such reparation, must

so 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 the act had not been committed. Restitution in kind, or, if

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135 See Draft Articles 40 and 41.

136 Article 41 of the Draft Articles.

137 *Certain Phosphate Lands in Nauru* (Nauru v Australia) (Preliminary Objections) ICJ 1992 Reports 240 at 271 (hereinafter *Certain Phosphate in Nauru* case).

138 Article 48(b) of the Draft Articles.

139 Article 34 of the Draft Articles.

this is not possible, payment of a sum corresponding to the value which restitution in kind would bear.<sup>140</sup>

Given the state-centric nature of the Draft Articles, it is axiomatic that the obligations contemplated in the Draft Articles are those of states, and the same can be said of the breaches and remedies. The Draft Articles make a very scant mention of non-state actors. Where non-state actors are mentioned, however, such reference is not made in a way that empowers them to have a meaningful role within the state-centric system. A typical example is in Article 33 that deals with the scope of international obligations.<sup>141</sup> Part two of this provision states that “this part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”.<sup>142</sup> According to Crawford paragraph 2 of Article 33 should not be read to be empowering persons and entities other than states, to invoke state responsibility.<sup>143</sup> In his view, the Article merely recognizes the possibility that state responsibility may be invoked by them.<sup>144</sup> Commenting on Article 33(2), Weiss points out that the Article recognizes that the primary rules of international law may provide rights for non-state entities.<sup>145</sup> For both Crawford and Weiss, this provision provides a window of opportunity in that it opens up the possibility for non-state actors to invoke state responsibility. An unresolved issue with the views of the two scholars though is that they too are not clear as to when the possibility for non-state actors to invoke state responsibility will arise and under what circumstances.

A perennial challenge to the international legal system relates to how it responds to human rights violations emerging from the private sphere, which is also one of the aspects that this study seeks to address. It is trite that international law is bifurcated into objects and subjects of the legal system. Within this division, international law imposes direct obligations on its subjects, meaning those entities

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140 *Chorzów Factory* case at 47.

141 See Draft Article 33(1) which states that: “The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.”

142 Article 33(2) of the Draft Articles.

143 Crawford *The International Law Commission’s Articles on State Responsibility* 210.

144 Crawford *The International Law Commission’s Articles on State Responsibility* 210.

145 Weiss 2002 *American Journal of International Law* 815.

with international legal personality. Objects of the legal system only have obligations indirectly through the state. The nature of human rights obligations is itself bifurcated. Conceptually a distinction is made between negative obligations and positive obligations. As Jägers<sup>146</sup> observes, the action required of a holder of negative obligations is that they must refrain from causing harm or infringing on the rights of others. Conversely, positive obligations require the holder of an obligation to take an action so as to realize a particular right. Argued to the logical conclusion, the answer is predictable as to whether MNCs have positive obligations under international law. As Alston points out, the system is designed and structured in such a way that an answer is given before the question is even asked.<sup>147</sup> If the logic above is to be followed, it becomes clear that conventionally MNCs operate in the private sphere, and are not subjects of international law and therefore do not have direct obligations under international law.

In light of the distinction between the two systems, the question posed by Jägers becomes relevant. Her enquiry in relation to the Draft Articles on State Responsibility is whether the rules developed by the ILC equally apply to international human rights law.<sup>148</sup> To find an answer she turns to Article 55<sup>149</sup> which deals with *lex specialis* and asks whether international human rights law should be considered *lex specialis*?<sup>150</sup> She concludes that practice has shown that international bodies do apply the principles of state responsibility when dealing with human rights issues. Her conclusion is further motivated by the fact that some authors have equally expressed the view that the “general rules of state responsibility are equally applicable within the framework of human rights”.<sup>151</sup> These general rules have put an emphasis on state obligations, even in the private sphere. It is on this basis there is an optimistic view that the law of state

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146 Jägers N *Corporate human rights obligations: In search of accountability* (Intersentia Antwerp 2002) 75.

147 Alston P “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?” in Alston P (ed) *Non-State Actors and Human Rights* (Oxford University Press Oxford 2005) 19.

148 Jägers *Corporate Human Rights Obligations* 145.

149 Draft Article 55 provides that: “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”

150 Jägers *Corporate Human Rights Obligations* 145–146.

151 Jägers *Corporate Human Rights Obligations* 146.

responsibility offers an interesting and yet underutilised tool for addressing human rights violations resulting from corporate activity.<sup>152</sup>

In discharging their obligations, both host and home states have a raft of measures at their disposal to deal with challenges posed by the phenomenon of economic globalisation. Options available to states are not only limited to legal measures. In addition to belonging to the family of nations under the umbrella of the United Nations, most states belong to political interest groups which are also powerful in their own right. For instance, most industrialised nations, which are to a large degree home states to most MNCs, are members of the G8<sup>153</sup> and the G20<sup>154</sup> groupings. Meetings of the two groups address *inter alia* global challenges that are mainly related to the economy of the world. Nothing prevents these home states from collectively agreeing on international human rights standards for the international operations of their own MNCs. Such an agreement may even be concluded in the form of a treaty.

According to McCorquodale and Simons, international human rights law “requires a state to take measures – such as by legislation and administrative practices – to control, regulate, investigate and prosecute actions by non-state actors that violate human rights of those within the territory of that state”.<sup>155</sup> This of course is not a closed list. Individually or through multilateral agreements, states are at liberty to design measures to deal with non-state actors. Developing countries for instance, can also make use of non-legal means, in addition to the measures outlined above. Most of the Heavily Indebted Poor Countries (HIPC)<sup>156</sup> feature on the list identifying the Least Developed Countries (LDC)<sup>157</sup> and are members of the G77 countries.<sup>158</sup> Issues of South-South economic investment feature prominently on

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152 Jägers *Corporate Human Rights Obligations* 175; Chirwa 2004 *Melbourne Journal of International Law* 4. Also see Gatto *A Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar Cheltenham 2011) 71.

153 “Profile: G8” available at: [http://news.bbc.co.uk/2/hi/americas/country\\_profiles/3777557.stm](http://news.bbc.co.uk/2/hi/americas/country_profiles/3777557.stm) (accessed on 14 November 2014).

154 “About G20” available at: [https://www.g20.org/about\\_G20](https://www.g20.org/about_G20) (accessed on 14 November 2014).

155 McCorquodale and Simons 2007 *Modern Law Review* 618.

156 “Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative” available at: <https://www.imf.org/external/np/exr/facts/hipc.htm> (accessed on 14 November 2014).

157 “Least Developed Countries (LDCs)” available at: <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/LDCs.aspx> (accessed on 14 November 2014).

158 “The Group of 77 at the United Nations” available at: <http://www.g77.org/doc/>. (accessed on

the agenda of the G77 countries' meetings. The challenge is for these groups to jointly agree among themselves on the minimum human rights standards they expect from corporations that invest within their territorial borders. OECD guidelines discussed in the preceding chapter, though not binding, resemble such an initiative, albeit from developed countries' point of view. By so doing, the developing countries will make it impossible for MNCs to look for countries with lower human rights standards. By agreeing among themselves on standards to impose on MNCs, developing countries would eliminate the race to the bottom and the run-away corporation phenomenon.<sup>159</sup>

Lobbying is also a tool that is available to developing countries.<sup>160</sup> In addition to setting their own binding universal standards, developing countries can also lobby with the developed countries to make sure that they encourage their own corporations to adhere to such set standards. Such an initiative can be coordinated around the various meetings of these political groupings or be raised within the multilateral bodies such as the UN. The key to unlocking the measures outlined above lies in the political will of the state. And this goes for both the developing and developed nations.

## 5 STATE RESPONSIBILITY IN RELATION TO PRIVATE CONDUCT

The general principle in international law is that conduct of private persons cannot be attributed to a state, unless there exists a special relationship between the private person and the state.<sup>161</sup> As was already pointed out, the positivistic conception of international law and its emphasis on state consent have a bearing on state responsibility in relation to private conduct. The basis for the doctrine of state responsibility is that states are not responsible for conduct of private persons and the conduct of persons not acting on their behalf.<sup>162</sup> There are of course exceptions to this rule.<sup>163</sup> The first exception is conduct that falls within the scope

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14 November 2014).

159 See the discussion in Chapter 1 of this study.

160 Bilchitz D 'Human Rights Beyond the State: Exploring the Challenges' in Vilhena O, Baxi U and Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press Pretoria 2013) 584.

161 Dugard *International Law* 274.

162 Wolfrum *State Responsibility for Private Actors* 424.

163 Wolfrum *State Responsibility for Private Actors* 425.

of Article 8 of the Draft Articles, as discussed above. The second relates to where a person or group of persons are acting on the instructions of or under the control of a state as contemplated by Article 9 of the Draft Articles. By their very nature, acts of private actors have a tendency to escape scrutiny. The private sphere is where most human rights violations by both states and non-stators alike occur. For example, feminist scholars have been consistent in pointing out that the private sphere is where the subordination of women takes place. In this regard Chinkin points out that

domestic violence against women can be designated as a private wrong, an individual matter that is outside international scrutiny. The tradition of viewing sexual conduct as private allows sexual abuse by public officials, such as prison officials or police officers, also to be readily discounted as not coming within their official duties. Failure by a state to investigate and punish such matters is a continuation of the exclusion of family/private life even from domestic intervention and thus from international accountability.<sup>164</sup>

As discussed earlier, under the international human rights norms, states have obligations to respect, protect and fulfil human rights. In a similar vein, Ruggie's UN mandate revolved around a framework which he titled to respect, protect and remedy.<sup>165</sup> In relation to the duty to protect, his final report is instructive in that the first part of the report rests on "the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication".<sup>166</sup> Within their own territories and subject to their jurisdictions, international human rights law enjoins it on states to protect human rights, which duty includes protecting individuals against human rights violations by private entities. For instance Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that:

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164 Chinkin C "A critique of the public/private dimension" 1999 (10) *European Journal of International Law* 392-393.

165 See Commission on Human Rights, "Protect, Respect and Remedy: A Framework for Business and Human Rights", A/HRC/8/5 (7 April 2008).

166 Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Respect, Protect and Remedy' Framework" A/HRC/17/31 (21 March 2011) para 6 (Introduction to the Guiding Principles).

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>167</sup>

State parties are enjoined to put in place legislative and other measures to ensure the enjoyment of the rights recognized in the ICCPR.<sup>168</sup> Further, state parties undertake to ensure that any person whose rights have been violated will have an effective remedy.<sup>169</sup> In this regard, state parties undertake to ensure that such remedies are determined by “competent judicial, administrative and legislative authorities”.<sup>170</sup> Equally important is the fact that state parties undertake to ensure that such remedies are enforced by competent authorities when granted.<sup>171</sup> The ICCPR further requests states to report on the obstacles to the effectiveness of the existing remedies.<sup>172</sup> The foregoing provisions enjoin it upon states to take positive steps to prevent violations of human rights, even those that emanate from private actors.<sup>173</sup> The obligations outlined in Article 2 of the ICCPR are such that every state has a legal interest in their performance, and therefore constitute obligations *erga omnes*.<sup>174</sup>

Should it happen that such violations have already taken place, states have an obligation to take positive steps to investigate and sanction such conduct.<sup>175</sup> Taking positive steps has been interpreted by the Human Rights Committee to mean that state parties should adopt legislative, judicial, administrative, educative

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167 International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), (entered into force 23 March 1976) (hereinafter ICCPR).

168 Article 2(2) of the ICCPR.

169 Article 2(3)(a) of the ICCPR.

170 Article 2(3)(b) of the ICCPR.

171 Article 2(3)(c) of the ICCPR.

172 Article 20 of the ICCPR.

173 Human Rights Committee, International Covenant on Civil and Political Rights, General Comment No.31 at para [80] CCPR/C/Rev.1/Add.13, (26 May 2004), para 8 (hereinafter the General Comment); Lehnardt C “State Responsibility and Private Military Companies” in Szabó M (ed) *State Responsibility and the Law of Treaties* (Eleven International Publishing The Hague 2010) 73; Chirwa 2004 *Melbourne Journal of International Law* 11.

174 General Comment, at para 2.

175 Lehnardt *State Responsibility and Private Military Companies* 11.



and other appropriate measures in order to fulfil their legal obligations.<sup>176</sup> International and regional tribunals have followed the same line of reasoning when adjudicating state obligations under international human rights law.

### **5.1 *Jurisprudence on state responsibility in the private sphere***

What has become evident from both the overview of the doctrine of state responsibility and the Draft Articles on State Responsibility above is that there is nothing that prevents states from taking measures to guarantee the protection of human rights within their territories and jurisdiction. Even apart from the stipulated obligations, states must ensure that there are legal systems to ensure the enjoyment of these rights.<sup>177</sup> If the responsibility of the home state arises from the extraterritorial operations of MNCs, nothing stops the home state from promulgating a regulatory legislation to deal with the extraterritorial activities of MNCs. The ATCA in the United States of America though dated and not without its own challenges, stands out as a classic example in this regard. Modern day examples of legislation with an extraterritorial reach were attempted in the United States of America,<sup>178</sup> Australia<sup>179</sup> and the United Kingdom.<sup>180</sup> The initiatives in both the United States and Australia were scuppered. As discussed above, in relation to the non-legal measures available to states, the failure or success of these initiatives depend on the political will of the states concerned.<sup>181</sup> The United Kingdom Corporate Responsibility Bill initiative, on the other hand, managed to have some relative success even though the end product was not as robust as the initial proposal.<sup>182</sup>

International instruments have articulated state obligations in a way that encapsulates both the specified and non-specified obligations of states. Article 2(1)

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176 Para 7 of the HRC, General Comment 31(80) Nature of the General Obligation Imposed on State Parties to the Covenant, available at <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f> (accessed on 10 February 2013).

177 Lawson *Out of Control* 91.

178 Corporate Code of Conduct Act, H.R 4596, 106th Cong. 2000.

179 Corporate Code of Conduct Bill 2000.

180 The United Kingdom Corporate Responsibility Bill and Companies Act 2006.

181 Broecker C "Better the devil you know": Home state approach to transnational corporate accountability" 2008 (41) *New York University Journal of International Law and Politics* 189.

182 For a detailed discussion see Broecker 2008 *New York University Journal of International Law and Politics* 159 – 217 and Deva S "Acting extraterritorially to tame multinational corporations for human rights violations: Who should 'bell the cat'?" 2004 (5) *Melbourne Journal of International Law* 49-51.

of the Covenant on Economic and Social Responsibility, for instance, states (albeit in the context of occupying powers) that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>183</sup>

International tribunals and courts have interpreted state obligations in a way that expects states to take preventive, protective and remedial measures in dealing with activities of private actors. Such was the approach of the ICJ in the *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* case.<sup>184</sup> The dispute arose when the Democratic Republic of Congo instituted an action against the Republic of Uganda for alleged acts of aggression perpetrated by Uganda on the territory of the DRC. The Court found that as an occupying power, Uganda at all times had the obligation to “take all measures in its power to restore, and ensure, as far as it is possible, public order and safety in the occupied area”. These obligations are interpreted in a wide and far-reaching manner. As the court continued, the

obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.<sup>185</sup>

The ICJ unanimously found that the Republic of Uganda had an obligation to make reparations to the DRC for the injury caused.

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183 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966), (entered into force 03 January 1976), (hereinafter the ICESCR).

184 *Armed Activities on the Territory of the Congo (DRC v Uganda)* 2005 ICJ Reports 168 (hereinafter the *Armed Activities on the Territory of the Congo* case).

185 *Armed Activities on the Territory of the Congo* case at 67.

Regionally, the approach of the ICJ to state obligations was echoed by the African Commission on Human and Peoples' Rights.<sup>186</sup> *La Commission Nationale des droit des l'Homme et des Libertes de la Federation Nationale des Union de Jeunes Avocats de France* brought a communication before the African Commission of Human and People's Rights (ACHPR) alleging serious human rights violations in Chad. Among some of the allegations were that journalists were harassed and attacked by unidentified individuals believed to be security agents of the government.<sup>187</sup> Further allegations were that in Chad there were, among others, arbitrary arrests and that people disappeared. Prisoners were also subjected to inhuman treatment. Within the backdrop of Article 1 of the African Charter on Human and Peoples' Rights,<sup>188</sup> which provides that member states shall "recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them", the ACHPR pronounced that "[e]ven when it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders".<sup>189</sup> Chad was therefore found to have been responsible for the violations of the African Charter.

The Inter-American system has also interpreted states' obligations in a manner that insists on accountability of states in the private sphere. The American Convention of Human Rights provides that "[t]he State parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms".<sup>190</sup> The scope of this provision came under scrutiny in the *Velásquez Rodríguez v Honduras* case before the Inter-American Court.<sup>191</sup> The case arose

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186 See the *SERAC* case paras 57 and 58 where it was pointed out that governments have duties to protect their citizens against acts perpetrated by private actors.

187 See *Commission Nationale des Droit de l'Homme et des Liberté v Chad*, Communication No 74/92 (1995) paras 1-5 (hereinafter the *Commission Nationale des Droit de l'Homme et des Liberté v Chad*).

188 The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1982), (entered into force on 21 October 1986) (hereinafter the African Charter).

189 *Commission Nationale des Droit de l'Homme et des Liberté v Chad* at para 22.

190 Article 1 of the The American Convention of Human Rights, OASTS No. 36 (1969), (entered into force on 18 July 1978) (hereinafter the ACHR).

191 *Velásquez-Rodríguez v Honduras* (Merits) IACHR (29 July) (hereinafter *Velásquez-Rodríguez v Honduras* case) available at:

out of the events in Honduras between 1981 and 1984. The Inter-American Commission on Human Rights presented evidence to the Inter-American Commission on Human Rights alleging that the Honduran government conducted, or at least tolerated a practice of forced disappearances of people. The question before the Court was whether the Honduran government could be held responsible for the disappearances. The Court found the Honduran government responsible for the failure to prevent and punish forced disappearance committed by persons whom it could not associate with the state. The reasoning of the court was that:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is an act of a private person or because a private person has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the Convention".<sup>192</sup>

The court went on to state that:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>193</sup>

An even more emphatic statement by the court is that:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State

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[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf) (accessed on 14 October 2014).

192 *Velásquez-Rodríguez v Honduras* at para 172 (emphasis added).

193 *Velásquez-Rodríguez v Honduras* at para 174.

apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.<sup>194</sup>

The court is aware of the fact that “in certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective”.<sup>195</sup>

The concept of due diligence casts the net of state responsibility wide and has had a bearing on international initiatives to deal with non-state actors.<sup>196</sup> For example, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights<sup>197</sup> has adopted the concept of due diligence too. With regard to acts by non-state actors the Maastricht Guidelines state that:

The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights

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194 *Velásquez-Rodríguez v Honduras* at para 176. The same approach was adopted in the Case of *González et al (“Cotton Field”) v Mexico* Judgment of November 16, 2009 Series C No. 205 at para 289 (hereinafter the *Cotton Field* case) where it was held that: “The duty to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality preordained to be ineffective.” For further commentary on the *Cotton Field* case see Strydom HA “Refining the scope of state obligations for treaty based human rights violations in respect of violence against women: The meaning of the 2009 Gonzales ruling by the Inter-American Court of Human Rights” 2010 (28) *Chinese (Taiwan) Yearbook of International Law and Affairs* 98-113.

195 *Velásquez-Rodríguez v Honduras* at para 177.

196 For further reading on this see Tzevelekos V “In search of alternative solutions: Can the state of origin be held internationally accountable for investors' human rights abuses that are not attributable to it?” 2010 (35) *Brooklyn Journal of International Law* 155–231.

197 Hereinafter the Maastricht Guidelines available at: [http://www1.umn.edu/humanrts/instree/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html). (accessed 14 November 2014).

that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.<sup>198</sup>

International tribunals have approached the concept of due diligence in such a way that it serves as an inclusive concept, even for conduct by private actors that cannot be attributed to a state.<sup>199</sup> Article 2 of the European Convention on Human Rights (ECHR) provides that everyone's right to life shall be protected by law. In the case of *Osman v United Kingdom* Mrs Osman's husband was killed by her son's former teacher. Her son was seriously wounded in the same incident.<sup>200</sup> The dispute concerned the alleged failure of authorities to protect the right to life of Mrs Osman's husband and her son from threat posed by individuals and lawfulness of restrictions on the applicants' right of access to a court to sue authorities for damage caused by such failure. Having observed that the state's obligations enjoins it on the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction, the court went on to say that:

It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.<sup>201</sup>

The protection of human rights in the private sphere brings to the fore the question of the interface between international law and municipal law. There are no guiding rules or procedures as to which of the two systems should be more responsible for the protection of human rights in the private sphere. Domestic courts remain the locus of accountability in international law. Theoretically, domestic courts can provide a remedy for a breach of international law.<sup>202</sup> The efficacy of the system

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198 The Maastricht Guidelines para 18.

199 For detailed discussion see Michalowski S "Due Diligence and Complicity: A Relationship in need of Clarification" in Deva S and Bilchitz D *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 218–242.

200 *Osman v United Kingdom* [1998] ECHR 101 (hereinafter the *Osman* case).

201 *Osman* case para 115.

202 Evans MD "International wrongs and national jurisdiction" in (ed) *Remedies in International*

though will to a large degree depend on the conceptualisation of the relationship between municipal law and international law. The relationship between the two legal systems has for a long time been explained in terms of two diametrically opposed theories, namely, dualism and monism.<sup>203</sup> The argument of the dualists is premised on the notion that international law and municipal laws are two different systems.<sup>204</sup> Within the jurisdiction of a state, international law must first be transformed into or incorporated into municipal law for it to apply.<sup>205</sup> Monism, on the other hand, contends that international law and municipal laws are intertwined. According to monism, when a state party ratifies a treaty, international law becomes part of municipal law without it being incorporated into municipal law.<sup>206</sup> Increasingly most legal systems are no longer distinctly monist or dualist, but instead exhibit elements of both approaches.<sup>207</sup> As a result, the fine distinction between the two theories is being challenged.<sup>208</sup>

International human rights law as an offshoot of international law, has inherited these dichotomies and debates. A monist approach argues that unless international human rights treaties are ratified, they will not have an impact at a national level.<sup>209</sup> Viljoen points out that legal theory has established a correlation between the extent of the integration of international human rights treaties into the legal system of a country and the status enjoyed by international law in the same system.<sup>210</sup> The paradox of international human rights law is more manifest in the relationship between international human rights law and municipal law. While the

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*Law: The Institutional Dilemma* (Hart Publishing Oxford 1998) 173.

203 For a detailed discussion of the two theories see: Viljoen F *International Human Rights Law in Africa* (Oxford University Press Oxford 2007) 18, 529–538; Olivier ME *International Law in South African Municipal Law: Human Rights Procedure, Policy and Practice* (LLD thesis University of South Africa 2002) 56-65, Crawford J *Brownlie's Principles of Public International Law* 8th ed (Oxford University Press Oxford 2012) 48-61 and Booyesen H *Principles of International Trade Law as a Monistic System* (Interlegal Pretoria 2003) 93-113, Ferreira G and Ferreira-Snyman A "The incorporation of public international law into municipal and regional law against the background of the dichotomy between monism and dualism" 2014 (17) *PER/PELJ* 1471-1496.

204 Dugard *International Law* 42.

205 Ferreira and Ferreira-Snyman 2014 *PER/PELJ* 1471.

206 Ferreira and Ferreira-Snyman 2014 *PER/PELJ* 1471.

207 Ferreira and Ferreira-Snyman 2014 *PER/PELJ* 1472.

208 Viljoen *Human Rights Law in Africa* 530–538, Crawford *Brownlie's Principles of Public International Law* 50 and Olivier *International Law in South African Municipal Law* 62-65, Ferreira and Ferreira-Snyman 2014 *PER/PELJ* 1471-1496, Donoho D "Human rights enforcement in the twenty-first century" 2006 (35) *Georgia Journal of International and Comparative Law* 12-14.

209 Viljoen *Human Rights Law in Africa* 530.

210 Viljoen *Human Rights Law in Africa* 530.

focus of international human rights law is on the protection of the rights of the individual against the state, the system depends on the same state to give effect to those rights first. A dualist approach will argue that if treaties or international agreements are ratified but not incorporated by a state, such treaties or agreements will only bind a state at an international level only.<sup>211</sup> As Viljoen points out, to become meaningful international human rights must be brought “home”.<sup>212</sup> Axiomatically, peremptory norms such as *jus cogens* and obligations *erga omnes* would constitute an exception to this view.

The foregoing discussion begs the question: Whether the protection of human rights in the private sphere should be left entirely to domestic law or whether it should be a matter of international law?<sup>213</sup> According to Knox<sup>214</sup> human rights in the private sphere have generally been protected by domestic law when:

- (a) Human rights law contemplates that states have a general duty to restrict the private actions that interfere with the enjoyment of human rights, but leaves to governments the task of specifying the resulting private duties;
- (b) Human rights law itself specifies the private duties that governments are obliged to impose;
- (c) Human rights law directly places duties on private actors, but leaves the enforcement of those duties to domestic law; and
- (d) Human rights law enforces private duties at the international level through international tribunals or other institutions.

The protection of human rights in the private sphere is saddled with complexities that are historical, conceptual and practical in nature.<sup>215</sup> As pointed out above, while state obligations are both vertical and horizontal, historically the classical conception of human rights has put more emphasis on the vertical obligations of states. To talk of human rights in the private sphere is therefore to take the

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211 Ferreira and Ferreira-Snyman 2014 *PER/PELJ* 1481.

212 Viljoen *Human Rights Law in Africa* 9-10.

213 See Knox JH “Horizontal human rights law” 2008 (102) *American Journal of International Law* 20.

214 Knox 2008 *American Journal of International Law* 18.

215 Duruigbo E “Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges” 2008 (6) *Northwestern Journal of International Human Rights* 251-252.



debates out of the classical model. The move from the public to the private sphere brings with it its own conceptual challenges. The concept of *Drittwirkung* within the European Human Rights system provides a good illustration of the complexities that arise in an attempt to protect human rights in the private sphere. The multifaceted concept of *Drittwirkung* has its origin in the jurisprudence of the German courts and has since made its way into the European Human rights system.<sup>216</sup> The concept of *Drittwirkung* was invoked with reference to the “third party effect”. As Clapham points out, it was used with reference to the possible application of the German Basic Law in cases where the litigants were both private parties.<sup>217</sup> The significance of *Drittwirkung* lies in the fact that it affirms the horizontal application of human rights norms in the private sphere to private individuals in their private relationships among themselves.<sup>218</sup> The notion that fundamental rights apply horizontally in the private sphere has become part of most jurisdictions, including South Africa.<sup>219</sup> In South Africa for instance, the Constitution provides that “[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”<sup>220</sup> In most municipal jurisdictions, it is no longer controversial to say that the fundamental human rights apply in the private sphere. What is still not settled is the protection of human rights in the private sphere in international and regional tribunals, and this is where the concept of *Drittwirkung* has received both acclaim and criticism alike.

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216 See Bomhoff J “Lüth’s 50th Anniversary: Some comparative observations on the German foundations of judicial balancing” 2008 (9) *German Law Journal* 121-124; Ratner 2001 *Yale Law Journal* 471; Jägers *Corporate Human Rights Obligations: In Search of Accountability* 36.

217 Clapham A “The ‘Drittwirkung’ of the Convention” in Macdonald R St J Matscher F and Petzold H (eds) *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers Dordrecht 1993) 165.

218 See Engle E “Third party effect of fundamental rights (Drittwirkung)” 2009 (5) *Hanse Law Review* 165.

219 Bomhoff 2008 *German Law Journal* 121; Ratner 2001 *Yale Law Journal* 471.

220 Section 8(2) of the Constitution of the Republic of South Africa, 1996. See Bilchitz *Human Rights Beyond the State* 593–596; Bilchitz D “Corporate law and the Constitution: Towards binding human rights responsibilities for corporations” 2010 (125) *South African Law Journal* 775-779; Chirwa DM “The doctrine of state responsibility as a potential means of holding private actors accountable for human rights” 2004 (5) *Melbourne Journal of International Law* 26 where he states that in Africa, the Constitutions of South Africa, Malawi, Gambia, Cape Verde, Ghana, and Mali are some of the recently adopted constitutions that recognise that human rights can bind private actors.

It is trite that the provisions of the European Convention on Human Rights are state centric. The language of the Convention is aimed at the traditional vertical conception of human rights protection, with duties and obligations imposed on state parties. The concept *Drittwirkung*, however, takes the discourse out of the traditional matrix into the private sphere by extending its application to non-state parties. *Drittwirkung* can either be direct or indirect.<sup>221</sup> Direct *Drittwirkung* contemplates a situation where an individual can lodge a complaint directly against a private person by invoking a human right before an international tribunal. Indirect *Drittwirkung*, on the other hand, refers to a situation whereby complaints can only be lodged if responsibility can be attributed to state authorities.

The idea that an individual can approach an international tribunal and lodge a complaint is a rather positive development towards the protection of human rights in the private sphere. However, as Jägers points out, some scholars are of the view that there can be no horizontal effect at an international level as the system does not have enforcement mechanisms in place.<sup>222</sup> The absence of an enforcement mechanism is a lamentable setback for the protection of human rights, for two reasons. Firstly, it negates the fundamental principle that where there is a violation of a right there must be a remedy. In the absence of remedies, the protection of human rights in the private sphere will have a hollow ring. Secondly, the deficit highlights the struggle of the state-centric system to adjust to non-state parties. Thus, even the concept of the *Drittwirkung* does not seem to be taking the protection of human rights any further.<sup>223</sup>

## **5.2 The limitations of the doctrine of state responsibility**

At a national level, most states do have a host of laws that corporations have to adhere to, but these are only within the confines of the borders of a given states.<sup>224</sup> Regional and international human rights bodies are state-centric to a large degree. The jurisdiction of these bodies is therefore mainly confined to complaints against

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221 Jägers *Corporate Human Rights Obligations: In search of accountability* 36-38.

222 Jägers *Corporate Human Rights Obligations: In search of accountability* 37.

223 Clapham *The 'Drittwirkung' of the Convention* 163.

224 See Kinley D and Tadaki J "From talk to walk: The emergence of human rights responsibilities for corporations at international law" 2004 (44) *Virginia Journal of International Law* 934-935.

states.<sup>225</sup> The law of state responsibility, especially for violations of rights in the private sphere, lends itself to two limitations.<sup>226</sup> The first relates to the fact that for state responsibility to arise, a connection must be established between the state and the conduct constituting a violation. However, relationships in the private sphere are by their very nature private and, therefore, do not have much connection to the state. Secondly, generally only states can bring an action against another state in the ICJ as individuals or groups do not have *locus standi*.<sup>227</sup> There, however, seems to be a shift in international law in that non-state actors are granted *locus standi* in some international tribunals. For instance, non-governmental organizations and individuals, among others, have *locus standi* in the European Court of Human Rights.<sup>228</sup>

There has been a proliferation of non-state actors and not all their acts are attributable to a state so as to give rise to state responsibility. As discussed above, some of these non-state actors, like MNCs, have grown in stature and power and are even engaged in state-like activities. This being the case, the Draft Articles are written in a language that does not anticipate the invocation of state responsibility by non-state actors. The state-centric nature of the Draft Articles is its own nemesis in dealing with the activities of MNCs. In this regard, Deva submits that “any international mechanism that tries to fix liability of MNCs ‘solely’ through states has failed in the past and is bound to fail in the future”.<sup>229</sup> For this rather pessimistic view he gives the following seven reasons:<sup>230</sup>

- (1) State governments cannot exercise effective control over MNCs, because of trans-border limitations: States operate within a defined territory and MNCs do not.
- (2) Sometimes states, or their corporate hands, are in connivance with MNCs.

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225 Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 347.

226 Chirwa 2004 *Melbourne Journal of International Law* 10.

227 See Brownlie I “The individual before tribunals exercising international jurisdiction” 1962 (11) *International and Comparative Law Quarterly* 701-720, Chirwa 2004 *Melbourne Journal of International Law* 10.

228 Robbertson AH “The European Court of human rights” 1960 (9) *The American Journal of Comparative Law* 1-28; Higgins R “Conceptual thinking about the individual” 1978 (4) *British Journal of International Studies* 6.

229 Deva S “Human rights violations by multinational corporations and international law: Where from here?” 2003 (19) *Connecticut Journal of International Law* 48.

230 Deva 2003 *Connecticut Journal of International Law* 48-49.

- (3) States are interested parties in a quest to establish a mechanism for corporate accountability.
- (4) Even if states wish to control MNCs, some of them, especially developing ones, do not possess the legal and / or economic capacity to do so.
- (5) Since MNCs operate in several countries, a suit for fixing responsibility before a municipal court is often scuttled with the plea of *forum non conveniens*.
- (6) There is a possibility of friction and confrontation between states if the municipal laws of country X are applied to a MNC incorporated in country Y.
- (7) States are notoriously inconsistent in their respect and enforcement of international human rights.

Valid as the concerns raised by Deva may be, they overlook the fact that there is nothing in the Draft Articles on State Responsibility that prevents states from taking both legal and non-legal measures to address each of the points he has raised. With regard to his first point above, this chapter has pointed out that state obligations under international human rights law are not confined to the territory of a given state but can also be established through jurisdiction. Nothing in the doctrine of state responsibility prevents a home state from promulgating extraterritorial legislation. Regarding his second point, it would to a large degree depend on the seriousness of the offence that the state and the MNCs connive in. If the matter is of such a serious nature that it violates peremptory norms of international law surely remedial measures can be taken by any state. On the third point raised, the fact that states are interested parties in a quest to establish an accountability mechanism should in fact work in favour of states and not against them. One commentator has pointed out that to a large degree, states obey international law based on self-interest.<sup>231</sup> With regard to the fourth point, Knox asserts that even in a relatively weak government, a state continues to be a single powerful entity within its own jurisdiction.<sup>232</sup> In addition, this chapter has argued that states are also at liberty to collectively lobby powerful home states. This is not proscribed by the doctrine of state responsibility. In relation to the fifth point raised, the Brussels Convention of European Union<sup>233</sup> has demonstrated that by putting

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231 Vázquez 2005 *Columbia Journal of International Law* 956.

232 Knox 2008 *American Journal of International Law* 18-19.

233 This was discussed in Chapter 2 of this study.

regulatory mechanisms in place certain hurdles such as *forum non conveniens* can be overcome. It would be recalled from the second chapter that *forum non conveniens* does no longer apply within the European Union member states. For points six and seven, it is worth pointing out that nothing in the Draft Articles prohibits states from collectively addressing the challenges posed by MNCs. A classic example of this is the initiative by the OECD countries discussed in chapter one of this study. Though limited to only a number of states, the OECD initiative has at least put in place standards that are to be adhered to by corporations from OECD countries, albeit on a voluntary basis.

As discussed above, what seems to be a major weakness with the indirect accountability in international law is that it is solely dependent on the medium of the state. A corollary to this challenge is that generally individuals and groups do not have the *locus standi* to enforce their rights in most international tribunals. While states have a raft of measures that they can put in place to ensure respect, protection and fulfil human rights, evidence points to the fact that for political and economic reasons, not all states have the political will to do so. If the indirect mode of accountability fails them, especially where the corporation connives with the state, victims of human rights violations do not have much recourse in an attempt to enforce their rights.<sup>234</sup> It is the argument of this study that in addition to the indirect mode of accountability, there is a dire need to hold MNCs directly accountable for their human rights violations under international law.

States play a pivotal role under the international legal system. As Ruggie asserts, individually they are the “primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime”.<sup>235</sup> Arising from this role states have both rights and obligations. A state may choose not to exercise its rights in full, but may not choose not to discharge

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234 For the corporate-state nexus in violating rights see Miranda LA “The hybrid state-corporate enterprise and violations of indigenous land rights: Theorizing corporate responsibility and accountability in international law” 2007 (11) *Lewis and Clarke Law Review* 135–183.

235 Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Respect, Protect and Remedy” Framework’ A/HRC/17/31 (21 March 2011) paragraph 4 (Guiding Principles) 9.

its obligations in full.<sup>236</sup> Article 13 of the Draft Declaration on Rights and Duties of States of 1949<sup>237</sup> states that:

Every state has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

At municipal level, effect is given to the international law obligations through constitutions or legislation. States have a number of options as to where to locate international law within the hierarchy of their municipal legal systems. According to Viljoen, they may place international law above all national laws, including the Constitution, or they may place it on par with the Constitution, but above other national laws, or they may place it on the same level with other national laws.<sup>238</sup> The test is not where international law is located in the hierarchy of laws of a state, but whether the state has discharged its obligations or not. In discharging their obligations, states have a duty to ensure that their laws are in conformity with their obligations under international law.<sup>239</sup> Accountability in this model, regardless of where the state locates international law, would still take place at the level of domestic courts and will depend on the state to ensure that domestic courts are functional. Indeed states have invoked criminal, civil and administrative sanctions to hold corporations to account.<sup>240</sup> However, as the preceding chapters have illustrated, relying solely on domestic courts is not without its own pitfalls.

In relation to the accountability of MNCs the challenges become even more pronounced in that the state-centric approach operates on the basis of the existence of the nexus between the state and the entity. The glaring challenge is that globalisation has generally widened the gap between the state and MNCs, thus putting MNCs beyond the reach of the state-centric system of accountability.

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236 Olivier *International Law in South African Municipal Law* 65.

237 "Draft Declaration on Rights and Duties of States with commentaries 1949" available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/2\\_1\\_1949.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/2_1_1949.pdf) (accessed on 10 July 2015).

238 Viljoen *Human Rights Law in Africa* 538.

239 Crawford *Brownlie's Principles of Public International Law* 52.

240 Stephens B "The amorality of profit: Transnational corporations and human rights" 2002 (20) *Berkeley Journal of International Law* 60.

For this reason, the state-centric approach has been criticised for not only being out of step with the prevailing international power relations, but also for shielding MNCs from assuming responsibilities for their actions.<sup>241</sup> The net effect of this is that for victims of human rights violations, the state-centric system fails them where it is needed most. As Shelton<sup>242</sup> writes, under international law, the state is obliged to ensure that there are domestic remedies for those who have suffered harm. The challenge however, as she aptly points out, is that in the event that the state does not meet its obligations, international law does not have procedures for an aggrieved individual to hold the state accountable before an international institution. The same argument can be made in the case of corporations. Beyond the domestic remedies, aggrieved victims of corporate human rights violations have nowhere to go. The conceptualisation of MNCs as having international personality, though not a panacea to the challenge of MNC accountability in international law, provides an additional avenue for victims of corporate human rights violations to assert their rights. What the architecture<sup>243</sup> of such a mechanism would look like, is the subject of the discussion in chapter five of this study.

## **6 BRIDGING THE ACCOUNTABILITY GAPS WITHIN THE INTERNATIONAL LEGAL SYSTEM**

In addition to the challenges posed by globalisation, inherently the international legal system has some gaps that make it difficult to hold MNCs to account for their human rights violations. The greatest accountability hurdle of MNCs under international law is the division between the private and the public spheres. Because of the historical context within which it arose, the language of human rights protection has traditionally been concerned with the protection of human rights vis-à-vis the state in the public sphere.<sup>244</sup> The inherent weakness with this

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241 Jochnick C “Confronting the impunity of non-state actors: New fields for the promotion of human rights” 1999 (21) *Human Rights Quarterly* 59.

242 Shelton D “Protecting human rights in a globalized world” 2002 (25) *Boston College International and Comparative Law Review* 282.

243 The use of the word architecture in relation to the structure of the institutional mechanisms for the protection of human rights is borrowed from Van den Herik L and Černič JL “Regulating corporations under international law: From human rights to international criminal law and back again 2010 (8) *Journal of International Criminal Justice* 727.

244 Raday F “Privatising human rights and the abuse of private power” 2000 (VIII) *Canadian Journal of Law and Jurisprudence* 103.

approach is that it overlooks the emerging power of private entities *vis-à-vis* the individual and private relations between individuals.<sup>245</sup> A further division which the legal system makes is the distinction between the subjects and objects of international law.<sup>246</sup> The legal system is still trapped in this dichotomy in that its theories, rules and institutional mechanisms of accountability are fashioned in silos reflecting the divisions and the distinctions.

It was pointed out in the first chapter to this study that under globalisation, the ordering of the international community is undergoing multiple processes all unfolding at the same time.<sup>247</sup> These processes are simultaneously moving towards and away from the state. The regulatory environment of corporations, for instance, is a classic example of this complex movement in that corporations are creations of national legislation.<sup>248</sup> This means that for their own existence, corporations need the state to facilitate the process of their incorporation. Once incorporated, corporations especially those with no link to the state, gravitate away from the state into the private sphere, a sphere which the international legal system is still struggling to conceptualise. Because of the division between the two spheres, state involvement in the private sphere is very minimal. The weakness of the system is exposed in that states are held to account in an area where their involvement is only minimal.<sup>249</sup> The conceptualisation of MNCs as having international legal personality, it will be argued, will allow corporations to account directly for their own violations under the international legal system and not through the prism of the state.

In the private sphere, at least in as far as international law is concerned, MNCs operate in a legal vacuum especially in relation to human rights accountability. About this Duruigbo writes that “without a doubt, the current situation has succeeded in placing MNCs in a sphere where their operations are conducted in a

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245 Raday 2000 *Canadian Journal of Law and Jurisprudence* 104.

246 Deva S “Human rights violations by multinational corporations and international law: Where from here?” 2003 (19) *Connecticut Journal of International Law* 3.

247 See earlier discussions in Chapter 1 of this study.

248 Ratner 2001 *The Yale Law Journal* 453.

249 Wettstein F “Making Noise about Silent Complicity: The Moral Inconsistency of the ‘Protect, Respect and Remedy’ Framework’ in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 246.



legal and moral vacuum”.<sup>250</sup> The absence of a legal regulatory framework means that technically there are no human rights obligations that arise from the activities of corporations in the private sphere, while all international law obligations are placed on the state. As it was discussed above, state responsibility for private acts operates on the basis of the nexus that exists between the corporation and the state. If there is no nexus, state responsibility will not arise. With no legal point of reference against which to directly measure the activities of corporations in the private sphere, international initiatives are reduced to just mere exhortations and recommendations. The Ruggie mandate for instance, did not succeed in steering itself out of these dichotomies. In fact, the mandate replicates the divisions in that it is constructed around the duty of the state to protect against human rights abuses by third parties, including business enterprises, and the corporate responsibility to respect human rights.<sup>251</sup> In the era of globalisation, the weaknesses of the bifurcated model of accountability quickly become apparent for a number of reasons. Firstly, the framework is constructed on the model of a powerful state that is in control politically, economically and legally. This however, does not resonate with the reality of most states particularly those confronted by human right challenges emanating from MNCs. The Ruggie mandate was cognisant of the fact that the risk of human rights abuses is heightened in conflict affected areas where there is conflict over the control of territory, resources or the government itself.<sup>252</sup> Ordinarily, such states have weak systems of accountability and governance. It is axiomatic that such states would in all likelihood be unable to discharge their obligations to protect against human rights violations. An asymmetry is therefore created between what the theory outlines and what the factual reality for some states is. This then implies that while the state-centric approach is constructed around a conception of a powerful state, human rights abuses in relation to MNCs have mostly emerged from very weak states with weak institutions of governance. To continue insisting on a state-centric approach under such circumstances becomes futile.

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250 Duruigbo 2008 *Northwestern Journal of International Human Rights Law* 250.

251 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) para 4 (Guiding Principles) 6.

252 Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Respect, Protect and Remedy” Framework’ A/HRC/17/31 (21 March 2011) para 9 (Guiding Principles) 10 - 11.

Secondly, the international operations of MNCs extend to beyond territories of states. Because MNCs, as Bratspies writes, “operate across national borders, beyond constrains of one nation’s domestic law, their actions are too often viewed as beyond the reach of any law”.<sup>253</sup> This is where human rights are more vulnerable and at risk of being violated and yet international law, as Ruggie points out, does not impose any duties on states to “regulate the extraterritorial activities of business domiciled in their territory and or/jurisdiction”.<sup>254</sup> Practically this means that MNCs operating in weak states are technically free to do as they wish especially given the fact that their home states do not have any legal obligation to regulate their affairs. In light of the fact that the traditional state-centric system has no room for MNCs, international law has no answer to this anomaly. Because there is no legal framework to refer to, the Ruggie mandate for business to respect human rights, remains just an exhortation. The exhortation is that the need for business to respect human rights

is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of state’s abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.<sup>255</sup>

The difficulty with the exhortation is that, like all other international voluntary measures, it has no legal basis and therefore cannot be enforced. The challenge with all voluntary measures in relation to issues of accountability for human rights violations of MNCs discussed thus far, is that the “mechanism only works when MNCs, the potential violators of human rights, want it to work”.<sup>256</sup> As a result,

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253 Bratspies RM “Organs of society”: A plea for human rights accountability for transnational enterprises and other business entities” 2005 (13) *Michigan State Journal of International Law* 11.

254 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) para 2 (Guiding Principles) 7.

255 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) para 11 (Guiding Principles) 13.

256 Deva 2003 *Connecticut Journal of International Law* 19.

should MNCs not adhere to the exhortation the international legal system has no way of enforcing it. Though not a panacea to all the challenges facing the state-centric system of accountability, the conceptualisation of MNCs as having international legal personality in international law, it will be argued, assists to address part of the challenge in that it bridges the gap between the public and the private spheres. In addition, it gives the international legal system a handle on MNCs thus also narrowing the governance gap referred to in the preceding chapters.

Internally, the legal system too is experiencing multiple processes all unfolding at the same time. While domestic courts remain the locus of accountability in international law, the international legal system has over the years expanded and in the process also fragmented at the same time.<sup>257</sup> New specialised areas dealing with issues of trade, environment, human rights, the sea, investment and refugees have emerged under the auspices of international law.<sup>258</sup> The adoption of the Rome Statute marked the addition of criminal law to the list of specialised areas. It can be argued that for its own self-preservation, the expansion of international law into these areas is important for the credibility, legitimacy and relevance of the legal system to modern international challenges. Notwithstanding this, fragmentation poses its own challenges to the legal system. As some scholars have argued, it has the potential to open up the door for “the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security”.<sup>259</sup> This concern is not unfounded, particularly in light of the fact that the international community has in the last fifty years witnessed an emergence of numerous international courts and tribunals.<sup>260</sup> Though operating under the ambit of the same international law, these tribunals and courts do not have a co-ordinated point of convergence. Each has its own rules, and deals with different aspects of the different subjects of international law. Functionally this means that each of the courts and tribunals must tread with caution not to encroach on to the

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257 See International Law Commission: Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, available at: [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) (accessed on 30 April 2015)

258 Fragmentation of International Law para 8.

259 Fragmentation of International Law paras 9 and 14; Dugard *International Law* 13.

260 The different institutional mechanisms will be discussed in Chapter 5 of this study.

area of specialisation of the other. Buergenthal underscores this point by stating that

each tribunal has an obligation to respect the general and special competence of the other judicial and quasi-judicial institutions which comprise the system, to recognize that it has an obligation, when rendering judgements, to take account of the case-law of other judicial institutions that have pronounced on the same subject and, most importantly, to promote and be open to the jurisprudential interaction or cross fertilization.<sup>261</sup>

Inevitably, any attempt to duplicate the institutional mechanisms of accountability increases the chances of the conflicting jurisprudence. The view proposed in this study is that the multiplicity of institutional mechanisms can be minimised by constructing a theory of accountability at a conceptual point of convergence of those subjects with some legal commonalities.<sup>262</sup> It will be argued that as the multiple processes continue to unfold in all directions under globalisation, points of convergence between some of the subjects and concepts of international law have emerged. These points of convergence provide a basis for a theory of accountability for human rights by MNCs in the era of globalisation.

## **7 CONCLUSION**

Not all international corporations are the same as there are nuanced differences among them. Some of these corporations are private in nature, while others have a closer proximity to the state as they are treaty based. As to which of these would give rise to state responsibility depends on the rules of international law. This chapter has argued that international law is a rules-based system. It was illustrated that both the state's vertical and horizontal obligations arise from the rules of the legal system. The chapter has argued that despite being state-centric, the doctrine of state responsibility provides a raft of measures that states can adopt so as to discharge their obligations in international law, particularly with regard to conduct

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261 Buergenthal T "Proliferation of International Courts and Tribunals: Is it good or bad?" 2001(14) *Leiden Journal of International Law* 274.

262 By commonalities, reference is made to what is legally expected of a given entity and not its physical attributes.

of MNCs. What has become apparent in this chapter is that despite its potential to serve as a useful tool of indirect accountability of MNCs, the doctrine of state responsibility is not without its own limitations. Such limitations relate to the fact that the doctrine of state responsibility is state-centric and this becomes a challenge where states do not have a political will to put measures to protect human rights in place. The second challenge relates to enforcement of internationally protected rights by individuals and groups of people as to a large degree these do not have *locus standi* in most international tribunals and fora.

It is this study's argument that the deficiencies of the state-centric regulatory framework, coupled with the inadequacies of the voluntary accountability mechanisms<sup>263</sup> of MNCs, provide a basis for the argument advanced in this study that there is a need to, in addition to the indirect mode of accountability, hold MNCs directly accountable in international law. According to the rules of international law direct accountability is reserved for those entities upon which the legal system has conferred international legal personality. This then begs the question: If it is argued that international law should confer international legal personality on MNCs, on what basis would international law do that? To answer this question, the study will turn to a discussion of the concept of international personality in international law in the next chapter.

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263 See the discussion in Chapter 2 of this study.

## CHAPTER 4

### THE EVOLUTION OF THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY IN INTERNATIONAL LAW

#### 1 INTRODUCTION

This chapter seeks to discuss the concept of international legal personality as it has evolved to encompass non-state entities. The discussion will not so much focus on the chronological flow of events, but on the conceptual evolution. The international legal system has over the years evolved to confer limited international legal personality to a limited number of non-state actors.<sup>1</sup> International legal personality to these non-state entities was conferred at different times in response to different challenges.<sup>2</sup> As already discussed in chapter one, international law is an “actor-centred system”. In this regard, it becomes important to establish how the legal system identifies its actors.

What has become evident in the preceding chapters is that MNCs are elusive and are therefore not within the full grasp of any legal system, including international law. In international law the concept of international legal personality provides the legal system with a conceptual grasp of its actors. The rationale for the discussion in this chapter is two-fold. Firstly, the chapter seeks to establish whether international law has evolved to such an extent that MNCs can be considered to be subjects of the international legal system. If indeed the legal system has evolved as such, the second leg of the discussion will then seek to establish the basis for arguing that international law has evolved to include MNCs.

The presentation of this chapter will be in seven parts, including this introduction. The first part will set the context to the evolution of the concept of international personality in international law. In the second section, the chapter will discuss the use of the concept of international person in international law. In the third section the chapter will discuss the sources of international law and its development. In this regard a cursory overview of the sources of international law will also be presented. The fourth section will discuss the different philosophical and

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- 1 Walter C “Subjects of international law” 2007 *Max Planck Encyclopedia of Public International Law* 1-10; Menon PK The international personality of individuals in international law: A broadening of the traditional doctrine” 1992 (1) *Journal of Transnational Law and Policy* 151-182.
  - 2 Cassese A *International Law in a Divided World* (Clarendon Press Oxford 1986) 74-75.

theoretical conceptions of the concept of concept of international personality in international law. How entities acquire international legal personality in international law will also be covered in the discussion. As Klabbers points out, there is still no agreement on “the modalities of acquiring personality, the extent and scope of personality, and the precise consequences to be attached to personality”.<sup>3</sup> In the fifth section the chapter will discuss the acquisition of international personality in international law. To illustrate the complexities surrounding the acquisition of international personality, the chapter will present a brief survey of the various subjects of international law and how these entities have acquired their limited international legal personality in international law. NGOs do not have international legal personality in international law, but are very active within the legal system. The sixth section will discuss the role of NGOs within the international legal system. Drawing from the discussions in the preceding subsections of this chapter, the seventh section will conceptualise the international legal personality of MNCs in international law, and then conclude.

## **2 THE HISTORICAL CONTEXT OF THE USE OF INTERNATIONAL PERSONALITY IN INTERNATIONAL LAW**

The concept of international legal personality seems to have come full circle, because international law has not always been about state relations to the exclusion of non-state entities.<sup>4</sup> In the early years of international law, as Koh writes, “the public/private, domestic/international categories that later came to dominate classical international legal theory had not been developed”.<sup>5</sup> The state-centric focus of international law emerged from the work of Jeremy Bentham, who coined the term “international law”.<sup>6</sup> The use of the word *person* with reference to the state has its origin in the work of Thomas Hobbes (1588-1679) and was developed further by Samuel Pufendorf (1632-1694).<sup>7</sup> Hobbes used the concept to

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3 Klabbers J “Presumptive Personality: The European Union in International Law” in Koskenniemi M (ed) *International Law Aspects of the European Union* (Kluwer Law International The Hague 1998) 234.

4 Janis MW “Individuals as subjects of international law” 1984 (17) *Cornell International Law Journal* 61 who writes that “[b]efore positivism, there was no theoretical insistence that the rules of the law of nations applied only to States”.

5 Koh HH “Why do nations obey international law?” 1997 (106) *The Yale Law Journal* 2605.

6 See Janis 1984 *Cornell International Law Journal* 62 and Koh 1997 *The Yale Law Journal* 2608.

7 Aufricht H “Personality in international law” 1942 (XXXVII) *The American Political Science*

explain his theory of social contract and the creation of a state. A state, according to Hobbes, was formed when natural persons through a social contract authorised one person to be their representative and wear a mask<sup>8</sup> as a sovereign actor under whom the rest were united.<sup>9</sup> Pufendorf saw a state as a moral person with the ability to perform actions unique to itself and different from those of individuals.<sup>10</sup> However, he did not see a state as having personality in international law as he denied the existence of international law separate from natural law.<sup>11</sup> Gottfried Wilhelm Leibniz, (1646-1716) is the first writer to use the term *international legal personality* in his work the *Codex iuris gentium diplomaticus* of 1693.<sup>12</sup> For Leibniz, the concept of international legal personality is directly connected to sovereignty as it has a component of representation of the public. Leibniz defines international legal personality as follows:

He possesses a *personality in international law* who represents the *public liberty*, such that he is *not subject* to the tutelage or the power of anyone else, but has in himself the power of war and of alliances; although he may perhaps be *limited by the bounds of obligation* towards a superior and owe him homage, fidelity and obedience. If his authority, then, *is sufficiently extensive*, it is agreed to call him a potentate, and he will be called a sovereign or a sovereign power ... Those are counted among sovereign powers, then, and are held to possess sovereignty, who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties.<sup>13</sup>

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Review 217-218; Nijman JE *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press The Hague 2004) 50-58.

- 8 The word *persona* in Latin means a mask or a disguise. See Cheng B "Introduction to Subjects of International Law" in Bedjaoui M (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers Dordrecht 1991) 24; Radin M "The endless problem of corporate personality" 1932 (32) *Columbia Law Review* 645; Paasivirta E "The European Union: From an aggregate of states to a legal person" 1997 (2) *Hofstra Law and Policy Symposium* 40; Nijman *The Concept of International Legal Personality* VII-VIII.
- 9 See Nijman *The Concept of International Legal Personality* 52.
- 10 Aufricht 1942 *The American Political Science Review* 218; Nijman *The Concept of International Legal Personality* 57 - 58.
- 11 Nijman *The Concept of International Legal Personality* 58.
- 12 Nijman *The Concept of International Legal Personality* 29.
- 13 Leibniz GW *Codex Iuris Gentium diplomaticus* (1693) 175 as quoted in Nijman *The Concept of International Legal Personality* 58-59. Emphasis in the original text.



Sovereignty<sup>14</sup> and international legal personality are intertwined. According to Nijman, the two have been “intimately connected” to an extent that (traditionally) the state person was regarded as absolutely sovereign and states were the only entities endowed with international legal personality.<sup>15</sup>

The concept of international legal personality has over the centuries been used differently by different scholars.<sup>16</sup> After Bentham, international law scholars were of the opinion that only states had international legal personality.<sup>17</sup> In the period before the Second World War, as Nijman points out, the concept received a place of prominence in scholarly debates and in treaty law. It featured prominently as a tool around which international law was to be revised.<sup>18</sup> In the scholarly discourses of the post Second World War era, however, the concept was eclipsed by the doctrine of state sovereignty. Nijman<sup>19</sup> attributes the decline to the decision of the International Court of Justice in the *Reparations* case.<sup>20</sup> Following this judgment, scholars were content to just quote from it instead of continuing the theoretical discourse of the concept of international legal personality. This non-engaging attitude was to prevail throughout a greater part of the Cold War era.<sup>21</sup> The situation has not improved much in the contemporary era to an extent that Nijman has reached the conclusion that contemporary scholars have neglected the concept of international legal personality.<sup>22</sup> There seems, however, to be a resurgence of interest in the concept as monographs, journal articles and books on the subject are beginning to emerge.<sup>23</sup>

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14 For a detailed discussion on the evolution of the concept of sovereignty and its use see: Ferreira-Snyman MP 2006 (12) “The evolution of state sovereignty: A historical overview” *Fundamina* 1-28; Fassbender B “Sovereignty and Constitutionalism in International Law” in Walker N (ed) *Sovereignty in Transition* (Hart Publishing Oxford 2003) 115 – 143; Van der Vyver “The Concept of Political Sovereignty” in Visser C (ed) *Essays in Honour of Ellison Khan* (Juta Cape Town 1989) 289-360.

15 Nijman J “Sovereignty and Personality: A Process of Inclusion” in Kreijen G (ed) *State, Sovereignty and International Governance* (Oxford University Press New York 2002)109.

16 See Nijman *Sovereignty and Personality* 109 –144.

17 See Lauterpacht H “The subjects of the law of nations” 1947 (63) *The Law Quarterly Review* 439-440, Nijman *Sovereignty and Personality* 109-110.

18 Nijman *Sovereignty and Personality* 113.

19 Nijman *Sovereignty and Personality* 113–114; Nijman *The Concept of International Legal Personality* 4.

20 *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Reports 178 (hereinafter the *Reparation for Injuries* case).

21 Nijman *The Concept of International Legal Personality* 277-288.

22 Nijman *The Concept of International Legal Personality* 387-388.

23 See for example, Portmann R *Legal Personality in International Law* (Cambridge University

Conventionally, international personality is reserved for entities which enjoy both the substantive and procedural rights and duties in international law.<sup>24</sup> An entity with international personality is one that has the capacity to possess such rights and duties and by extension be able to enforce them under international law. For legal participation, the concept of international legal personality becomes important. In this regard, legal personality is the *conditio sine qua non* for legal participation within a legal system.<sup>25</sup> To this end, legal participation is preceded by “community acceptance through the granting by states of rights and/or obligations under international law to the entity in question”.<sup>26</sup> How this granting of acceptance takes place is a subject of great debate among scholars. In as far as states are concerned, the law of recognition in international law is relevant.<sup>27</sup> An entity so recognised has legal personality and can be held accountable under the rules of international law.

Unlike municipal legal systems, international law does not have set categories of persons. Municipal law, makes a distinction between natural and juristic persons. Juristic persons may include, among others, churches, universities, corporations, non-profit organisations and non-governmental organisations. There are clear rules as to how each category attains personhood.<sup>28</sup> In most municipal legal systems, legal personality is determined with reference to the law of persons. It is the law of persons which determines the actors it endows with rights and duties and the legal consequences that arise from such actions.<sup>29</sup> For instance, in South Africa the law of persons is defined as

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Press Cambridge 2010); Meijknecht A *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia Antwerpen 2001); Nijman JE “Non-State Actors and the International Rule of Law: Revisiting the ‘Realist Theory’ of International Legal Personality” in Noortmann M and Ryngaert C (eds) *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate Publishing Farnham 2010); Johns F (ed) *International Legal Personality* (Ashgate Publishing Farnham 2010); Nijman *The Concept of International Legal Personality*.

- 24 Charney JI “Transnational corporations and developing public international law” 1983 (87) *Duke Law Journal* 774.
- 25 Klabbers J “The Concept of Legal Personality” in Fleurs J (ed) *International Legal Personality* (Ashgate Publishing Farnham 2010) 5.
- 26 Nowrot K “Reconceptualising International Legal Personality of influential Non-state Actors: Towards a Rebuttable Presumption of Normative Responsibilities” in Fleurs J (ed) *International Legal Personality* (Ashgate Publishing Farnham 2010) 372.
- 27 The law of recognition will be briefly discussed below.
- 28 Bilchitz D “Moving beyond arbitrariness: The legal personhood and dignity of non-human animals” 2009 (25) *South Africa Journal of Human Rights* 41.
- 29 Portmann *Legal Personality in International Law* 7 who writes that “[h]istorically, this law of

that part of private law which determines which beings or entities are legal subjects or persons, the way in which legal personality begins and is terminated, which different classes of legal subjects are distinguished, and the legal status of each of these classes of persons.<sup>30</sup>

In international law, legal personality is employed as a tool to identify who the main role players in the system are and the rights and duties that flow from being conferred with such a status. However, international legal personality in international law, as Portmann<sup>31</sup> notes, has its own peculiarities that set it apart from municipal law. The first peculiarity relates to the fact that personality in international law includes the competence to create the law. He points out that contrary to municipal law, where the creation of the law is the competence of centralised state power, international law as a legal system emanates from its primary persons, namely, states.<sup>32</sup> The second peculiarity, which has a bearing on the first, is that international law has no centralised law of persons, nor any treaty containing rules that comprehensively deal with matters of legal personality.<sup>33</sup> To this end Nijman notes that:

Unlike most domestic legal systems, international law lacks the rules to stipulate which are the system's legal persons. There is no 'Vienna convention on the law of international legal persons'.<sup>34</sup>

International law does not have a closed number of legal subjects and its horizontal evolution to include non-state actors bears credence to this fact.<sup>35</sup> As a result, the question as to who the subjects of international law are cannot always

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persons was concerned with marking several distinctions in the legal personality of individuals. It comprised classes like nobles, clerics, serfs or slaves to which it allocated degrees of personality in law".

30 Cronjé DSP and Heaton J *The South African Law of Persons* (Butterworths Durban 1999) 1.

31 Portmann *Legal Personality in International Law* 8-9.

32 Private law and its sub-disciplines such as contract law constitute an exception in this regard.

33 Portmann *Legal Personality in International Law* 9; Cassese *International Law in a Divided World* 77.

34 Nijman *Non-State Actors and the International Rule of Law* 100.

35 Nowrot *Reconceptualising International Legal Personality of influential Non-state Actors* 372; Nowrot K "Legal consequences of globalisation: The status of non-governmental organisations under international law" 1999 (6) *Indiana Journal of Global Legal Studies* 621.

be answered with certainty.<sup>36</sup> Schlemmer's comment in relation to whether an individual is a subject of international law illustrates this point. She writes:

Generally speaking, whether an individual can be a subject of international law, depends on your definition of international legal subjectivity. In turn, this definition depends on which author you choose to follow and can also not be viewed in a vacuum; you must consider the position within the international community as well.<sup>37</sup>

Whether to say that an entity has legal personality is the same as saying that it is a subject of the legal system is debatable and controversial.<sup>38</sup> Raič<sup>39</sup> points out that in a municipal legal system, legal persons or natural persons are always subjects of law, but subjects of law are not necessarily legal persons. For Klabbbers<sup>40</sup> the concept of legal personality is ambivalent. To illustrate this point, he asserts that in a municipal legal system, to say that a six year old is a subject of the law does not necessarily mean that he or she has legal personality as yet. The same can be said of a mentally handicapped person who, though a natural person, may not everywhere be regarded as a legal person. Historically, the same distinction was made with regard to slaves, who were no doubt natural persons, but were not considered to be legal persons. A legal person's status plays a major role in determining whether they have legal capacity, capacity to act and capacity to litigate.<sup>41</sup> International law has borrowed the use of these concepts with their attendant confusions. As Clapham points out, under international law, the discussion of the subjects of international law is confusing and incomplete.<sup>42</sup> Legal

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36 Vukas B "States, Peoples and Minorities as Subjects of International Law" in Fleurs J (ed) *International Legal Personality* (Ashgate Publishing Farnham 2010) 79.

37 Schlemmer EC "A new international law on foreign investment" 2005 (3) *Tydskrif vir die Suid-Afrikaanse Reg* 534.

38 Raič D *Statehood and the Law of Self-Determination* (Kluwer Law International The Hague 2002) 11.

39 Raič *Statehood and the Law of Self-Determination* 11.

40 Klabbbers *The Concept of Legal Personality* 5.

41 Waschefort G "The pseudo legal personality of non-state armed groups in international law" 2011 (36) *South African Yearbook of International Law* 227.

42 Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 59. Also Klabbbers J "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Bianchi A (ed) *Non-State Actors and International Law* (Ashgate Publishing Farnham 2009) 39 who is of the opinion that "[t]he idea of 'subjects' of the international legal system is a confusing idea, and the confusion stems in part from being conflated with the notion of international legal personality. For many authors,

personality, he writes, “has remained entangled with the misleading concept of ‘subjects’ of international law and the attendant question of attributions of statehood under international law”.<sup>43</sup>

The idea of differentiating between the concepts of legal personality and the subjects of a legal system is not universally held by scholars. For some scholars the distinction between the two concepts is of no relevance and, as a result, they use the two concepts interchangeably.<sup>44</sup> For these scholars, international legal personality is reserved for entities which enjoy both the substantive and procedural rights and duties in international law.<sup>45</sup> Such entities are subjects of international law. This study, in a similar manner uses the concept of subject or legal person with reference to

an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane.<sup>46</sup>

This means that an entity that has been conferred with international legal personality does not only have rights and obligations under the legal system, but can also directly enforce such rights in the appropriate forum. Van Hoof,<sup>47</sup> is of the view that the concept of international personality “may be considered an empty shell because it does not give a clue as to what rights and/or duties the entity concerned has in the concrete case at hand”. To illustrate his point he argues that no two states enjoy the same rights and duties in international law. Because of the centrality of consent in international law, state duties vary according to what the different states have consented to.

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understandably, subjectivity and legal personality are one and the same, and there is nothing particularly wrong with treating them as such in pragmatic fashion”.

43 Clapham *Human Rights Obligations of Non-State Actors* 59.

44 See Portmann *Legal Personality in International Law* 1.

45 Charney 1983 *Duke Law Journal* 774.

46 Menon PK “The International personality of individuals in international law: A broadening of the traditional doctrine” 1992 (1) *Journal of Transnational Law and Policy* 152; Raič *Statehood and the Law of Self-Determination* 11.

47 Van Hoof F “International Human Rights Obligations for Companies and Domestic Courts: An unlikely Combination?” in Castermans-Holleman M, Van Hoof F and Smith J (eds) *The Role of the Nation-State in the 21st Century Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (Kluwer Law International The Hague 1998) 53.

From the foregoing discussion, it is clear that the concept of international legal personality in international law is highly contested among scholars.<sup>48</sup> Despite the debates, contests and confusions, the concept of international legal personality continues to be of great importance in international law. It is only entities that have been granted legal personality or have been recognised by the legal system that can perform legal acts within the legal system.<sup>49</sup> The concept of international legal personality serves as a “handle” through which the legal system engages the actor conceptually and practically.<sup>50</sup>

In light of the foregoing discussion, it follows that the concept of international legal personality provides a possible means to holding MNCs directly accountable under international law. International law develops through its sources. If it is asserted that international law has conferred international legal personality on non-state actors, it becomes important to know the basis for such a conferral.<sup>51</sup> The answer lies in the role played by the sources of the legal system in its development.

### **3 SOURCE BASED DEVELOPMENT OF INTERNATIONAL LAW**

As lawmakers in international law, states are the primary decision makers and are therefore both the source and the authority of the law.<sup>52</sup> Only states can decide which entities to empower with international personality, the method of conferring such personality and the purpose of international personality so conferred. The Statute of the International Court of Justice has encapsulated the sources of international law into the following:<sup>53</sup>

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48 See Waschefort 2011 *South African Yearbook of International Law* 233.

49 Klabbers J “The Concept of Legal Personality” in Fleurs J (ed) *International Legal Personality* (Ashgate Publishing Farnham 2010) 17.

50 Hansen RF “The international legal personality of multinational enterprises: Treaty, custom and governance gap” 2012 (10) *Globalist* 78.

51 Hickey JE “The source of international legal personality in the 21st century” 1997 (2) *Hofstra Law and Policy Symposium* 1.

52 Fuachald OK and Stigen J “Corporate responsibility before international institutions” 2009 (40) *George Washington International Law Review* 1029; Mutua M “Standard setting in human rights: Critique and prognosis” 2007 (29) *Human Rights Quarterly* 551.

53 See Article 38(1) of the Statute of the International Court of Justice (ICJ) available at: [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II) (accessed on 15 May 2012).

### 3.1 *Treaties*<sup>54</sup>

Treaties constitute the most conventional method in international law of creating rights and duties.<sup>55</sup> Accordingly, treaties “establish obligations with which international law requires the parties to comply”.<sup>56</sup> From antiquity to modern-day society, treaties have been a constant feature in inter-state relations.<sup>57</sup> These treaties covered a variety of issues that arose out of bilateral or multilateral relations of states. Until the late nineteen sixties, there were no set rules or guidelines in place to guide the process of treaty making. Since 1969, there are set rules of treaty making and these depend on who the parties to the treaty are. For inter-state treaties, the provisions of the Vienna Convention on the Law of Treaties of 1969<sup>58</sup> (the 1969 Convention) apply. Article 2(1)(a) of this Convention defines a treaty as

an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

For treaties concluded between a state and an International Organisation or between two International Organisations, the provisions of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986<sup>59</sup> (the 1986 Convention) apply.

A treaty binds only the parties who have signed and ratified its terms.<sup>60</sup> In line with a positivist conception of international law, consent plays an important role in the binding effect of a treaty. Determining the mode of state consent is itself a

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54 Sometimes referred to in other texts as convention, covenant or charter. These terms are used interchangeable and do not affect the legal meaning. See Viljoen F *International Human Rights Law in Africa* (Oxford University Press Oxford 2007) 20.

55 Okeke CN *Controversial Subjects of International Law* (Rotterdam University Press Rotterdam 1974) 192.

56 Vázquez CM “Treaty-based rights and remedies of individuals” 1992 (92) *Columbia Law Review* 1082.

57 See Shaw MN *International Law* 7th ed (Cambridge University Press Cambridge 2014) 12-13.

58 Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (accessed on 02 February 2013).

59 Available at: [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_2\\_1986.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf). (accessed on 02 February 2013).

60 *North Sea Continental Shelf Cases*, Judgment, 1969 ICJ Reports 3 at 24 (hereinafter the *North Sea Continental Shelf cases*).

challenge though as states do not always give explicit consent.<sup>61</sup> The situation becomes different where a treaty reflects rules of customary international law. In the latter case, non-parties to a treaty are bound merely because a given treaty reaffirms the rules of customary international law. Should there be a need to supplement or amend an aspect of an existing treaty, then protocols are adopted. The legal effect of a protocol is the same as that of the treaty.<sup>62</sup>

As discussed in chapters one and two of this study, treaty-signing powers have not always been the preserve of states. Historically, powerful corporations have had powers to wage wars and even enter into treaties with states. This practice has since dissipated as the international norms evolved. Since its inception, the United Nations has adopted a plethora of human rights treaties dealing with *inter alia*, the prevention of genocide, the advancement of cultural rights, elimination of discrimination against women and the rights of the child.<sup>63</sup> On their own accord, states have entered into a wide range of bilateral and multilateral treaties on a catalogue of issues, including investment.<sup>64</sup> In essence, there is nothing that prevents states from adopting a treaty to regulate the activities of MNCs or from conferring treaty-making powers on corporations. In the field of international investment, states have signed treaties to facilitate trade.<sup>65</sup> On the African continent, the Organisation for Harmonisation of Business Law in Africa (OHADA) Treaty is but one example of what is possible for states to jointly do. The OHADA is an initiative of 17 African states aimed at harmonising commercial law in the French speaking zone of the African continent.<sup>66</sup>

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61 Hansen RF "The international legal personality of multinational enterprises: Treaty, custom and the governance gap" 2010 (10) *Global Jurist* 13.

62 Viljoen *International Human Rights* 20.

63 See Buergenthal T "The evolving international human rights system" 2006 (100) *American Journal of International Law* 789-790.

64 See Hansen 2012 *Globalist* 1-9.

65 Born G "A new generation of international adjudication" 2012 (61) *Duke Law Journal* 832 - 833 where he writes that "[s]tates from all regions of the world and in all stages of development have entered into BITs. In 1999, there were some 1800 BITs in force and, although the rates at which states are concluding BITs has declined in the past decade, by 2010, the figure exceeded 2600".

66 See "Treaty on the Law of Uniform Business in Africa" available at: <http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm> (accessed on 15 December 2015). For an analysis of the OHADA Treaty see Samb M "Human Rights and Business Law in the African Context" in Mancuso S and Fombad CM (eds) *Comparative Law in Africa: Methodologies and Concepts* (Juta Cape Town 2015) 168-174.



A treaty-based approach to granting international legal personality with a view to holding them accountable does not seem to have found favour with both states and business. As seen from the discussion in the first chapter of this study, most states from the developed countries and their corporations seem reluctant if not outrightly opposed to the idea of adopting a treaty in relation to MNCs. The closest the international community has come towards having an international treaty for MNCs was with the 2003 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>67</sup> (the Draft Norms). However, this was never realised, as the Draft Norms have since been jettisoned and have been overtaken by other international initiatives such as the Guiding Principles arising from the Ruggie mandate.

Once again, there is a renewed call to explore possibilities of having a treaty as a tool to regulate the activities of MNCs.<sup>68</sup> The call seems to suggest that until there is a treaty in place to regulate the activities of MNCs internationally, certain states and civil society activists will never rest. Ruggie, though, is not convinced that the latest call will yield the desired results. Recounting the various attempts to regulate the activities of MNCs by treaty going back to the 1970s and how these have not succeeded, Ruggie asks:

Will this attempt to impose binding international obligations on transnational corporations [MNCs] turn out to be another instance of the classic dysfunction of doing the same thing over and over and expecting a different result? Or might the negotiations come to reflect more deeply on the reasons for this prior record and move in a productive direction?<sup>69</sup>

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67 Available at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En). (Accessed on 27 June 2011).

68 See Zhang J "Negotiations kick off on a binding treaty on business and human rights" available at: <https://www.iisd.org/itn/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights/> (accessed on 10 December 2015).

69 Ruggie JG "The past as a prologue? A moment of truth for business and human rights treaty" available at: [http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty\\_Final.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/Treaty_Final.pdf) (accessed on 27 January 2015).

Predictably, Ruggie is of the view that the only workable solution, for now, lies in the Guiding Principles that emanated from his mandate and were unanimously endorsed by the Human Rights Council.

### 3.2 Custom

Like treaties, custom is dependent on consent, but is unlike treaties not written down. In case of a dispute as to the existence of a custom, the consent of the state will be inferred from its conduct or practice. For a practice to become a rule of customary international law, it must satisfy two requirements: It must be a settled practice (*usus*) and the practice must be accepted as an obligation (*opinio juris*). Settled practice is difficult to prove, and it becomes even more difficult to ascertain how long a practice should be in practice for before it can become settled practice.<sup>70</sup> For customary law to be established, both requirements of *usus* and *opinio juris* must be satisfied. For *opinio juris*, a state concerned must have a sense of obligation towards the settled practice. Like practice, it is difficult to prove the existence of *opinio juris*.<sup>71</sup> This then begs the question: If it is this difficult to establish the two requirements at the level of state-to-state relations, how much more difficult would it be at the level of the state versus an individual? Viljoen concludes that custom is less helpful in the human rights discourse as it is difficult to collect empirical proof of how states behave towards individual citizens.<sup>72</sup> The situation is slightly different in the case of MNCs though.

In the absence of treaties to regulate the activities of MNCs in relation to human rights, courts have turned to custom. For instance, in *Kiobel v Royal Dutch Petroleum*,<sup>73</sup> a claim was brought against a corporation alleging violation of the law of nations under the Alien Tort Act (ATCA).<sup>74</sup> The United States Court of Appeals for the Second Circuit dismissed the claim on the basis of the absence of custom. The challenge with custom is that there are no guidelines on how to determine it and, as a result, a lot is left to inference. While it is accepted that custom takes time to develop, it is not clear as to exactly when custom is formed. As a result,

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70 See *Columbia v Peruvian* 1950 ICJ Reports 266.

71 *North Sea Continental Shelf* case at 3.

72 Viljoen *International Human Rights* 27.

73 621 F. 3d 111 - Court of Appeals, 2nd Circuit 2010 148-149 (hereinafter the *Kiobel* Second Circuit Court decision).

74 Alien Tort Act 23 U.S.C of 1789 (hereinafter referred to as the ATCA).

custom and its development is a contentious issue among scholars.<sup>75</sup> Custom develops organically and does not crystallise at a particular time.<sup>76</sup> A comparative observation to note is that custom operates in a slightly different way from treaties. A treaty, unless it reflects a customary law norm of international law, would not apply to states that are not party to the particular treaty. Custom once established, applies to all states unless a state is a persistent objector. If a state does not register its objection then consent would be inferred from its silence.<sup>77</sup> While the Second World War marks the turning point in how international law relates to the individual, there is no particular moment in history at which limited international legal personality was conferred on the individual. The limited international legal personality of individuals in international law has developed gradually through custom.<sup>78</sup>

Based on both treaty and custom, Hansen has constructed an argument for the international personality of MNCs in international law.<sup>79</sup> His argument is premised on the simple basis that international investment law is part of public international law.<sup>80</sup> Under international investment law, about 173 states have signed more than 2600 bilateral investment treaties.<sup>81</sup> Through these treaties, certain international law rights and duties arise *vis-à-vis* the signing state and the MNC concerned. On this basis Hansen<sup>82</sup> asserts that

states cannot have their cake and eat it. Either MNE [MNC] investors are international persons with international law rights or they are not. For states that have ratified treaties granting international law rights and personality to MNEs, MNEs are international persons, recognised as holding legal personality within the international legal

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75 Hansen 2012 *Globalist* 18.

76 Bilchitz D "A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles" in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 114.

77 Hansen 2012 *Globalist* 18.

78 Hansen 2012 *Globalist* 13-16.

79 Hansen 2012 *Globalist* 1-129.

80 Hansen 2012 *Globalist* 3.

81 Hansen 2012 *Globalist* 7.

82 Hansen 2012 *Globalist* 15-16.

system, with a standing ability to acquire rights, duties and claim capacity within the system.

If followed to its logical conclusion, the argument raised by Hansen makes great sense. Both international human rights law and international investment law operate in the same realm of international law and are part of it, albeit with nuanced differences. Granting international legal personality to MNCs under international investment law and not under the international human rights law therefore creates an anomalous situation.<sup>83</sup> The anomaly is that under international investment law, MNCs have international legal personality and therefore hold certain rights and duties, while under international human rights law they have rights and not duties. This anomalous situation is a reflection of the ambivalent practice by states in as far as the international legal personality of MNCs is concerned.

### **3.3 *The general principles of law recognised by civilized nations***

In accordance with legal theory, this is the most contested of all the sources, because it strikes at the heart of the debate between natural law theorists and positivists. Since states do not need to give consent to this source, natural law theorists have argued that this source confirms the natural law basis of international law.<sup>84</sup> Adherents of the positivistic conception of international law do not find this source to be acceptable.<sup>85</sup> Contested as it may be, this source may be of assistance to an international tribunal or court in a situation where both treaty and custom are silent on a matter, or not applicable. The difficulty with this source, however, is with regard to its binding effect on a party to a dispute.

### **3.4 *Judicial decisions or precedent and the teachings of the highly published publicists***

Article 38(1)(d) of the Statute of the International Court of Justice is to be read with the provisions of article 59.<sup>86</sup> In international law, reliance on judicial decisions and

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83 Hansen 2012 *Globalist* 15.

84 Dugard *International Law* 35.

85 Dugard *International Law* 35.

86 Article 59 of the Statute of the ICJ reads that: "The decision of the Court has no binding force

precedents is problematic. Because of its decentralised nature, international law also has decentralised judicial bodies.<sup>87</sup> As Oellers-Frahm points out, international judicial bodies exist on the same footing and are therefore not obliged to follow each other's precedent even when there is an overlap in the subject-matter under consideration.<sup>88</sup> Despite the provisions of article 59, Dugard notes that there is a tendency among the courts to follow their own previous decisions and the decisions of other international tribunals.<sup>89</sup>

Unlike in earlier years, reference to highly published publicists as sources of international law is on the wane.<sup>90</sup> It is axiomatic that the latter would be the case given the constantly changing challenges that the modern-day international human rights discourse is confronted with, as opposed to what the highly published jurists would have reflected on. A view is gaining momentum that equates scholars with publicists contemplated by the Statute.<sup>91</sup> This is also not very helpful as international law has a whole host of scholars with divergent views. For instance, on the issue of corporations and human rights, there are as many scholars as there are views on each side of the debate. This should however not be of great concern as reliance on both the judicial decisions and the teachings of the highly published publicists is generally used only as a subsidiary means for the determination of the rules of the law.<sup>92</sup>

Like almost all other areas of international law, the source based analysis of international law is also contested. In this regard Hollis writes, “[s]cholars and practitioners have never been able to agree on a definitive list of what sources contain the rules of international law, let alone what method, or methods, provide the basis for obligation for such rules”.<sup>93</sup> This notwithstanding, Article 38(1) does not constitute a closed list of sources for international law. There are sources that

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except between the parties and in respect of that particular case.”

87 Oellers-Frahm K “Multiplication of international courts and tribunals and conflicting jurisdiction – Problems and solutions” 2001 (5) *Max Planck Yearbook of United Nations Law* 75 – 76.

88 Oellers-Frahm 2001 *Max Planck Yearbook of United Nations Law* 77.

89 Dugard *International Law* 35.

90 Dugard *International Law* 36.

91 *Kiobel* Second Circuit Court decision at 131; Estreicher S “Rethinking the binding effect of customary international law” 2003 (44) *Virginia Journal of International Law* 7.

92 See Article 38(1)(d) of the Vienna Convention.

93 Hollis DB “Why consent still matters – Non-state actors, treaties and changing sources of international law” 2005 (23) *Berkeley Journal of International Law* 3.

are non-binding such as declarations and resolutions of the United Nations and other international organisations.<sup>94</sup> As evidenced by the sources above, normatively and institutionally, international law and international human rights law are intertwined. The norms and ideals inscribed in both the Charter of the United Nations<sup>95</sup> and the Universal Declaration of Human Rights<sup>96</sup> impose duties on states for the protection of human rights to be enjoyed by individuals. Above all, member states have undertaken to fulfil the obligations they have undertaken under the Charter.<sup>97</sup> The human rights ideology was also to serve as the basis for states to recognise individuals as subjects of international law.<sup>98</sup> The position of the individual in international law gave rise to both philosophical debates and theoretical debates to be discussed in the next segment.

## **4 CONCEPTUALISATION OF INTERNATIONAL LEGAL PERSONALITY IN INTERNATIONAL LAW**

### **4.1 *Philosophical foundations***

The concept of international legal personality is inextricably intertwined with that of international law itself. How one conceives of the concept of international legal personality inevitably impacts on what one perceives to be the nature of international law.<sup>99</sup> This is so because the evolution of the concept of international legal personality is intertwined with the evolution of international law itself.<sup>100</sup> Accordingly, Green points out that one cannot take a stand on issues of international legal personality without implicating more fundamental concepts such as state sovereignty and the nature of international legal obligations.<sup>101</sup>

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94 See Viljoen *International Human Rights* 28- 30.

95 United Nations, Charter of the United Nations, 1 UNTS XVI (1945), (entered into force in 31 August 1965), (hereinafter the UN Charter).

96 The Universal Declaration of Human Rights, GAOR, 3d Sess., U.N. Doc A/810 (10 December 1948), (hereinafter the UDHR).

97 Article 2(2) of the UN Charter.

98 Jägers N "The Legal Status of Multinational Corporations under International Law" in Addo MK (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999) 263.

99 Nijman JE *The Concept of International Legal Personality* x.

100 Duruigbo E "Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges" 2008 (6) *Northwestern Journal of International Human Rights* 231.

101 Green F "Fragmentation in two dimensions: The ICJ's flawed approach to non-state actors and international legal personality" 2008 (47) *Melbourne Journal of International Law* 53.

Conversely, one cannot take a stand on the nature of international law and its obligations without implicating the concept of international legal personality.

Legal theory provides the key to understanding the trajectory that the debates on international law and its nature have followed over the years. As Derham asserts “any discussion of legal personality almost necessarily opens up the field of legal theory”.<sup>102</sup> The debates on international legal personality are steeped in the philosophical positions of natural law adherents and positivists on the very nature of international law itself. Natural law or law of nature was conceived and developed by the Greeks and later by the Romans. The central tenet of natural law is that there are certain laws whose content is from nature and therefore should have a universal appeal. Early philosophers argued that natural law was higher than earthly laws. They understood natural law to embody elementary principles of justice, which were apparent to the eye of reason alone.<sup>103</sup> Such unchangeable principles transcend the will and consent of human beings.<sup>104</sup> For natural law lawyers, therefore, the binding effect of international law did not depend on the will or consent of states.

Over the centuries, there have been different inputs from different scholars inclined to natural law. These scholars, though, did not depart from the employ of nature to explain reality, but have instead added nuanced variations to it.<sup>105</sup> Thomas Aquinas for instance, introduced a divine element to the debate. He taught that natural law was part of the law of God which was discoverable by human reason.<sup>106</sup> In his view, natural law complemented that part of eternal law that has been divinely revealed through the scriptures.<sup>107</sup> For him, natural law served as the basis for conferring immutable rights upon individuals.<sup>108</sup> Natural law

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102 Derham DP “Theories of Legal Personality” in Webb LC (ed) *Legal Personality and Political Pluralism* (Melbourne University Press Carlton 1958) 1 and Waschefort 2011 *South African Yearbook of International Law* 236 who writes that international law theory in this regard is vastly underdeveloped.

103 Cranston M *What are Human Rights?* (The Bodley Head London 1973) 10-11.

104 Agarwal HO *International Law and Human Rights* 10th ed (Central Law Publications Allahabad 2003) 11.

105 See Edwards AB “Legal Theory” in Hostein WJ et al *An Introduction to South African Law and Legal Theory* (Butterworths Durban 1995) 44 -73. Authors such as Grotius, Pufendorf and Vattel were to play a crucial role in advancing this view, albeit with some modifications.

106 Brierly JL *The Law of Nations* 6th ed (Oxford University Press London 1963) 18; Shaw *International Law* 16.

107 See Shaw *International Law* 16; Edwards *Legal Theory* 59.

108 Meron T *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press

was to serve as the philosophical basis for the concept of natural rights theory which is closely associated with the concept of human rights.<sup>109</sup> The concept of human rights owes its origins to the work of both Thomas Hobbes and John Locke.<sup>110</sup> Until the arrival of the two scholars, rights were understood as privileges to people given according to status. For natural law lawyers, therefore, the individual is the primary unit of international law and in this regard the role of the state is viewed and understood in relation to its obligations to the individual.<sup>111</sup>

Positivism, on the other hand, borrowed a lot of its methodological approach from the Renaissance era with its emphasis on reason and empiricism. However unlike other theories that base their methodology on deduction and reasoning only, positivism bases its theories on empirical data. The core of positivists' argument is that only those principles which have been adopted by states may be deemed to be law.<sup>112</sup> Their conception of international law rules is premised on the primacy of the autonomous sovereign state to an extent that the only limitations to state sovereignty are those to which states have consented.<sup>113</sup> According to this view, states give their express consent through treaties, while implied consent may be given through usage, which is custom.<sup>114</sup>

The two approaches are not without their limitations though. According to Purvis,<sup>115</sup> natural law theory was “condemned as religious, arbitrary, subjective, unprincipled, and unknowable”, while positivism, on the other hand, was seen as being “excessively historical, unable to assure that international law reflected the normative beliefs of the day”. Despite their inherent limitations, the two theories have provided a basis for understanding the different trajectories that the debates on the nature of international law have followed over the years.<sup>116</sup> The scholarly debates became so predictable in that where the natural law theory dominated, the role of

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Oxford 1994) 77.

109 Meron *Human Rights Law in International Law* 78.

110 Hinchman LP “The origins of human rights: A Hegelian perspective” 1984 (37) *The Western Political Quarterly* 7–16.

111 Green 2008 *Melbourne Journal of International Law* 52.

112 Agarwal *International Law and Human Rights* 11.

113 Green 2008 *Melbourne Journal of International Law* 51.

114 Agarwal *International Law and Human Rights* 11.

115 Purvis N “Critical Legal Studies in public international law” 1991 (32) *Harvard International Law Journal* 82.

116 For a detailed discussion of these debates see Koh 1997 *The Yale Law Journal* 2599 – 2659.



the individual in international law became the centre of focus, and where positivism dominated, state sovereignty became the focal point. Because international institutional<sup>117</sup> mechanisms were created at the height of state sovereignty, most of them, as it will be discussed in the next chapter, reflect the dominance of the state-centric paradigm.

#### **4.2 Theoretical foundations of the concept of international personality**

Over the years, bodies other than states, have been recognised as subjects of international law, capable of incurring certain international rights and duties. Modern international law writers reject the view that only states are subjects of international law.<sup>118</sup> The challenge though, is that outside the state-centric model of conceptualising international law, there are no set criteria in place to determine international legal personality of non-state entities. In addition, there is no set formula or criteria to determine the horizontal evolution of the concept of international legal personality to include non-state actors. Furthermore, it is not clear as to what factual reality must prevail before the international legal system can broaden its list of subjects. The question as to which entities can qualify as subjects of international law thus remains a debated one. According to Lauterpacht,<sup>119</sup> the debate over subjects of international law has been mainly two-fold. First, the debate revolved around the controversy as to whether only states and individuals were subjects of international law. Secondly, the debate focused specifically on the position of individuals. In as far as individuals were concerned, the debate was whether individuals could possess rights directly given to them by customary law and treaties. Three theories or conceptions<sup>120</sup> have emerged from these debates:

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117 Institutional mechanisms will be discussed in Chapter 5 of this study.

118 See Raič *Statehood and the Law of Self-Determination* 10.

119 Lauterpacht 1947 *The Law Quarterly Review* 438.

120 For a discussion of the different conceptions of international personality see Portmann *Legal Personality in International Law*.

#### 4.2.1 The realist theory<sup>121</sup>

Philosophically, this theory is deeply rooted in the positivistic conception of international law. Adherents of this theory argue that an entity called a state is real and exists in and under international law, separate from human beings. State sovereignty plays a pivotal role in the conception of international law. The state therefore is a person in law with legal personality.<sup>122</sup> Realist scholars argue that the concept of international legal personality has relevance in as far as it relates to states, but outside that it has no relevance.<sup>123</sup> In their view, only states are subjects of international law and human beings and other non-state actors are only objects of international law. The realist theory has received criticism on the basis that entities other than states also possess international legal personality and that this theory is therefore no longer tenable.<sup>124</sup> The core of the argument advanced by the realists is that even if individuals derive some benefits under international law, such a benefit is derived not by virtue of a right which accrues to them, but by virtue of a right enjoyed by the state of which the individual is a national.<sup>125</sup> The *Mavrommatis Palestine Concessions* case<sup>126</sup> provides an illustration of this. Mr Mavrommatis, a Greek national, was granted certain concessions by the Ottoman Empire which was the sovereign power over Palestine at the time of the signing of a contract. When the League of Nations assigned the British mandate over Palestine, the British government refused to recognise concessionary rights which Mr Mavrommatis had. Greece took up the claim of Mr Mavrommatis and brought it to the Permanent Court of International Justice (PCIJ). The court held that:

It is true that the dispute was at first between a private person and a state ... Subsequently, the Greek Government took up the case. The

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121 There are different strands of the realist theory. See Krasner SD "Realist view of international law" 2002 (96) *American Society of International Law* 265-268. In the context of this study this theory is discussed, because it has a bearing on how one understands the concept of international legal personality. See Nijman JE "Non-State Actors and the International Rule of Law: Revisiting the 'Realist Theory' of International Legal Personality" in Noortmann M and Ryngaert C (eds) *Non-State Actors Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate Farnham 2010) 91-124.

122 See Raič *Statehood and the Law of Self-Determination* 22.

123 Green 2008 *Melbourne Journal of International Law* 51.

124 Agarwal *International Law and Human Rights* 59.

125 Lauterpacht 1947 *The Law Quarterly Review* 440; Waschefort 2011 *South African Yearbook of International Law* 229.

126 The *Mavrommatis Palestine Concessions* case (*Greece v UK*) 1924 PCIJ Series A No.2 (hereinafter the *Mavrommatis* case).

dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two states ... 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 whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant.<sup>127</sup>

Portmann<sup>128</sup> points out that the formulation in the *Mavrommatis* case provides the basis for diplomatic protection in that the ill-treatment of a foreign national affects the international rights of the home state of the national, and not the right of the individual. When Greece took up the matter to the PCIJ it was asserting its own right, not the right of Mr Mavrommatis. The second observation he makes is that the international legal system does not see individuals as separate entities in their own right, but as nationals of a particular state. The net effect of this is that only states are subjects of international law. The realist view has also impacted *locus standi* in international courts and tribunals. With the exception of some regional courts, the general rule is that individuals lack standing to assert violations of international treaties.<sup>129</sup> For questions of jurisdiction and the international protection of the individual, the question of nationality becomes of paramount importance as it establishes a link between the individual and the state.<sup>130</sup>

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127 *Mavrommatis* case at 12.

128 Portmann *Legal Personality* 66-67.

129 See Menon PK "The international personality of individuals in international law: A broadening of the traditional doctrine" 1992 (1) *Journal of International Law and Policy* 166-174.

130 Shaw *International Law* 189.

It should be noted, however, that nothing in international law rules precludes states from conferring rights on individuals which are enforceable in international law. This was the approach adopted by the PCIJ in the *Danzig Railway Officials* case.<sup>131</sup> In accordance with the provisions of the Treaty of Versailles, Danzig was ceded by Germany and became a free city. Danzig then entered into an agreement with Poland according to which Danzig railways were to be administered by Poland. A further agreement, the *endgültiges Beamtenabkommen* was entered into which regulated the entry of Danzig railway workers into Polish employment. Some of the Danzig railway workers brought employment claims based on the *Beamtenabkommen*. On whether the *Beamtenabkommen*, being an international treaty applicable to state parties was also applicable to individuals, the court said:

It may be readily admitted that, according to a well-established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot as such create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts. That there is such an intention in the present case can be established by reference to the terms of the *Beamtenabkommen*.<sup>132</sup>

This decision has received mixed reactions. Scholars like Lauterpacht have interpreted the view above as an acknowledgment by the court that treaties, if parties so intend, can apply directly to individuals.<sup>133</sup> The view by Lauterpacht accords with the positivistic view of international law that states are only bound by those rules to which they have expressly consented. If states create obligations for themselves through a treaty, then the will of such states should be given effect. For Portmann,<sup>134</sup> the Danzig decision is a continuation of the state-centric approach to international personality, “but applied in such a way as to partly open

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131 *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ Series B No.15 (hereinafter the *Danzig* case).

132 *Danzig* case at 17-18.

133 See Portmann *Legal Personality* 70; Shaw *International Law* 189.

134 Portmann *Legal Personality* 70.

the (back) door for involving the individual in international law". Like in the case of individuals, it is submitted that nothing prevents states from conferring rights and direct obligations on MNCs, by means of a treaty.

#### 4.2.2 Fictional theory

Scholars who hold this view stand diametrically opposed to the views of the realists. Their argument is hinged on the fact that the core of the law, whether under national or international law, is to regulate human conduct. It is to human beings that norms, whether of municipal or international law, apply. A state in their view is only an abstract structure acting through individuals.<sup>135</sup> This is the view that was adopted by the Nuremburg Tribunal after the Second World War which held that:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who committed such crimes can the provisions of international law be enforced.<sup>136</sup>

The fictional theory argues that the legal personality of the state cannot be real and is therefore only a fiction. The fictional theorists do not dispute the fact that norms of international law were conventionally addressed to the state. The core of their argument is that, indirectly, the same norms are addressed to individuals. In concordance with the natural law theory, the fictional theory gives primacy to individuals as subject of international law.<sup>137</sup>

Raič<sup>138</sup> is of the view that the debate between the realists and fictionalists is misdirected as international law does not define its actors on the basis of realness or unrealness. International law, he argues, defines its subjects on the basis of legal rules. It is these rules that would guide states as they decide on which entities should be subjects of international law. This argument of Raič is equally problematic for two reasons. Firstly, the rules of international law are applicable only when determining the legal subjectivity of states. When the issue of the subjects of international law involves non-state actors, the matter is left solely to

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135 Agarwal *International Law and Human Rights* 59.

136 *The Nuremburg Trial*, 6 F.R.D. 69, 110 (International Military Tribunal 1946).

137 Agarwal *International Law and Human Rights* 59-60.

138 Raič *Statehood and the Law of Self-Determination* 22-23.

the discretion of the states and for this there are no clear guiding rules. Secondly, there is an element of international law rules that is fictional. For instance, legal personality is itself a legal construct<sup>139</sup> and therefore there might be some basis for arguing that a state is but an abstract in international law.

#### 4.2.3 Functional theory

The functional theory provides a golden mean between the two extremes of both the positivists and the naturalist theories.<sup>140</sup> This theory was proposed by the post Second World War scholars who were frustrated by the indeterminacy of international legal theory of the time.<sup>141</sup> These scholars sought to move international law out of its classical dilemma by adopting an approach that is pragmatic and functional.<sup>142</sup> Reality as opposed to abstracts became the contextual basis of their scholarship.<sup>143</sup> In as far as international legal personality is concerned, the functionalists sought to develop a progressive approach to international law that is inclusive of non-state actors.<sup>144</sup> They were of the view that international legal personality should not be restricted to limited subjects but should be granted to those entities which are capable of performing legal functions under international law.<sup>145</sup> These entities perform certain legal functions and have distinct separate legal personalities in international law separate from those of states.<sup>146</sup> The functionalists therefore sought a vision of international law that acknowledges the existence and proliferation of non-states.<sup>147</sup> As a result, they did not find concepts like subjects of international law and international legal personality of much assistance in their project.<sup>148</sup>

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139 See Bilchitz 2009 *South African Journal of Human Rights* 41.

140 Green 2008 *Melbourne Journal of International Law* 52.

141 Purvis 1991 *Harvard International Law Journal* 83.

142 Purvis 1991 *Harvard International Law Journal* 83-84.

143 Nijman *The Concept of International Legal Personality* 248.

144 Green 2008 *Melbourne Journal of International Law* 53.

145 Agarwal *International Law and Human Rights* 60.

146 Agarwal *International Law and Human Rights* 60.

147 Agarwal *International Law and Human Rights* 59-60.

148 Nijman *Non-State Actors and the International Rule of Law* 105-106; Green 2008 *Melbourne Journal of International Law* 53; Higgins R *Problems and Process: International Law and how We use It* (Oxford University Press Oxford 1994) 49-50. See also the discussion in Chapter 1.

## 5 THE ACQUISITION OF INTERNATIONAL LEGAL PERSONALITY IN INTERNATIONAL LAW

As it is with most international law concepts, almost every aspect of the concept of international legal personality in international law is contested. The task of determining the legal personality of international law subjects is to a large degree left to scholars. As a result, the debates on international legal personality have been unbridled, and have therefore resulted in varied opinions. Clapham highlights this point when he writes that:

The list of subjects of international law is determined by the text-book writers and not by any authoritative decision making body. Even if bodies such as the International Court of Justice and the International Tribunal for the former Yugoslavia have pronounced on the topics of subjects and personality, this can only represent an *ad hoc* declaration of the situation rather than a constitutive act creating personality.<sup>149</sup>

As seen from the preceding segment, most of the discussions of the concept of international legal personality are, as a result, steeped in the discussions put forward by various scholars. Scholars make a distinction between the primary subjects of international law and secondary ones.<sup>150</sup> Primary subjects are those subjects that attain their existence directly from the rules of international law itself, and secondary subjects being those entities that derive their existence from the formal decisions of primary subjects.<sup>151</sup> A commonly held position in international law is that as primary subjects of international law, states would confer personality on secondary subjects either by an international instrument such as a treaty, or by acquiescence.<sup>152</sup> This approach, as already discussed above, is not without its own limitations.

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149 Clapham A *Human Rights Obligations of Non-State Actors* (Oxford University Press Oxford 2006) 71.

150 See Meijknecht A *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law* (Intersentia Antwerpen 2001) 55. And also see Cassese A *International Law in a Divided World* 77 who refers to international organisations and the individual as “ancillary” subjects of international law.

151 Cassese *International Law in a Divided World* 77.

152 Hickey 1997 *Hofstra Law and Policy Symposium* 3.

Meijknecht<sup>153</sup> provides an interesting reflection on the acquisition of international legal personality. Basing her reflection on the work of the German scholar Gierke, she explains that legal personality can emerge in one of three ways. Gierke's work was a reflection on how legal personality evolved within the German domestic law context. Meijknecht borrowed Gierke's conceptualisation to explain how legal personality functions within the context of international law. Firstly, personality can emerge through the factual existence of an entity. Secondly, legal personality can be attributed through the use of the law. Thirdly, legal personality can be attributed to an entity through an official document. The three distinctions, as she elaborates, are not necessarily mutually exclusive. Although the German domestic law may assist in determining international legal personality, it has certain limitations.<sup>154</sup> The first limitation is that the distinctions made are silent on the context that may necessitate the need to confer legal personality on an entity. Entities assert themselves differently on the international plane. Not all entities adopt a passive approach and wait for the system to confer personality on them. Some entities, like liberation movements and insurgents, assert themselves in demand for recognition.<sup>155</sup>

The determination of international legal personality is complex and may depend on many factors. As Shaw writes:

A range of factors needs to be carefully examined before it can be determined whether an entity has international legal personality and, if so, what rights, duties and competences apply in the particular case. Personality is a relative phenomenon varying with circumstances. It will always involve a test of judgment and perception of the situation at hand and the overall context of the current nature and requirements of the international community at large.<sup>156</sup>

Some scholars are of the opinion that the focus should not be on how international personality is conferred, but rather on what an entity is capable of doing, as an

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153 Meijknecht *Towards International Personality* 28-29.

154 See Meijknecht *Towards International Personality* 30-32.

155 Okeke *Controversial Subjects* 19.

156 Shaw MN *International Law* 7th ed (Cambridge University Press Cambridge 2014) 143.



indication that such entity possesses legal personality in international law. For this they analyse the rights and obligations which the entity enjoys as evidence of the fact that such an entity possesses international legal personality.<sup>157</sup>

From the above discussion, it is clear that the concept of international legal personality is highly contested and debated. The debates are not any less robust in the context of the legal personality of states, for which international law has developed certain criteria.

### **5.1 States as subjects of international law**

By way of a brief background, the Peace Treaty of Westphalia<sup>158</sup> marked a turning point in the development of modern international law and the power of sovereign states. For international law, Westphalia marked the beginning of its development. International law was secularised and was therefore freed from any religious background.<sup>159</sup> In as far as the sovereign state is concerned, Westphalia marked a shift from the hierarchical model of societal organisation to a new model consisting of equality of sovereign states not subject to any external authority.<sup>160</sup> The sovereign state was to play a pivotal role in the evolution of modern international law over the years. Despite the increasingly important role the nation state had assumed, there were no set rules in the early centuries to determine statehood for

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157 Klabbers J *An Introduction to International Institutional Law* 2nd ed (Cambridge University Press Cambridge 2009) 39-52; Ijalaye DA *The Extension of the Corporate Personality in International Law* (Oceana Publications New York 1978) 15-56.

158 The Peace Treaty of Westphalia was signed in 1648 in what is today Germany. Members of the community of nations agreed to have rules to govern a peaceful world order for the nation states. Some scholars make reference to this treaty as marking the beginning of the concept of the sovereign state and its power. See in this regard Shams H *Legal Globalisation: Money Laundering Law and Other Cases* (BIICL London 2004) 102-103; Krasner SD "Comprising Westphalia" 1995 (20) *International Security* 115. However, this is not a commonly held view as there are those scholars who argue that the Westphalia Treaty was just a moment in history affirming what was already in existence. See Cutler AC "Critical reflections on the Westphalian assumptions of international law and organisation: A crisis of legitimacy" 2001 (27) *Review of International Studies* 133-150. This study adopts the view that whether the nation state was in existence or not, the Westphalia Treaty was the defining moment for modern international law and the sovereign state. Gross L "The Peace of Westphalia, 1648-1948" 1948 (42) *American Society of International Law* 28 writes that: "The Peace of Westphalia, for better or for worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world. The old we are told, lived in the idea of a Christian commonwealth, of a world harmoniously ordered and governed in the spiritual and temporal realms by the Pope and Emperor. This medieval world was characterised by a hierarchical conception of the relationship between the existing political entities on the one hand and the Emperor on the other."

159 See Gross 1948 *American Society of International Law* 26.

160 See Gross 1948 *American Society of International Law* 28-29.

international law purposes. Existing states had the discretion whether or not to recognise the new entity as a state.<sup>161</sup>

Early classical writers were not concerned about any of the processes of state creation. A new state could either be formed by integrating two separate states or through a process of dividing an existing one. How a state came into being was thus not of importance to them. They accepted the concept of the state without giving a definition to it. It was only in the later centuries that recognition became an important requirement for statehood, and even then it was discussed in relation to state consent.<sup>162</sup> Both recognition and consent, at least in as far as positivists were concerned, formed the basis of international law. International law became binding only to those states that had consented to it. Recognition became a tool through which to welcome states into the community of nations.<sup>163</sup> Entities so recognised, became states and thus international legal persons.

Though international legal personality has expanded to include other subjects, statehood continues to be the main co-ordinating principle of international law. Unlike secondary subjects, the legal subjectivity of states originates from a *de facto* process and not from any formal decision of existing subjects.<sup>164</sup> The existence of original subjects (in other words, states) is dependent on the existence of a factual situation as required by law. This view however should also be qualified. International legal personality has both a juridical and a political dimension to it.<sup>165</sup> A commonly held view by scholars is that to attain international legal personality, an entity seeking to become a state must meet the set criteria for statehood and also be recognised as a state by other existing states.<sup>166</sup> As it will be discussed below, the political requirement is fulfilled when an entity seeking to be a state satisfies the criteria for statehood, while the juridical aspect is dependent on recognition of such an entity by existing states.

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161 Crawford J *The Creation of States in International Law* 2nd ed (Oxford University Press Oxford 2006) 6–7.

162 Crawford *The Creation of States* 13.

163 Crawford *The Creation of States* 15.

164 Cassese *International Law in a Divided World* 77.

165 Ip EC “The power of international personality in regional integration” *UNU-CRIS Working Papers*, W-2010/4 available at: <http://www.iadb.org/intal/intalcdi/PE/2010/06331.pdf> (accessed on 22 July 2011).

166 Recognition is discussed in the subsection below.

As discussed above, states are the principal law creators in international law. According to Van Hoof, states are subjects *par excellence*, while some non-state entities have limited and derivative personality.<sup>167</sup> The rising number of other subjects of international law owes their existence in law to states. The existence of non-state entities as secondary subjects of international law thus depends on the will of states.<sup>168</sup> The sovereign state, therefore, continues to be of significance to the evolution of international law. According to Klabbers, there is a symbiosis between states and international law in that “the existence of the state facilitates international law, whereas the very structure of international law facilitates statehood”.<sup>169</sup>

Despite its importance in international law, there is no set definition of what a state is.<sup>170</sup> The existence of a state in international law is determined with reference to questions of fact and the law.<sup>171</sup> The criteria for statehood are clearly set out by the rules of international law. Article I of the Montevideo Convention of the Rights and Duties of States of 1933 provides that:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.<sup>172</sup>

It is generally accepted that the Montevideo criteria have attained the status of general customary international law.<sup>173</sup> Though still not uniform, there seems to be an emerging viewpoint among scholars that respect for human rights and self-determination is becoming an additional requirement for statehood.<sup>174</sup> This study is

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167 Van Hoof *International Human Rights Obligations for Companies and Domestic Courts* 52–53.

168 Agarwal *International Law and Human Rights* 61.

169 Klabbers J “(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors” in Bianchi A *Non-State Actors and International Law* (Ashgate Publishing Farnham 2009) 42.

170 See Crawford *The Creation of States* 31, 38-45.

171 Shaw *International Law* 144.

172 Article 1 of the Convention on the Rights and Duties of States, Montevideo, 26 December 1933, 165 LNTS 19.

173 Nijman *Sovereignty and Personality* 113; Raič *Statehood and the Law of Self-Determination* 24 footnote 15; Acquaviva G “Subjects of international law: A power-based analysis” 2005 (38) *Vanderbilt Journal of Transnational Law* 348.

174 Dugard *International Law* 87-89, Shaw *International Law* 144-151. See Crawford *The Creation of States* 107 who having acknowledged that there is a link between statehood and

of the view that the requirement of respect for human rights and self-determination is a rather promising development for the protection of human rights especially given the fact that, historically, the manner in which an entity exercised its authority within its territorial borders was of no concern to the international community.<sup>175</sup> There are now some sporadic signs that respect for human rights and self-determination is becoming a pre-condition for statehood.<sup>176</sup> There is even a viewpoint that within the United Nations (UN), advancement of self-determination has become a criterion to be considered in the decision on statehood.<sup>177</sup>

Although an entity may meet the criteria for statehood as prescribed by the Montevideo Convention, a question may still be asked whether such an entity becomes a state for international law purposes. An even more important question for this study is whether such an entity has international personality or not. Whether the fulfilment of the Montevideo requirements by an entity marks the birth of a state is a debatable question.<sup>178</sup> This question relates to what Dugard<sup>179</sup> describes as the “most maligned and controversial branch of international law” - the law of recognition. It is to the law of recognition that this study now turns.

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self-determination writes that: “A significant body of practice attests to the reality of the link; but it remains to be seen whether self-determination as such has become a criterion of Statehood; and if so, with what effects.”

- 175 Dugard *International Law* 87 writes that: “Neither the League of Nations nor any State raised objections to South Africa’s racial policies when it became an independent member of the community of states. Since 1945 many new States with poor human rights record have been recognised and admitted to the United Nations. Moreover, there has been no serious suggestion that the recognition of States with outrageous human rights records should be withdrawn.”
- 176 Dugard *International Law* 87 illustrates this point by using the example of the dissolution of the Soviet Union in 1991. The European Community made it clear that it would only recognise those states with evidence of some willingness and capacity to respect and protect human rights. However, this was not fulfilled as Croatia was recognised by the European Community before giving assurances that it would protect the rights of minorities. Bosnia was recognised at the time when one of the great tragedies of the centuries was unfolding within its borders.
- 177 Dugard *The Law of Recognition and the United Nations* (Grotius Publications Limited Cambridge 1987) 79. Admission to the UN is briefly discussed below.
- 178 For a detailed discussion of recognition see: Dugard *International Law* 91-102; Dugard *The Law of Recognition*, Shaw *International Law* 321-322; Raič *Statehood and the Law of Self-Determination* 82-88
- 179 Dugard *The Law of Recognition* 1. See also Kelsen H “Recognition in international law: Theoretical observations” 1941 (35) *American Journal of International Law* 605 who points out that “[t]he problem of recognition of States and governments has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial, or leads in the practice of States to such paradoxical situations”.

### 5.1.1 The law of recognition

The role of recognition in international law cannot be underestimated. It is the foundation upon which international law is built.<sup>180</sup> To the positivistic conception of international law, which views international law as a body of rules that governs inter-state relations, recognition plays an even more important role. Its importance lies in the fact that it constitutes the branch of law that determines the existence of states.<sup>181</sup> In addition, recognition encapsulates some of the fundamental principles of international law such as sovereignty, autonomy, and consent. At no stage are autonomous sovereign states compelled to recognise other states, insurgents and governments. Recognition is an act which sovereign states freely exercise.<sup>182</sup> Despite its importance, however, there is still no clearly formulated position in international law of what recognition entails. International law has afforded states a lot of discretion with regard to which entities they recognise, on what basis and how. As a result, state practice reveals a lack of uniformity, and this has led to recognition being “badly misunderstood and needlessly confused”.<sup>183</sup> In both theory and practice, recognition has not only attracted controversy, but has led to paradoxical situations.<sup>184</sup>

Recognition serves two purposes - a political and a legal one.<sup>185</sup> A political act is purely dependent on the subjective decision of the recognising state. This, according to Menon, is a determination based on convenience and national interest.<sup>186</sup> Through the act of political recognition, an existing state affirms that it is willing to enter into political and other relations with the entity which it recognises

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180 Menon PK “The problem of recognition in international law: Some thoughts on community interest” 1990 (59) *Nordic Journal of International Law* 247; Dugard *The Law of Recognition* 1.

181 Dugard *The Law of Recognition* 1.

182 Ruda JM “Recognition of States and Governments” in Bedjaoui M (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers Dordrecht 1991) 451 writes that: “Recognition is an act of free will. Each State determines for itself whether and when to take such a decision. According to international usage, there is no obligation to recognise the new State; this is a freely determined, political act.”

183 Menon PK “The problem of recognition in international law: Some thoughts on community interest” 1990 (59) *Nordic Journal of International Law* 248.

184 Kelsen 1941 *American Journal of International Law* 605.

185 Kelsen 1941 *American Journal of International Law* 605. Also see Menon 1990 *Nordic Journal of International Law* 248 who writes that: “Recognition per se is a political act; since its consequences are within the ambit of international law, it may be said that it is a legal act.”

186 Menon 1990 *Nordic Journal of International Law* 249.

as a state.<sup>187</sup> Factually, therefore, even if an entity seeking to become a state has met all the requirements for statehood, such an entity still needs other existing states to recognise it. In an attempt to develop a legal theory of recognition, Lauterpacht advanced a view that as soon as an entity has met all the requirements of statehood, such an entity had a right to be recognised while existing states had a duty to recognise it.<sup>188</sup>

International law prescribes neither the process nor the form of recognition. Just as states are free to decide as to which entities to recognise, states are equally free to determine how they want to recognise other states or governments. A state can expressly recognise an entity as a state or imply such recognition in its practice.<sup>189</sup> The act of recognition can either be a unilateral act from the recognising state or a bilateral one in that it would involve mutual transactions between the recognising state and the state being recognised.<sup>190</sup> This therefore means that an entity becomes a state even if it is recognised by one state only. The fact that an entity has been recognised by one state does not necessarily make it a state for other states, as it is the case with Palestine and Kosovo. Other states must also exercise their discretion to determine the statehood of such an entity for themselves. This uncertainty is one of the inherent weaknesses of unilateral recognition in that it has the potential to create an untenable situation of creating an entity that is a state for one set of states and not a state for others.

Since its formation, the UN has played an important role in, among others, international diplomacy with far-reaching political consequences for nation states. Membership to the UN is by admission subject to meeting statehood requirements.<sup>191</sup> Given the role that the UN has assumed in international relations, it follows that nation states stand to benefit from becoming members of the community of nations. Being admitted to the UN, however, is not necessarily the same as being recognised by the institution.<sup>192</sup> The UN does not have the power

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187 Kelsen 1941 *American Journal of International Law* 605.

188 See Menon 1990 *Nordic Journal of International Law* 251-252; Dugard *The Law of Recognition* 1.

189 Menon 1990 *Nordic Journal of International Law* 257.

190 Kelsen 1941 *American Journal of International Law* 605.

191 Article 4 of the UN Charter.

192 Broms B "States" in Bedjaoui M (ed) *International Law: Achievements and Prospects* (Martinus Publishers Dordrecht 1991) 45.

to recognise states or governments.<sup>193</sup> A debate has emerged among scholars regarding the admission of states to the UN *vis-a-vis* recognition. Menon<sup>194</sup> is of the view that admission to the UN carries more weight than recognition of statehood. The core of his argument is that admission to the UN adds to the rights and duties of the state under the Charter of the United Nations. He articulates this view as follows:

Articles 2(1) and (4) make it clear that every member is regarded by the United Nations as a sovereign state with a position under general international law equal to that of other sovereign states. As such, it would be reasonable to draw the conclusion that the members who voted for admission of a state to the United Nations, unless they express their will of objection, are to be considered to have granted recognition of that state implicitly.<sup>195</sup>

In a similar vein, Dugard<sup>196</sup> is of the view that the UN has in the past admitted colonies as members and therefore secured their statehood through admission to the body. Secondly, existing member states of the UN have also used their vote in the Security Council or the General Assembly to acknowledge the statehood of a new member as opposed to providing formal notification of recognition. Thirdly, Article 4 of the Charter and the political organs of the UN consider statehood in admitting new entities as members. Drawing from the dictum of the *Reparation for Injuries* case<sup>197</sup> that “the vast majority of the members of the international community had the power, in conformity with international law, to bring into being an entity possessing objective international personality”, he concludes that the UN has capacity to confirm the existence of a new state. Based on the foregoing, a case can be made for collective recognition by institutions such as the UN, European Union and African Union, for instance.

The second purpose which recognition serves is a legal one. Legally, a determination as to whether international law applies to the new entity in its

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193 See <http://www.un.org/en/members/about.shtml> (accessed on 26 September 2011).

194 Menon 1990 *Nordic Journal of International Law* 265.

195 Menon 1990 *Nordic Journal of International Law* 265.

196 Dugard *The Law of Recognition* 78-79.

197 *Reparations for Injuries* case at 185.

relationship with other states is done with reference to recognition.<sup>198</sup> Ruda<sup>199</sup> defines recognition of states as

a unilateral act whereby one or more States admit, whether expressly or tacitly, that they regard the said political entity as a State; consequently, they also admit that the said entity is an international legal personality, and as such is capable of acquiring international rights and contracting international obligations.

For international law purposes, the legal aspect of recognition is important as it endows the new entity with international legal personality. An entity that meets the Montevideo Convention requirements but has not been recognised, is legally without international personality. As was pointed out earlier, unlike municipal law, in as far as legal personality is concerned, international law is decentralised and does not have a central body with established procedures to determine the existence of facts to which certain legal principles can be applied to the concept of international personality. International law, as Kelsen points out, has instead empowered states to decide on issues of legal personality.<sup>200</sup> The net effect of this is that an *a priori* claim to legal personality in international law cannot be made.<sup>201</sup>

One of the problems raised by recognition is that state practice reveals a lack of consistency in relation to the application of recognition.<sup>202</sup> In addition, international scholars are divided on the role of recognition *vis-a-vis* the Montevideo requirements. The debate on recognition has led to two different schools of thought: the constitutive and the declaratory theories.

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198 Menon 1990 *Nordic Journal of International Law* 248.

199 Ruda *Recognition of States and Governments* 450.

200 Kelsen 1941 *American Journal of International Law* 607 writes that: "General international law is primitive law, and, like every primitive law, highly decentralized. Unlike the technically developed national law, it does not institute special organs authorized to establish in a legal procedure the existence of concrete facts as determined by the law in order that the consequences also prescribed by the law may be attached to these facts. General international law leaves these functions to the interested parties."

201 See Raič *Statehood and the Law of Self-Determination* 10.

202 Menon 1990 *Nordic Journal of International Law* 249 points out that: "There was a time when recognition was accorded as soon as the facts of existence and stability of the new State were conclusively established. Later on, there arose a situation of delaying or even refusing recognition although the necessary conditions of Statehood were present. In exceptional cases, on the other hand, States had even granted recognition to political entities before they actually existed as independent States."



#### 5.1.1.1 The constitutive theory

The constitutive theory of recognition asserts that it is only through recognition that a state comes into being under international law. According to Kelsen,<sup>203</sup> what the constitutive theory means is that before recognition, the unrecognised entity does not legally exist in relation to the recognising state.

It must be pointed out that the number of states in the international community has increased significantly in the last centuries.<sup>204</sup> Even more important is the fact that ideologically, religiously and politically the world is polarised. Chances are that not all states will confer recognition on the same entity at the same time. Some states may choose not to recognise the new entity at all. This choice may not necessarily be based on the non-existence or existence of the factual reality, but on certain political or strategic considerations.<sup>205</sup> This concurrent recognition and non-recognition of the same entity has the potential to create an anomalous situation in international law. Some of the objections against the constitutive theory are located within this potential anomaly. According to Dugard,<sup>206</sup> if an entity is recognised by state A and not by state B, it becomes in effect both a state and a non-state. Legally, this anomalous situation means that an entity in such a position could not derive international law rights and also does not have an international law obligation not to attack its neighbours. The net effect of this is that an entity exists, but does not exist for international law purposes. As Raič<sup>207</sup> correctly points out, “it is incomprehensible that a State may exist outside international law”. Dugard<sup>208</sup> is of the view that this anomalous situation can be remedied by admission through the collective recognition of states through the UN.

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203 Kelsen 1941 *American Journal of International Law* 608.

204 Crawford *The Creation of States* 4 points out that: “At the beginning of the twentieth century there were some fifty acknowledged States. Immediately before World War II there were about seventy-five. By 2005, there were almost 200 – to be precise, 192”. On 14 July 2011, the Republic of South Sudan became the 193rd state of the community of States. See <http://www.un.org/apps/news/story.asp?NewsID=39034&Cr=South+Sudan&Cr1> (accessed on 22 July 2011).

205 See Shaw *International Law* 329 who gives an example of the United States which for many years refused to recognise the People’s Republic of China or North Korea, not because it did not meet the requirements but simply because it did not wish the legal effect of recognition to come into operation.

206 Dugard *International Law* 91 gives the example of North Korea which was recognised by the Soviet Union, China, and some fifty states, while at the same time it was not recognised by the United States and the United Kingdom, among others.

207 Raič *Statehood and the Law of Self-Determination* 34.

208 Dugard *The Law of Recognition* 80.

The basis for his argument is that if all members within the UN recognise each other as states, there will be no room for an anomalous situation to arise where the same entity is considered to be a state by some states and not a state by others.

#### 5.1.1.2 The declaratory theory

The declaratory theory of recognition, on the other hand, holds that once there is factual evidence that the criteria for statehood are fulfilled, a state comes into existence. Recognition in this regard, becomes only an affirmation of what is already in existence. Article 3 of the Montevideo Convention of the Rights and Duties of States provides that:

The political existence of the State is independent of recognition of the independence of other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interest, administer its services, and to define its jurisdiction and competence of its courts.<sup>209</sup>

For the declaratory theory, statehood thus comes into being once there is an existence of the factual situation. The declaratory theory is however not without its limitations. As Raič<sup>210</sup> notes:

The theory assumes that the existence of a mere factual situation, which is a result of the fulfilment of the criteria for Statehood would lead *ipso facto* to international personality, which is incorrect. For, international personality is not the result of the mere existence of a factual situation. It is the result of the existence of an international legal rule which requires the existence of certain facts for the attribution of international personality to that factual situation.

The existence of a state for international law purposes is not only a factual matter

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209 See also Articles 12 and 13 of the Charter of the Organisation of American States of 1948 as amended, which adopts the same language.

210 Raič *Statehood and the Law of Self-Determination* 38.

but also a matter of law, which the declaratory theory seems to overlook. By so doing the theory tends to “depreciate the importance of recognition”.<sup>211</sup>

Notwithstanding the weaknesses inherent in each of the two theories, recognition remains an important aspect of international law. Some authors have even suggested that recognition has both the declaratory and constitutive elements to it.<sup>212</sup>

In light of the foregoing discussion, a state, at least according to the constitutive theory, comes into being once both the factual and the legal requirements of statehood have been met. Documents like the constitution, a decree or a proclamation would give an indication of the “critical date of commencement of Statehood”.<sup>213</sup> This means that an entity that meets all the requirements of statehood may in actual fact be in existence before recognition, with all the rights and attributes of sovereignty but without rights *vis-a-vis* other states.<sup>214</sup> It is only after recognition that the new state would be able to exercise its rights *vis-a-vis* other states.

It should also be pointed out that a state which has been recognised by other states may be in existence, but its government may not necessarily be recognised by other states. The 2011 uprisings in Libya serve as an example in this regard. At no stage during the uprisings against the government of Muammar Gaddafi, was the existence of Libya as a state questioned by the international community. What was in contention was the recognition of the government that was in charge of Libya at the time.<sup>215</sup> There is no connection between recognition of government and of the state. As Menon points out, a state once recognised, is perpetual and survives the form of its government.<sup>216</sup>

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211 Raič *Statehood and the Law of Self-Determination* 39.

212 See Ruda *Recognition of States and Governments* 455.

213 Raič *Statehood and the Law of Self-Determination* 86.

214 Menon 1990 *Nordic Journal of International Law* 247.

215 See Talmon S “Recognition of the Libyan National Transitional Council” 2011 (15) *Insights* available at: <http://www.asil.org/pdfs/insights/insight110616.pdf> (accessed on 26 August 2011).

216 Menon 1990 *Nordic Journal of International Law* 252.

## 5.2 Legal personality of insurgents

It is evident from the discussion above that the legal personality of the primary subjects of international law is itself conceptually and theoretically contested. The concept of legal personality becomes even more contested when it moves horizontally to encompass non-state entities, such as insurgents. These are entities that for one reason or the other pose a challenge to statehood. The international community is only too familiar with the concept of insurgents. Wars have been a perennial feature in the evolution of states over the ages throughout the world.<sup>217</sup> Just as the concept of human rights has evolved over time, so have the methods of protecting human rights, especially in a war situation. The question whether international humanitarian law applies to armed groups is controversial.<sup>218</sup> Due to the state-centric nature of international law, the rules of international law were applicable only to states. The activities of insurgents on the international plane, like those of MNCs, have highlighted the mismatch between the state-centric nature of international law and international reality which is fast becoming less state-centred.<sup>219</sup> A problem then arose where there was armed conflict between a state and insurgents. Since insurgents had no legal standing in international law, the rules of armed conflict were not applicable to them. Thus, an untenable situation arose where the rules of international law, especially humanitarian laws were applicable only to one party to the conflict.<sup>220</sup> For insurgents to comply with the rule of international law, they too needed to derive a benefit from such rules. It is within this context that the debate over the recognition of insurgents emerged. As Cassese points out, states and insurgents have been the *dramatis personae* of the international community since its inception.<sup>221</sup> This is not to say that insurgents are like states. The two entities are not the same and therefore do not possess the same powers in international law. The position of states in international law is very clear; they are the principal subjects of

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217 Bean R "War and the birth of the nation state" 1973 (33) *The Journal of Economic History* 203-221; Cassese *International Law in a Divided World* 81.

218 Sassòli M "Taking armed groups seriously: Ways to improve their compliance with international humanitarian law" 2010 (1) *International Humanitarian Legal Studies* 18.

219 Sassòli 2010 *International Humanitarian Legal Studies* 7.

220 For a discussion of the Geneva Conventions and the four Protocols see Cassese A "The status of rebels under the 1977 Geneva Protocol on non-international armed conflicts" 1981 (30) *International and Comparative Law Quarterly* 416-439.

221 Cassese *International Law in Divided World* 74.

international law. Insurgents, on the other hand, occupy a rather curious position in international law. Their status is aptly captured by Cassese who writes that insurgents

come into being through their struggle against the State to which they formally belonged. They are born from a wound in the body of a particular State and are therefore not easily accepted by the international community unless they can prove that they exercise some of the sovereign rights typical of a State. They assert themselves by force, and acquire international status proportionate to their power and authority.<sup>222</sup>

It should be pointed out that not every conflict will give rise to the protection of international law. International law makes a distinction between rebellion, insurgency and belligerency.<sup>223</sup> International law does not involve itself in a situation that constitutes a rebellion within a state. In a situation of a rebellion, states are left to their own devices to deal with rebellions using their own domestic institutions. It is only when a conflict results in a large scale armed conflict within a given state that international law intervenes to afford protection to belligerent parties. Such intervention is preceded by recognition of insurgency. A determination of whether there is an armed conflict is done with reference to a number of factors.<sup>224</sup> Firstly, there must be an existence of civil war within a state, beyond the scope of a mere local unrest. Secondly, insurgents must occupy a substantial part of territory of the state where they wield authority over the people in that given locality. Thirdly, rebels must have a measure of orderly administration and also adhere to a single command that will enable them to act responsibly. The state of belligerency is considered to have been reached when, as a matter of fact, an insurgency has met all the three requirements outlined.<sup>225</sup> Clearly the

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222 Cassese *International Law in a Divided World* 75.

223 Lootsteen YM "The concept of belligerency in international law" 2000 (166) *Military Law Review* 113.

224 See *Prosecutor V. Ramush Haradinaj Idriz Balaj Lahi Brahimaj*, ICTY, 03 April 2008, Case No. IT-04-84-T, paras 49 and 60; *Prosecutor v Jean-Paul Akayesu* (1998) ICTR, 2 September 1998, Case No. ICTR 96-4-T, paras 622 to 626; *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997), para 155.

225 Lootsteen 2000 *Military Law Review* 114.

requirements are framed in a way that uses states as the measure against which insurgents are to be measured. It is clear that insurgents can only be recognised when they manifest state-like features.

Modern wars are fought by parties different from those originally contemplated by international law. For instance, the struggle for decolonisation, particularly on the African continent, was fought on different fronts. Most independent African states were liberated by national liberation movements who unsuccessfully wanted their strife to be regarded as international armed conflict. To date, the status of national liberation movements in international law is still undetermined.<sup>226</sup> In the twentieth century, the status of terrorists under international law continues to be a subject of great debate.<sup>227</sup> Through the act of recognition, an individual state acknowledges “the existence of an uprising or revolution against an established government and declares that it grants certain rights to the rebel party”.<sup>228</sup> When recognised, insurgents can have access to ports of the recognising governments and their soldiers are entitled to receive the status of war prisoners, if captured.<sup>229</sup> Recognition also affords insurgents an opportunity to invoke international law.<sup>230</sup> In addition to being beneficial to insurgents, recognition also imposes certain responsibilities on insurgents. Insurgents have a duty to abide by international humanitarian laws.<sup>231</sup> Recognition therefore becomes a basis for imposing rights and responsibilities on insurgents, which would not otherwise have been possible. In this regard, it may be argued that insurgents are afforded limited international personality.<sup>232</sup>

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226 Ranjeva R “Peoples and National Liberation Movements” in Bedjaoui M (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers Dordrecht 1991) 101-112; Clapham A “Human rights obligations of non-state actors in conflict situations” 2006 (88) *International Review of the Red Cross* 491-523.

227 Klabbers J “Rebel with a cause? Terrorists and humanitarian law” 2003 (14) *European Journal of International Law* 299-312.

228 Ruda *Recognition of States and Governments* 462.

229 Lootsteen 2000 *Military Law Review* 110.

230 Cassese 1981 *International and Comparative Law Quarterly* 417.

231 See Cassese 1981 *International and Comparative Law Quarterly* 431.

232 Wippman D “Hearing voices within the state: internal conflicts and the claims of ethno-national groups” 1995 (27) *New York University Journal of International Law Politics* 599.

### 5.3 Legal personality of individuals in international law

The position of the individual in the international legal system is a curious one. It was mentioned in the first chapter of this study that international law is in a constant state of development. What is rather interesting to note, is that the individual either as a bearer of human rights has not always been part of the development of the international legal system.<sup>233</sup> The notion of the legal personality of the individual only emerged towards the end of the nineteenth century and was intensified after the Second World War.<sup>234</sup> The legal personality of the individual has been a subject of great debate. Generally, scholarly opinion on the position of the individual in international law has followed different trajectories.<sup>235</sup> The one category of scholars holds a view that is state-centric and therefore rejects the international personality of the individual. The individual, this approach argues, is not a subject of international law but its object. As an object, the individual has no rights and duties under international law. The effect of this is that the individual cannot seek protection under international law or violate its rules.<sup>236</sup> Diametrically opposed to the first approach, is the view that adopts a fictional approach to the concept of the state and therefore asserts that the individual is the sole and only real subject of international law.<sup>237</sup> Nijman<sup>238</sup> adopts a balanced view that sees both the state and the individual as bearers of international personality in international law. However, in her conception, individuals are the legal persons *par excellence* and therefore the primary legal persons, while states are secondary persons of international law. On the other hand, Higgins, as pointed out above, adopts a view that does not embrace or reject the legal personality of the individual in international law, but proposes an approach that rejects the concept of subject in international law altogether.<sup>239</sup> She instead proposes that the concept of the subject should be replaced by that of a

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233 See Tzevelekos V "In search of alternative solutions: Can the state of origin be held internationally accountable for investors' human rights abuses that are not attributable to it?" 2010 (35) *Brooklyn Journal of International Law* 157-158.

234 Orakhelashvili A "The position of the individual in international law" 2003 (31) *California Western International Law Journal* 243-244.

235 See Orakhelashvili 2003 *California Western International Law Journal* 241-249.

236 See Menon PK "The international personality of individuals in international law: A broadening of the traditional doctrine" 1992 (1) *Journal of Transnational Law and Policy* 155-156.

237 See Orakhelashvili 2003 *California Western International Law Journal* 244.

238 Nijman *The Concept of International Legal Personality* 473.

239 Orakhelashvili 2003 *California Western International Law Journal* 247.

participant. Within this model, the individual will be conceived of as a participant alongside other participants.<sup>240</sup>

The post Second World War era marked a great shift in the position of the individual in international law. International human rights instruments became explicit in affording individuals certain rights and responsibilities in international law. It is now no longer contested that the rights and duties of individuals feature prominently in international law.<sup>241</sup> As Orakhelashvili points out, their rights feature in treaties, are accepted in international law as part of universal customary law and are also recognised as part of *jus cogens*.<sup>242</sup>

Procedurally, individuals now have international standing in certain international tribunals and regional courts.<sup>243</sup> For instance, within the European Economic Community, for human rights purposes, the individual enjoys the same status as states. In the *Van Gend en Loos v Nederlandse Administratie Der Belastingen*<sup>244</sup> the court held that:

The community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and subjects of which comprise not only Members States but also their nationals. Independently of the legislation of Member States, Community law therefore not only impose obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in clearly defined way upon individuals

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240 Higgins R *Problems and Process: International Law and how We use It* (Oxford University Press Oxford 1994) 49-50.

241 See Menon "The international personality of individuals in international law: A broadening of the traditional doctrine" 1992 (1) *Journal of Transnational Law and Policy* 151-182; Orakhelashvili 2003 *California Western International Law Journal* 241-276.

242 Orakhelashvili 2003 *California Western International Law Journal* 242.

243 See Orakhelashvili 2003 *California Western International Law Journal* 253-254; Menon 1992 *Journal of International Law and Policy* 166-174; Udombana N "An African Human Rights Court and an African Union Court: A needful duality or a needless duplication?" 2003 (28) *Brooklyn Journal of International Law* 811-870.

244 *Van Gend en Loos v Nederlandse Administratie Der Belastingen* [1963] ECR 1.



as well as upon the Member States and institutions of the Community.

The regional human rights system has brought about an added impetus to the human rights protection regime.<sup>245</sup> The European System for the Protection of Human Rights, the first of the three systems to be established, has charted the way in effectively protecting the rights of the individual.<sup>246</sup> Central to the European System is the European Convention on Human Rights which serves not only as a blue print for giving legal content to human rights in Europe but also as a founding document for the establishment of the machinery to supervise and enforce those rights.<sup>247</sup> The European Commission can receive communication from individuals claiming violations by contracting parties.<sup>248</sup>

The Inter-American Human Rights System and the African System of Human Rights and People's Rights<sup>249</sup> were each modelled after the European Human Rights system.<sup>250</sup> Article 44 of the American Convention on Human Rights provides that:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

The African System of Human and People's Rights affords individuals *locus standi* to submit communications before the African Commission on Human and Peoples' Rights.<sup>251</sup> Furthermore, the system has been hailed for innovatively introducing the concept of duties on individuals.<sup>252</sup> In as far as the court is concerned, the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an

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245 See Mutua 2007 *Human Rights Quarterly* 587-594.

246 Buergenthal T "The evolving international human rights system" 2006 (100) *American Journal of International Law* 792.

247 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS. 222 (1950), (entered into force on 3 September 1953), (hereinafter the European Convention)

248 Article 25(1) the European Convention.

249 The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1982), (entered into force on 21 October 1986), (hereinafter the African Charter).

250 The American Convention of Human Rights, OASTS No. 36 (1969), (entered into force on 18 July 1978), (hereinafter the American Convention).

251 Article 56(1) of the African Charter.

252 These duties appear in Articles 27-29 of the African Charter. See also Mutua 2007 *Human Rights Quarterly* 588; Viljoen *International Human Rights* 248-251.

African Court on Human and Peoples' Rights has opted to leave the *locus standi* of the individual to the discretion of the court.<sup>253</sup> Even then the state continues to play a determinative role.<sup>254</sup>

Despite these legal developments, there are still some practical realities that hamper individuals from asserting their rights in international tribunals or courts.<sup>255</sup> These are, according to Meijknecht,<sup>256</sup> due to the fact that in most countries where human rights violations occur, people do not have information about the availability of international remedies for such violations. A further contributing factor is that those who know about the existence of these remedies are unable to take appropriate legal steps either because it is physically impossible to do so, or that they are afraid of the repercussions of doing so.

The position of certain categories of "peoples" who have organised themselves in pursuance of a right to self-determination in international law is not yet clear in international law. This is so because both concepts of peoples and self-determination are not clearly defined in international law, and have over the years become a source of great debate.<sup>257</sup> In an in depth study of the position of minorities and indigenous peoples in international law, Meijknecht concludes that

as far as the position of indigenous peoples in international law is concerned, it appears that they have international legal capacity and that they are bearers of international rights and duties but, that the main obstacle on their road to international

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253 Article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (1998), (entered into force on 25 January 2004) (hereinafter the Protocol to the African Charter).

254 Article 5(3) provides that: "The Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol." Article 34(6) states that "at the time of the ratification of this Protocol or anytime thereafter, the state shall make a declaration accepting the competence of the Court to receive petitions under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration."

255 Institutional mechanisms will be discussed in Chapter 5 of this thesis.

256 Meijknecht *Towards International Personality* 13.

257 See Mnyongani FD "Between a rock and a hard place: the right to self-determination versus *uti possidetis*" 2008 (XLI) *The Comparative and International Law Journal of Southern Africa* 474-479; Ranjeva *Peoples and National Liberation Movements* 101-112.

personality lies at the level of international *jus standi*.<sup>258</sup>

She reaches this conclusion after having explored the various approaches that are used by international law instruments when dealing with questions of minorities and indigenous people. International law has conceptualised minorities and indigenous people mainly in three ways.<sup>259</sup> In some documents, international law uses a language that is indirect in which the protection of minorities and indigenous people is phrased as obligations to states. The second possible approach is one that deals directly with minorities and indigenous people as direct subjects of the rights and duties. The third approach is a blend of the first and the second approaches in that the language of the instrument addresses itself to minorities and indigenous peoples but continues to contain explicit state obligations.<sup>260</sup> Each of the approaches would therefore have an impact on how the rights and duties outlined are enforced, which is why it becomes difficult to come to a definite conclusion regarding the international personality of minorities and indigenous people.

While there is little doubt that individuals are now subjects of international law, specifically for the purposes of international human rights law, the international law position of minorities and indigenous peoples in international law is still an open question.<sup>261</sup> Another category of non-state actors with an uncontested position in international law is that of international organisations.

#### **5.4 Legal personality of international organisations**

The concept of international organisations generally refers to institutions such as the UN and its specialised agencies<sup>262</sup> and regional organisations.<sup>263</sup> Over the last

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258 Meijknecht *Towards International Personality* 232.

259 See Meijknecht *Towards International Personality* 168–174.

260 Meijknecht *Towards International Personality* 172.

261 See Meijknecht *Towards International Personality* 224–226.

262 These include, among others, the International Labour Organization (ILO), Food and Agriculture Organization of the United Nations (FAO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), World Bank (WB), International Monetary Fund (IMF), World Intellectual Property Organization (WIPO). For a list of the United Nations Bodies, see “Other United Nations Bodies” available at: <http://www.ohchr.org/EN/HRBodies/Pages/OtherUnitedNationsBodies.aspx> (accessed on 30 September 2011).

263 These include, among others, the European Union (EU), the Association of Southern Asian Nations (ASEAN) the Organisation of American States (OAS), the African Union (AU), the League of Arab States and the Andean Community. For a comprehensive list see: “Regional

few decades, international organisations have grown to outnumber sovereign states.<sup>264</sup> In terms of scope and power, it is no exaggeration to say that there is virtually no aspect of modern day life that is not governed or influenced by international organisations in one way or the other.<sup>265</sup> Areas such as peace and security, human rights, labour, trade and intellectual property, among others, are now regulated by rules that emanate from international organisations.

The notion of a group of states cooperating to form institutions tasked with responsibilities to serve their mutual interest is not new in history.<sup>266</sup> However, the status of these intergovernmental organisations in international law remained unarticulated for years. It was only in 1949 that the International Court of Justice (ICJ) in the case concerning *Reparations for Injuries Suffered in the Service of the United Nations* brought about some clarity regarding the status of international organisations.<sup>267</sup> The decision of the ICJ marked a turning point in international law as it has since been generally accepted that international organisations, along with states, have international legal personality and are therefore subjects of international law.<sup>268</sup> For Bederman,<sup>269</sup> the *Reparations for Injuries* case represents the final vindication that states are not the only subjects of international law. In his view, the ICJ decision signalled the final days of the law of nations by ushering in the era of international law.

Even after the *Reparations for Injuries* case, one aspect that is still not clear, is what international law regards to be international organisations. Article 2 of the

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Organisations”, available at: [http://www2.lse.ac.uk/library/collections/govtpub/igos/IGO\\_web\\_regional.aspx](http://www2.lse.ac.uk/library/collections/govtpub/igos/IGO_web_regional.aspx) (accessed on 30 September 2011).

264 See Klabbers J *An Introduction to International Institutional Law* 2nd ed (Cambridge University Press Cambridge 2009) 1 footnote 1; Boom KE “New directions in responsibility: Assessing the International Law Commission’s Draft Articles on Responsibility of International Organisations” 2011 (37) *The Yale Journal of International Law Online* 4.

265 Klabbers *International Institutional Law* 1.

266 Cassese A *International Law in a Divided World* 85-99; Bederman DJ “The souls of international organisations: Legal personality and the light house at Cape Sparte!” 1996 (36) *Virginia Journal of International Law* 275-377.

267 *Reparation for Injuries* case at 174.

268 Dugard *International Law* 1; Gautier P “The Reparations for Injuries Revisited: The Personality of the European Union” in Frowein JA and Wolfrum R (eds) *Max Planck Yearbook of United Nations Law* (Kluwer Law International The Hague 2000) 332-333; Acquaviva 2005 *Vanderbilt Journal of Transnational Law* 384-386.

269 Bederman 1996 *Virginia Journal of International Law* 279. See also Udombana NJ “An African human rights court and African Union court: A needful duality or a needless duplication?” 2003 (28) *Brook Journal of International Law* 826.

Draft Articles on Responsibility of International Organisations defines an international organisation as:

An organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.<sup>270</sup>

In the absence of any international law rules on this, scholars have tried to fill the void by formulating their own definitions. After analysing different definitions by different scholars, Gautier defines an international organisation as:

An autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane.<sup>271</sup>

The *Reparations for Injuries* case has succeeded in providing some guidance with regard to the international legal personality of the UN in international law. Scholars have used this decision to be the basis of international legal personality of international organisations.<sup>272</sup>

The *Reparations for Injuries* arose from a request by the UN to the ICJ for an advisory opinion after one of its agents was killed. The question before the court was whether the UN as an organisation, could claim reparations from the responsible state. The legal question<sup>273</sup> before the court was two-fold:

I. In the event of an agent of the United Nations in the performance of his duties suffering injury in the circumstances involving the responsibility of a State, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or the persons entitled through him?

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270 Draft Articles on Responsibility of International Organizations, with Commentaries. Report of the International Law Commission on the work of its sixty-third session, 26 April to 3 June and 4 July to 12 August 2011 (A/66/10 and Add.1) (hereinafter the Draft Articles on Responsibility of International Organisations).

271 Gautier *The Reparations for Injuries Revisited* 333.

272 Gautier *The Reparations for Injuries Revisited* 332.

273 This chapter will mainly address the first question and briefly refer to the second question.

II. In the event of an affirmative reply on point I(b), how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a nation?<sup>274</sup>

In addressing the first question, the court first explained what it understood to be an international claim. In the view of the court, an international claim is a claim against a state. In this context then, capacity to bring an international claim would refer to “the capacity to resort to the customary methods recognised by international law for the establishment, presentation and the settlement of claims”. This capacity, the court asserted, belongs to states.<sup>275</sup> Having said this, the court was in essence not opposed to the UN bringing a claim, provided the organisation had capacity to. A determination of whether the organisation has capacity to bring such a claim was done with reference to the United Nations Charter. In this regard the ICJ stated that:

The court must first enquire whether the Charter has given the Organisation such a position as that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organisation possess international personality?<sup>276</sup>

According to the court, to say that an entity is an international person means that

it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.<sup>277</sup>

It has been correctly pointed out by Rama-Montaldo that the request by the UN for an opinion did not mention international personality and yet the court saw it fit to address this question in detail.<sup>278</sup> There is no clear explanation as to why the court decided to take this approach. Gautier is of the view that this may have happened because the question of legal personality was indeed raised in submissions made

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274 *Reparation for Injuries* case at 175.

275 *Reparation for Injuries* case at 177.

276 *Reparation for Injuries* case at 178.

277 *Reparation for Injuries* case at 179.

278 Rama-Montaldo M “International Legal personality and Implied Powers of International Organisations” 1970 (111) *British Yearbook of International Law* 125; Gautier *The Reparations for Injuries Revisited* 337.

by governments to the court.<sup>279</sup> Klabbers, on the other hand, assumes that it may have been raised presumably because of two points. Firstly, the Charter of the UN was silent on the possibility of the organisation bringing a claim. Secondly, even if the Charter had contained something on this point, the defendant state was not a member of the UN and therefore a right to bring such a claim would have been opposable.<sup>280</sup> The court seems to suggest a two-stage approach to the question of international personality of an organisation. The first stage is to look at the provisions of the Charter to see if it has afforded the organisation such a status. If the Charter is silent on this, then the second stage of the enquiry focuses on the characteristics which the organisation was intended to have.<sup>281</sup> In answer to the second stage, the court explored the various articles of the Charter and arrived at the conclusion that:

In the view of the Court, the organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organisation, and it could not carry out the intentions of its founders if it was devoid of international personality.<sup>282</sup>

The court then concluded that the UN is an international person but hastened to add that, “that is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State”.<sup>283</sup> It should be pointed out that there is nothing unique about a legal system differentiating between the different subjects. Even in municipal law, to say that a juristic entity is a person in that legal system does not necessarily mean that it becomes a natural person or *vice versa*. Legal personality is conferred for different purposes. As the ICJ stated:

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279 Gautier *The Reparations for Injuries Revisited* 337.

280 Klabbers *International Institutional Law* 47.

281 *Reparation for Injuries* case at 178.

282 *Reparation for Injuries* case at 179.

283 *Reparation for Injuries* case at 179.

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community.<sup>284</sup>

The *Reparations for Injuries* case has put the question of the legal personality of international organisations beyond doubt. What is however still unsettled, is how international organisations acquire such personality, and the same question can be asked of individuals and insurgents. Further, the court did not also address the question of the benefits that accrue to an organisation once it has been conferred with international personality. International law rules are also silent on both the sources of the legal personality of international organisations and the consequences or benefits of such personality. Drawing from the decision of the ICJ in the *Reparations for Injuries* case, four theories have emerged to explain the sources of the legal personality of international organisations.

#### 5.4.1.1 The will theory

The will theory is premised on the positivistic conception of international law where state consent plays a major role.<sup>285</sup> According to this theory, legal personality of international organisations is derived from the will of states.<sup>286</sup> This theory argues that if states want an organisation to have international legal personality, their will should not be disregarded.<sup>287</sup> The founders of the organisation will stipulate in the constitutive document that the organisation should have legal personality. This is the approach that was adopted by the ICJ in the *Reparations for Injuries* case.<sup>288</sup> However, it is not clear whether such a will should be express or implied. Paasivirta is of the view that the will of the founders should be “explicitly attributed to the organisation in a constitutive treaty”.<sup>289</sup> Rama-Montaldo, on the other hand, seems to suggest that such a will can also be implied in the constitutive instrument.<sup>290</sup>

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284 *Reparation for Injuries* case at 178.

285 Klabbers *International Institutional Law* 47.

286 Rama-Montaldo 1970 *British Yearbook of International Law* 112; Paasivirta 1997 *Hofstra Law and Policy Symposium* 42.

287 Gautier *The Reparations for Injuries Revisited* 335; Klabbers *International Institutional Law* 47.

288 *Reparation for Injuries* case at 178.

289 Paasivirta 1997 *Hofstra Law and Policy Symposium* 42.

290 Rama-Montaldo 1970 *British Yearbook of International Law* 112.



The first difficulty that the will theory runs into is that it is not always the case that the legal personality of the organisation is expressly mentioned in the founding document. For instance, the Charter of the UN, which was before the ICJ in the *Reparations for Injuries* case, did not explicitly confer legal personality to the organisation.<sup>291</sup> The constituent documents of, among others, the European Union<sup>292</sup> and the African Union,<sup>293</sup> for instance, do not explicitly confer legal personality to the organisations. In this regard, the objective theory becomes relevant.

#### 5.4.1.2 The objective theory

The objective theory stands directly opposed to the will theory. This theory holds that legal personality of the organisation is acquired from the rules of international law upon the existence of certain factors. That is, as soon an entity exists as a matter of law, meaning as soon as it meets the requirements in international law, that entity possesses international legal personality.<sup>294</sup> It should however be borne in mind that international law does not have set criteria against which to measure the legal existence of international organisations. In this regard the question raised by Klabbbers becomes important: “What are the requirements of international law with respect to ‘organisationhood’?”<sup>295</sup> The main criterion advanced by the proponents of this approach is that an organisation should have a distinct will of its own.<sup>296</sup> A closer inspection of some of the international organisations is that they have features that bear some resemblance to those of states. Though they may not have territory or population, most international organisations, as Ip points out, have their own constitutions and their own courts as it is the case with, for

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291 See Amerasinghe CF “International Legal Personality Revisited” in Johns F (ed) *International Legal Personality* (Ashgate Publishing Farnham 2010) 241-242.

292 See Klabbbers J “Presumptive Personality: The European Union in International Law” in Koskenniemi (ed) *International Law Aspects of the European Union* (Martinus Nijhoff Publishers The Hague 1998) 231-253; Paasivirta 1997 *Hofstra Law and Policy Symposium* 37-38.

293 See Udombana NJ “The institutional structure of the African Union: A legal analysis” 2002 (33) *California Western International Law Journal* 81-84.

294 Klabbbers *International Institutional Law* 49.

295 Klabbbers *International Institutional Law* 49.

296 Klabbbers *International Institutional Law* 49.

example, the Appellate Body of the World Trade Organisations (WTO), the ICJ of the United Nations and the Andean Community's Court of Justice.<sup>297</sup>

Legal personality of the organisation, according to the objective theory, is determined by looking for specific elements in the structure of the organisation as set out in the constitutive document.<sup>298</sup> An important guiding factor in this regard is the autonomy of the organisation. This autonomy relates to whether the organisation is not a subject of the jurisdiction of any of its members, and whether the organisation has its own organs to realise its objectives.<sup>299</sup> Factors to consider are that the organisation must (1) be autonomous, in that it is not subject to the jurisdiction of any state and (2) have an organ, the function of which is to express the will of the organisation and not that of the founding state members.<sup>300</sup> In most cases, the constitutive documents would make reference to the general structure of the organisation. The UN Charter, for instance, had envisaged an organisation with its organs and special tasks. The Charter further defined the relationship the organisation would have *vis-a-vis* its own state members.<sup>301</sup>

The rapid increase of new non-state actors in international law requires a system that responds fast to international challenges. The will theory, with its emphasis on state consent is not able to accommodate the fast changing international order and its new actors. The objective theory, on the other hand, has the ability to accommodate the changes, but is criticised for its disregard of the will of states.<sup>302</sup> Both the will and the objective theories are thus not without their own limitations. As Klabbers points out, they seem to feed off each other in a symbiotic way in that “the will theory must include some more or less objective elements, while the objective theory cannot avoid accommodating the will of the founders”.<sup>303</sup> Even more problematic is the basis upon which the two are constructed. The two theories assume that legal personality is the key through which international

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297 Ip EC “The power of international legal personality in regional integration” UNU-CRIS Working Paper W-2010/4 at 5 available at: <http://www.cris.unu.edu/fileadmin/workingpapers/W-2010-4.pdf>. (Accessed on 15 May 2013).

298 Rama-Montaldo 1970 *British Yearbook of International Law* 112.

299 Paasivirta 1997 *Hofstra Law and Policy Symposium* 42.

300 See Paasivirta 1997 *Hofstra Law and Policy Symposium* 42; Klabbers *Presumptive Personality* 242.

301 *Reparations for Injuries case* at 178-179.

302 Paasivirta 1997 *Hofstra Law and Policy Symposium* 43.

303 Klabbers *Presumptive Personality* 243.

organisations are able to act under international law.<sup>304</sup> This view is of course not without its basis, as the court emphatically stated in the *Reparations for Injuries* case that international personality is indispensable.<sup>305</sup> It should be pointed out that Klabbers does not deny the importance of legal personality in international law. What he however seems to be against is the use of legal personality as a normative concept.<sup>306</sup> Legal personality in his view

implies that some rights and duties rest upon that entity; it does not mean, however, that personality is a threshold requirement, without which such rights and duties simply cannot exist.<sup>307</sup>

Having virtually discredited both the will and the objective theory, Klabbers comes to the conclusion that a careful reading of the *Reparations for Injuries* case would reveal that there is nothing in the advisory opinion to support either the will or objective theory.<sup>308</sup> Instead, he argues, that the court presumed the legal personality of the UN, which, in his view, is more pragmatic than the other two approaches.<sup>309</sup> As it will be evident below, Klabber's presumption theory, does not seem to be much different from the implied theory.

#### 5.4.1.3 The implied theory

Though the constitutive document may be silent on the personality of an organisation, this theory argues that such personality can be implied from the functions and powers which the organisation is empowered to exercise on the international plane.<sup>310</sup> On the face of it, this theory seems to adopt the same approach as that advocated for by the objective theory. The two theories are not the same though. The objective theory looks at the structural or institutional arrangement of the organisation in order to determine whether it has legal personality. The implied theory on the other hand, looks at the functions and powers of the organisation. Paasivirta<sup>311</sup> lists the requirements of international

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304 Klabbers *Presumptive Personality* 243.

305 *Reparation for Injuries* case at 178.

306 Klabbers *Presumptive Personality* 243.

307 Klabbers *Presumptive Personality* 244.

308 Klabbers *Presumptive Personality* 245-246.

309 Klabbers *Introduction to International Institutional Law* 49.

310 Paasivirta 1997 *Hofstra Law and Policy Symposium* 43; Rama-Montaldo 1970 *British Yearbook of International Law* 114.

311 Paasivirta 1997 *Hofstra Law and Policy Symposium* 44.

personality as follows: (1) Legal personality must be indispensable for the performance of the objectives of the organisation; (2) The organisation must have its own organs and special tasks; and (3) The organisation must be distinct from its member states. In the case of the UN in the *Reparations for Injuries* case, the ICJ looked at a variety of functions the organisation was empowered to do. The court noted, *inter alia*, that the organisation had legal capacity and privileges and immunity in the territory of member states; that the organisation could conclude agreements with member states; and that the UN organisation is charged with important tasks, such as, the maintenance of peace and security, the development of friendly relations among nations and the achievement of international cooperation.<sup>312</sup>

#### 5.4.1.4 Presumptive theory of personality

The presumptive theory of personality is anchored in the notion that as soon as an organisation performs acts which can only be explained on the basis of personality, the legal personality of such an organisation will be presumed.<sup>313</sup> In the *Reparations for Injuries* case, for instance, the court was of the view that

[f]ifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with capacity to bring international claims.<sup>314</sup>

For Klabbers, the above text captures the essence of the presumptive theory. The basis of his argument is that while states had the power to create an entity possessing international personality, the court does not say whether states used that power. Instead, the court presumes that states have used that power.<sup>315</sup> While the presumptive theory sounds potentially convincing, the difficulty which Klabbers himself runs into is that he cannot account for the basis of the presumptive theory

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312 *Reparations for Injuries* case at 179

313 Klabbers *International Institutional Law* 49-50; Klabbers *Presumptive Personality* 243-253.

314 *Reparation for Injuries* case at 185.

315 Klabbers *International Institutional Law* 50; Klabbers *Presumptive Personality* 246.

in the *Reparations for Injuries* case.<sup>316</sup> In his attempt to explain what the presumptive theory entails, he falls back to the discussion of the implied theory of personality.

As it can be discerned from the discussion above, scholars make reference to different aspects of the decision of the ICJ in the *Reparations for Injuries* case to argue in favour of their own preferred theories of international legal personality. The choice of one theory over another does not have a bearing on what the organisation, which has been endowed with personality, can or cannot do. As Paasivirta asserts, once an organisation has international legal personality, it is able to assert rights and accept correlative duties on the international plane.<sup>317</sup>

Of importance to note though, is that the different theories point to how complex the question of legal personality of international organisations can be. In the case of the European Union for instance, the founders of the organisation chose not to confer legal personality on the organisation.<sup>318</sup> Despite this, some scholars have convincingly argued that the Union has international personality. Klabbers for instance, is of the view that the activities of the European Union can only be understood by presuming that the organisation has legal personality.<sup>319</sup> Wessel, on the other hand, bases his argument on the implied theory of personality to also arrive at the conclusion that the EU is an international person.<sup>320</sup> Wessel<sup>321</sup> reaches this conclusion after having considered a number of factors that accord with the criteria, set out above, for the implied theory. Firstly, the EU as an institution is identifiable, as the founders sought to create an association called the European Union. Secondly, the EU is an institution which is distinct from its members. Thirdly, despite there not being any provision that endows the EU with personality, an argument can be put forward to say that such personality is implied.

The position of the African Union (AU) is not any different from that of the European Union. Despite the fact that the Constitutive Act of the AU does not

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316 Klabbers *Presumptive Personality* 247.

317 Paasivirta 1997 *Hofstra Law and Policy Symposium* 45.

318 Paasivirta 1997 *Hofstra Law and Policy Symposium* 59.

319 Klabbers *Presumptive Personality* 231-253.

320 Wessel RA "The International legal status of the European Union" 1997 (2) *European Foreign Affairs Review* 109-129.

321 See Wessel 1997 *European Foreign Affairs Review* 113-129.

explicitly endow the organisation with international personality; its personality in international law is not contested. As discussed above, the fact that a constitutive document is silent on the legal personality of an organisation does not in itself negate the fact that such an organisation has legal personality in international law. Legal personality of international organisations vacillates between issues of law and fact. To make a determination on the question of legal personality requires a consideration of a number of factors some of which may be legal, while others may be factual. Relying on the work of Brownlie, Udombana, lists the criteria of personality for international organisations as: (1) a permanent association of states, (2) with a lawful object, (3) equipped with organs, (4) with a clear distinction in terms of powers and purposes between the organisation and its members.<sup>322</sup> The provisions of the Constitutive Act of the AU are silent on the legal personality of the organisation. Using the criteria above, Udombana<sup>323</sup> points out that the AU was, for instance, created to take up a myriad of challenges confronting the people on the African continent, to have an existence separate from that of the member states who created it, to have its own objectives independent from those of member states and to have organs through which it functions. According to Udombana, the totality of the factors above, read within the context of the statement of the ICJ in the *Reparations for Injuries* case that “[t]he Organisation must be deemed to have those powers which, though not expressly provided in the Charter [Act], are conferred upon it by necessary implication as being essential to the performance of its duties”,<sup>324</sup> point to the fact that the AU is indeed an international legal person.

Given the distinction between primary and secondary subjects of international law, it follows, at least according to the will theory, that the international legal personality of secondary subjects is dependent on the will of the original subjects from whom their personality is derived. Should original subjects decide to withdraw their bestowal of status, secondary subjects will lose their international legal personality.<sup>325</sup> This means that the concept of international personality is not rigid,

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322 Udombana 2002 *California Western International Law Journal* 82.

323 Udombana 2002 *California Western International Law Journal* 82-83.

324 *Reparations for Injuries* case at 182.

325 Cassese *International Law in a Divided World* 76-77.

especially in as far as secondary subjects of international law is concerned.<sup>326</sup> As was pointed out earlier, international law has developed in scope and content over the years. As one of the basic principles of international law, the concept of international legal personality has been part of the international law evolution. In lieu of this evolution, and given the fact that international law does not have a closed list of subjects it becomes important to constantly enquire on the possibilities of expanding the list of subjects of international particularly in the wake of the changing dynamics in international relations. NGOs constitute a category of influential international players whose status in international law is still in the process of evolution.

## **6 TOWARDS THE INTERNATIONAL LEGAL PERSONALITY OF NGOs IN INTERNATIONAL LAW?**

International organisations are not the same as international non-governmental organisations (NGOs). The former are bodies created by states and their membership consists mainly or entirely of states.<sup>327</sup> The latter are also international in operation and in certain instances perform functions traditionally reserved for states. Unlike international organisations, NGOs are private bodies not formed by states, but by private interest groups. Some NGOs even have states as their members, while others are composed of individuals who are themselves public officials.<sup>328</sup>

The legal personality of NGOs in municipal law is not contested. In actual fact, NGOs are formed, operate and are even dissolved pursuant to the provisions of municipal laws. Broadly categorised, NGOs are of two kinds. First, there are those that are local in operation and scope, and therefore do not pose any challenge to the international legal system. These NGOs are only content to confine their activities within the territorial borders of the state under which they have legal personality. The only contact that these domestically-based NGOs have with international law is indirectly through the state under which they have been constituted. The challenge to the international legal system comes from the

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326 Jägers *Legal Status of Multinational Corporation under International Law* 262.

327 Bekker *The Legal Position of International Organisations* 39-40.

328 See Charnovitz S "Nongovernmental organizations and international law" 2006 (100) *American Journal of International Law* 351-352.

second kind of NGOs, whose operations are international. Vested only with legal personality under municipal law, these NGOs operate beyond the territorial borders of the state of their origin. These international NGOs participate directly in international affairs without the mediation of their home states.<sup>329</sup>

As a result of globalisation, the world has become so interconnected that it is increasingly becoming difficult to identify purely domestically-based issues. The divide between what is domestic and international is thus becoming increasingly blurred. Even locally-based NGOs can rally international support that can result in a local issue being taken up by the international civil society. Conversely, the world has also become a global village to an extent that decisions that are reached at international fora, such as the World Trade Organisation, the UN and the World Economic Forum, now have an impact on policy decisions of states at a national level. NGOs have adapted to these changes so as to continue having an influence on both domestic and international decision-making levels.<sup>330</sup> Whether local or international in operation, the activities of NGOs are wide and varied. Of interest to note is that these NGOs have developed expertise in areas that traditionally used to fall within the competence of sovereign states.

While the legal personality of NGOs in municipal law is not contested, it is under international law that the role of NGOs is contested and therefore a subject of great debate.<sup>331</sup> NGOs do not have international legal personality and are therefore not accountable under international law. Procedurally though, as it will be discussed below, NGOs have access to certain regional human rights bodies. This creates an anomalous situation in that under the international legal system, NGOs do have some rights but do not have duties under the same legal system. It is this lack of accountability that has raised concerns about the activities of NGOs on the international plane. While critics do not have a problem with NGOs exerting pressure within states, concerns have been raised about NGOs being allowed to exert pressure on the international plane.<sup>332</sup> Despite their lack of international

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329 Spiro P "New Players on the international stage" 1997 (2) *Hofstra Law and Policy Symposium* 1.

330 Nowrot K "Legal consequences of globalisation: The status of non-governmental organisations under international law" 1999 (6) *Indiana Journal of Global Legal Studies* 587.

331 Charnovitz 2006 *American Journal of International Law* 351.

332 Kamminga MT "The Evolving Status of NGOs under International Law: A Threat to the Inter-state System?" in Kreijen G (ed) *State, Sovereignty and International Governance* (Oxford



personality, NGOs have made a significant contribution in the development of international law. As Charnovits points out, they have contributed to the “development, interpretation, judicial application, and enforcement of international law”.<sup>333</sup>

On its part, international law does not have a definition of NGOs. In the absence of international law definition, the work of scholars in this regard may be instructive. Charnovits defines NGOs as

groups of persons or societies, freely created by private initiative, that pursue an interest in matters that cross or transcend national borders and are not profit seeking.<sup>334</sup>

Nowrot similarly defines NGOs as

privately founded organisations that pursue primarily non-profit-oriented public interest objectives on a transnational basis in accordance with a general respect for the rule of law.<sup>335</sup>

Kamminga, on the other hand, does not commit himself to a definition, but instead puts forward an approach that explains what NGOs are not *vis-a-vis* state entities.<sup>336</sup> This is so, because to say that an organisation is an NGO is to describe what it is not in relation to a government organisation.

It is apparent from the descriptions above that there is no exhaustive definition of the phenomenon, called NGOs. Common features can however be identified in that NGOs are private initiatives, not designed to make profit and aimed at pursuing a common initiative or purpose. The means employed to reach their goals vary from one NGO to another.

Within the UN system NGOs have a consultative status. In this regard the UN Charter states that:

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University Press Oxford 2002) 388.

333 Charnovitz 2006 *American Journal of International Law* 352.

334 Charnovitz 2006 *American Journal of International Law* 350.

335 Nowrot 1999 *Indiana Journal of Global Legal Studies* 620.

336 Kamminga *The Evolving Status of NGOs under International Law* 390.

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence.<sup>337</sup>

As it has become apparent throughout this study, the concept of international legal personality serves as a dividing line between entities that are included in the international legal system and those that are not. The role of NGOs on the international scene is on the rise. In addition to having a consultative status within the UN system, NGOs have also played a pivotal role in setting the human rights agenda.<sup>338</sup> Based on the active participation of NGOs within the UN system and the rights and duties they enjoy therein, some scholars are of the view that NGOs have already gained international legal personality.<sup>339</sup> In this regard, Nijman advocates for an approach to the concept of international legal personality that is inclusive of NGOs and MNCs. In her view, such an approach will make the international legal system to be legitimate and just.<sup>340</sup>

The question of the international legal personality of NGOs is still not settled. Interesting views have emerged in this regard. On the one side of the spectrum there are those scholars who are of the view that NGOs should not be granted international legal personality. To these scholars, NGOs function better on the international scene without international personality and are therefore free to define their role unconstrained by law.<sup>341</sup> On the other side of the spectrum, are those scholars who insist on the need to provide a global legal framework for creating mechanisms for accountability through which NGOs can be held accountable.<sup>342</sup>

Attempts to grant NGOs international personality go as far back as 1910.<sup>343</sup> To date there is still no coherently formulated international position on the international legal personality of NGOs. Within the human rights sphere, regional

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337 Article 71 of the UN Charter.

338 See Mutua 2007 *Human Rights Quarterly* 589–604.

339 See Nijman *The Concept of International Legal Personality* 405.

340 Nijman *The Concept of International Legal Personality* 406.

341 Nowrot 1999 *Indiana Journal of Global Legal Studies* 580.

342 Nowrot 1999 *Indiana Journal of Global Legal Studies* 580; Kamminga *The Evolving Status of NGOs under International Law* 388.

343 Charnovitz 2006 *American Journal of International Law* 356; Nowrot 1999 *Indiana Journal of Global Legal Studies* 623.

bodies have formulated their own positions that grant NGOs procedural access to human rights bodies. The African Commission on Human and Peoples' Rights, for instance, can receive communications from states as well as "other communications".<sup>344</sup> This means that in as far as the protection of human rights is concerned; NGOs are on the same level as states and individuals, albeit at the procedural level only.<sup>345</sup> NGOs with observer status before the Commission may be granted direct access before the African Human Rights Court.<sup>346</sup> The American Convention on Human Rights affords "any person or group of persons, or any nongovernmental" procedural access to petition the Commission.<sup>347</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms may receive petitions from "any person, non-governmental organisation or group of individuals".<sup>348</sup>

What has become apparent from the foregoing discussion is that unlike in municipal law, there is no *a priori* claim to international legal personality in international law. International legal personality requires factual participation in the international system and some form of community acceptance.<sup>349</sup> Recognition is the medium through which states express their acceptance of a new entity as having international legal personality, whether limited or not. It is axiomatic that factually, NGOs do participate in the international legal system. While it is fairly easy to determine the factual participation of NGOs in the international system, the situation is a bit different with determining community acceptance. States, on an individual and collective level, have not communicated a clear message in this regard either. It can therefore be concluded that the question of the international legal personality of NGOs cannot, at least for now, be answered with certainty. What is clear at this stage, though, is that international law does not have rules that proscribe the granting of international legal personality to NGOs.

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344 See articles 55 – 57 of the African Charter.

345 Udombana NJ "So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights" 2003 (97) *American Journal of International Law* 2.

346 Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004) full text in Heyns and Killander *Compendium of Key Human Rights Documents* 35 – 41.

347 Article 44 of the American Convention on Human Rights.

348 Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

349 Nowrot 1999 *Indiana Journal of Global Legal Studies* 621.

In summary, despite the important role played by the concept of international legal personality, international law does not have generally set criteria to determine how this is acquired and under what circumstances. There seems to be some set criteria, but these apply only to entities seeking to become states. As discussed above, insurgents need to manifest state-like features so as to be afforded limited personality in international law. This chapter has however demonstrated that even in the case of primary subjects, states, the fact that an entity has met all the necessary requirements for statehood is itself not necessarily enough. In terms of the constitutive theory, such an entity will still need to be recognised first. Recognition revolves mainly around the will and consent of states. Recognition, as discussed, has proven to be too controversial a concept and has not in any meaningful way resolved the problem of legal personality in international law. The concept of recognition gets even more controversial and complex when it relates to insurgents. This is so because states may not be readily willing to recognise entities that contest both their sovereignty and territorial integrity.

Notwithstanding the controversies and debates, it has further been argued that international law does not have a closed list of subjects and its horizontal evolution to include a limited number of non-state actors bears credence to this fact. Instead, international law has a mix of subjects with limited international personality made up of insurgents, individuals and international organisations. The difficulty, however, is that given its decentralised nature, international law, unlike municipal law, does not have a central authority that determines who its subjects are. How each of these acquires its international legal personality varies from one entity to the other. In the absence of set rules, the theoretical basis on how the legal system has evolved to accommodate new subjects has to a large degree been driven by legal scholars assessing the needs of the international community.<sup>350</sup> As lawmakers in international law, states have the discretion to decide how they want to respond to the challenges brought forth by international life. Even in this regard, there is no indication of which factors must first prevail for states to decide as such. It is therefore not clear as to whether non-state entities should passively wait for states to confer personality on them, or whether they

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350 Clapham *Human Rights Obligations* 70-71.

must exert themselves and demand their personality against the state?<sup>351</sup> State practice does not reveal any consistent approach with regard to the different subjects of international law. Furthermore, international law does not have set criteria against which to measure non-state entities seeking to acquire international legal personality. In the absence of such set criteria, international legal personality is discussed within a highly contested conceptual space.<sup>352</sup>

Controversial and contested as it may be, the concept of international legal personality remains important for the legal existence of an entity within the international legal system. In light of the evolution of international law to include non-state actors, Clapham<sup>353</sup> aptly asks:

If individuals are to be deemed subjects of international with legal personality, why not non-governmental organisations? And if we add non-governmental organisations, why not transnational corporations?

Drawing from the discussion in this chapter, the next sub-section seeks to conceptualise a theory of the international legal personality for MNCs in international law.

## **7 CONCEPTUALISING THE INTERNATIONAL LEGAL PERSONALITY OF MNCs IN INTERNATIONAL LAW**

The very idea of attributing international legal personality to non-state actors is itself conceptually problematic. For instance, it is not clear as to whether non-state actors have legal personality similar to that of states or personality which is different from that of states. What is clear though, is that there are varying degrees to the concept of legal personality in international law.<sup>354</sup> In this regard, non-state actors have been referred to as ancillary subjects,<sup>355</sup> as having a pseudo legal personality,<sup>356</sup> and as secondary subjects of international law.<sup>357</sup> What is not clear

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351 Hickey Jnr JE "The source of international legal personality in the 21st Century" 1997 (2) *Hoefstra Law and Policy Symposium* 18.

352 Charney 1983 *Duke Law Journal* 774.

353 Clapham *Human Rights Obligations of Non-state Actors* 61.

354 Charney 1983 *Duke Law Journal* 774-775.

355 See Cassese *International Law in a Divided World* 77.

356 See Waschefort 2011 *South African Yearbook of International Law* 226-236.

357 Deva S "Human rights violations by multinational corporations and international law: Where from here?" 2003 (19) *Connecticut Journal of International Law* 50.

though, is whether the different degrees of personality have a bearing on whether the legal personality of the different entities should be differentiated *vis-à-vis* that of the state. Those who argue for a differentiated approach base their argument on the unique role played by states in the legal system. Only states they argue “can enforce those laws that create other entities and they can delegate their law-making authority and grant personhood to other bodies”.<sup>358</sup> Scholars opposed to this view argue on the basis of the sameness of legal subjects in the legal system. For them, there is no basis for a differentiated approach. Acquaviva, for instance, holds the view that other than territory and population, no other differentiation is warranted with regard to states and other subjects of international law.<sup>359</sup> Without disregarding Acquaviva’s concern, it is important to note that conceptually and practically, the primacy of the role of states in the legal system cannot be overlooked. States determine the existence of other subjects of the legal system and also serve as a yardstick against which other entities are measured in order to participate within the legal system. Insurgents provide a good illustration of this point. With the exception of the individual, non-state entities that have been considered subjects of the legal system are those that have exhibited or performed state-like functions in international law.

An equally contested question in international law is whether international law has evolved so as to confer legal personality on MNCs.<sup>360</sup> A compounding factor for this is that the determination of whom the subjects of international law are and the content of legal personality so conferred can be done with reference to a broad range of factors. Such factors, as the foregoing discussion has illustrated, vary from one entity to another. For instance, factors that were considered for the international legal personality of a state are not the same as those for international organisations, the individual or insurgents. Conceptualising the concept of international personality in international law is conducted on shifting grounds and encompasses factors ranging from the sources of the legal system, legal theory and the needs of the international community. There is however no coherent

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358 Gatto A *Multinational Enterprises and Human Rights: Obligations under EU Law and International Law* (Edward Elgar Cheltenham 2011) 50. See also Deva 2003 *Connecticut Journal of International Law* 50-51 who argues that, unlike states, MNCs do not enjoy privileges and immunities from national jurisdiction as a sovereign entity.

359 Acquaviva 2005 *Vanderbilt Journal of Transnational Law* 384.

360 See Duruigbo 2008 *Northwestern Journal of International Human Rights* 223-224; Clapham *Human Rights Obligations of Non-State Actors* 76-80.

approach that consolidates these arguments. Precisely which of the factors are determinative of international personality is not yet resolved.

Notwithstanding the debates and the challenges, the concept of the international legal personality holds a key towards addressing some of the challenges of holding MNCs accountable in international law. Hansen<sup>361</sup> enumerates three advantages that arise from granting international legal personality to MNCs as follows: Firstly, granting MNC international legal personality will enable them to enter the international legal system on a conceptual level and therefore create a potential for the legal system to regulate them. Secondly, it will enable the legal system to set a benchmark of non-optional conduct for MNCs that can be enforced by the state and public pressure. Granted, MNCs are not states and cannot have full international legal personality in international law.<sup>362</sup> In this regard, this study is of the view that, conceptually, MNCs have international personality analogous to that of individuals under international law.<sup>363</sup> The call to grant international legal personality to corporations under international law has been made before.<sup>364</sup> What is different and controversial is the basis for granting such personality to corporations. Inevitably, not having full international legal personality limits the scope of activities that an entity can and cannot perform. In the case of international organisations, as Walters points out, their rights and duties are confined to what is outlined within the founding documents.<sup>365</sup> MNCs are not international organisations and international law has no bearing on their founding documents.

## **7.1 The basis for the international personality of MNCs in international law**

### 7.1.1 Source-based analysis

Legal personality may be conferred in a number of ways. It may be done through some discernible legal principle, a municipal law statute, an international

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361 Hansen 2012 *Globalist* 78.

362 Walter *Subjects of International Law* para 23.

363 For a discussion of the international legal personality of the individual see 5.3 above.

364 See Clapham A "The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court" in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 189.

365 Walter *Subjects of International Law* 23.

instrument, such as a treaty, or by acquiescence.<sup>366</sup> Under municipal law the rights and duties of a corporation are set out in its constituent document and regulated by means of legislation. In the event that there are doubts about the legal personality of an entity, a certificate of incorporation can serve as evidence.

The situation is not only different with regard to international legal personality, but is also more complex. A positivistic conception of international law teaches that state sovereignty and consent are the two pillars of international law.<sup>367</sup> In this regard state action is important to confer legal personality.<sup>368</sup> If we argue that MNCs have personality in international law, then theirs would be a state-granted international legal personality.<sup>369</sup> A difficulty though is that states do not always make their consent explicit which then makes it very difficult to argue for a source-based analysis of international personality. Further, there is little agreement among scholars on the essential elements of legal personality.<sup>370</sup> In this case the approach of the court in the *Reparations for the Injuries* case becomes instructive.

The *Reparations for the Injuries* case has made it clear that a subject of international law is an entity capable of possessing international rights and duties, and has capacity to maintain its rights by bringing international claims.<sup>371</sup> Such an entity, the court said, has international legal personality in international law. Based on the *Reparations for Injuries* case, there seems to be an emerging consensus among scholars, that an entity that has international personality has both the substantive rights and duties as well as procedural rights and duties under the legal system.<sup>372</sup> Though the ICJ was concerned with the advisory opinion before it, its exposition on the subject of international law with reference to the UN has influenced the subject-object debate. According to Okeke,<sup>373</sup> to be a subject of a

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366 Hickey 1997 *Hoefstra Law and Policy Symposium* 3.

367 Bederman 1995 *Virginia Journal of International Law* 280.

368 Walter *Subjects of International Law* para 26.

369 Hansen 2012 *Globalist* 8.

370 Charney *American Journal of International Law* 774.

371 *Reparations for Injuries* case at 179. While these factors may present themselves as consequences of international legal personality, they also serve as criteria for international legal personality.

372 Charney 1983 *Duke Law Journal* 775.

373 Okeke CN *Controversial subjects of contemporary International Law* (Rotterdam University Press Rotterdam 1973) 19. See also Duruigbo 2008 *Northwestern Journal of International Human Rights Law* 233; Jägers *Legal Status of Multinational Corporation under International Law* 261; Černic JL "Corporate human rights obligations at the international level" 2008 (16) *Willametter Journal of International Law and Dispute Resolution* 152-153.



system of law is dependent on the following essential elements: (1) a subject of law has duties, thereby incurring responsibilities for any behaviour which is at odds with what the legal system requires; (2) a subject can claim rights under the legal system; and (3) a subject of law possesses capacity to legally interact with other subjects of a given legal system.<sup>374</sup> The extent of this legal interaction, as he points out, will vary depending on the nature of the entity concerned. What is not clear though is whether all three elements must simultaneously be present in order for an entity to have international legal personality.<sup>375</sup> This study is of the view that in light of the definitions of the concept of international legal personality considered thus far, all three elements must be satisfied before an entity can be considered to be a subject of international law. Consequently, it becomes important to ascertain whether MNCs do meet the three requirements.

#### 7.1.2 Duties of MNCs under international law

Part of the debate and the controversy around the notion of the international legal personality is conceptual.<sup>376</sup> As was pointed out earlier, according to the positivistic conception of international law, state consent plays an important role in international law. Despite the importance of consent, the rules of customary international law dictate that certain actions are prohibited and constitute violations of international law, even if a state has not consented to such rules. Though most of the agreements dealing with such rules are addressed to states, it is clear that such rules also apply to individuals and corporations alike.<sup>377</sup> As indicated earlier, some authors argue that MNCs do have obligations under customary international law. One of the self-explanatory rights that corporations have an obligation to respect is the right to life. This is so because the right to life is recognized as a customary law right which as Kinley and Tadaki point out, has achieved the status of *jus cogens*.<sup>378</sup> Customary international law further prohibits genocide, slavery and slave trade, torture, apartheid, piracy, crimes against humanity, among others.

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374 See also Černic 2008 *Willametter Journal of International Law and Dispute Resolution* 152 where the author points out that the definition of international personality consists of three elements: legal subjectivity, legal capacity, and *locus standi*.

375 Černic 2008 *Willametter Journal of International Law and Dispute Resolution* 152.

376 Duruigbo 2008 *Northwestern University Journal of International Human Rights* 252.

377 Stephens B "The amorality of profit: Transnational corporations and human rights" 2002 (20) *Berkeley Journal of International Law* 71.

378 Kinley and Tadaki 2004 *Virginia Journal of International Law* 970.

It may be argued that MNCs have an obligation to respect these. Like individuals under international law, corporations are thus prohibited from violating these rights that fall under *jus cogens*.<sup>379</sup> Conceptually, this argument becomes easy to sustain only if one accepts that MNCs have some international legal personality under international law.

### 7.1.3 Rights of MNCs under international law

Under municipal laws, corporations are entities recognized by law and therefore have certain rights that flow from that. As discussed earlier, international law regards corporations as nationals of a state. As a national of a state, an MNC enjoys rights under international law. In light of the assertion by Henkin above, it follows that if MNCs have obligations under the UDHR, they should also enjoy rights under it. Under the UDHR, MNCs enjoy rights that are in as far as it is practically possible applicable to them. For instance, those rights that relate to life, freedom and security of a person and torture might not be applicable to a corporation.<sup>380</sup> As for the rest, corporations enjoy the protection of all other rights enshrined in the UDHR. Some scholars have even argued that if corporations have rights, it therefore follows that they too can be victims of human rights violations.<sup>381</sup>

The main drivers of globalisation are corporations.<sup>382</sup> In a world which is fast globalising, MNCs have carved a niche for themselves particularly in areas such as trade and investment. In light of the global imperatives of privatization, deregulation and liberalization, states have given MNCs wide latitude within which they can pursue their business interest.<sup>383</sup> The practical effect of privatization, deregulation and liberalization is that MNCs operate within an environment where there is very little state intervention in their affairs. In addition, states have

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379 See the earlier discussion of the application of *jus cogens* norms to corporations in Chapter 2 of this study.

380 See Shaw *International Law* 283.

381 Addo MK "The Corporation as a Victim of Human Rights Violations" in Addo MK (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International The Hague 1999) 187-200.

382 Van den Herik L and Černič JL "Regulating Corporations under International Law: From human rights international criminal law and back again" 2010 (8) *Journal of International Criminal Justice* 725-726; Černič 2008 *Willamette Journal of International Law and Dispute Resolution* 132.

383 The Social Responsibility of Transnational Corporations UNCTAD available at: <http://unctad.org/en/docs/poiteiitm21.en.pdf> (accessed on 10 July 2012).

expressly given MNCs rights and duties which, to borrow from what the ICJ said in relation to the UN, can only be explained in terms of international legal personality.<sup>384</sup> The latter is a major development within a state-centric international law. In this regard Hansen writes that:

With little fanfare and scarce acknowledgement, a watershed change has occurred in public international law which has gained momentum especially during the past ten years. States have granted the capacity for international law rights to new global players, and such players have begun to exercise these rights in earnest. The majority of states have granted this capacity directly by signing and ratifying treaties to this effect. Others have silently acquiesced to the customary establishment of these new players' capacity for international law rights and claims.<sup>385</sup>

The legal rights of MNCs, particularly in relation to their activities in the area of investment and trade, have been on an increase in the recent past.<sup>386</sup> Hansen<sup>387</sup> lists these rights as: the right to national treatment; the right to most favoured national treatment; the right to fair and equitable treatment; the right to full protection and security; the right for compensation for expropriation; the right to free transfer of payments; and the right to state observance of their assumed obligations. This increase of rights has however raised a concern among some scholars that international law seems to emphasize rights of MNCs, as opposed to obligations.<sup>388</sup>

It is interesting to note that in as far as investment and trade is concerned, which is their domain, MNCs have asserted themselves and states have acceded to their demand by granting them rights that can only be explained in terms of international legal personality. In as far as their obligations for human rights is

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384 *Reparations for Injuries* case at 179.

385 Hansen 2012 *Globalist* 1.

386 Commission on Human Rights, "Protect, Respect and Remedy: A framework for Business and Human Rights", A/HRC/8/5 (7 April 2008) paragraph 12.

387 Hansen 2012 *Globalist* 22-29.

388 Kamminga MT "Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC" in Alston P, Bustelo M and Heenan J (eds) *The EU and Human Rights* (Oxford University Press Oxford 1999) 557; Jäger *Legal Status of Multinational Corporations under International Law* 264.

concerned, the situation is much different; MNCs have not asserted themselves in this regard with the same vigour.

#### 7.1.4 The capacity of MNCs to legally participate in international law

Arguments around capacity are two-fold. The first part relates to the fact that for the element of capacity to be satisfied, the organization must factually exist and therefore be identifiable.<sup>389</sup> In the case of MNCs, a cluster of corporate entities, albeit in a fragmented form at times, does exist either under one brand, a common seat of administration or a name. One of the consequences of legal personality under municipal law is that once incorporated, a corporation becomes a legal person and can, *inter alia*, sue or be sued and own property in its own name. This in effect means that, in as far as municipal law is concerned, such an entity exists. While a corporation does exist in municipal law, the clustered entity does not as yet have an identity in international law. A challenge for international law therefore is to conceptualise the clustered entity. The second aspect relates to procedural capacity to bring claims in appropriate institutions. The latter refers to “the capacity to have and to maintain certain rights, and being subject to perform certain duties”.<sup>390</sup> In recent times, there has been an establishment of various international dispute mechanisms internationally.<sup>391</sup> Some of which, as Jägers points out, have accorded MNCs with *locus standi* which, according to her, flows from international legal personality.<sup>392</sup>

## 8 CONCLUSION

Despite the important role played by the concept of international legal personality, international law does not have set criteria to determine how this is acquired and the circumstances under which it is acquired. There seems to be some criteria, but these apply only to entities seeking to become states. Even for states, the set criteria, as this chapter has illustrated, are not without their own challenges. It has further been argued that international law does not have a closed list of subjects and its horizontal evolution to include a limited number of non-state actors bears credence to this fact. The difficulty, however, is that given its decentralised nature,

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389 Green 2008 *Melbourne Journal of International Law* 72.

390 Shaw *International Law* 142.

391 The institutional mechanisms will be discussed in Chapter 5 of this study.

392 Jägers *Legal Status of Multinational Corporation under International Law* 266.

international law, unlike municipal law, does not have a central authority that determines who its subjects are. Furthermore, international law does not have set criteria against which to measure non-state entities seeking to acquire international legal personality. Even where there are some set criteria, as is the case with states, such criteria are challenged. From states, to non-state entities, the evolution of the concept of legal personality has been driven mainly by the vicissitudes of the international life, without following any set criteria. As lawmakers in international law, states have the discretion to decide how they want to respond to the challenges brought forth by the international life. Controversial and contested as it may be, the concept of international legal personality remains important for the legal existence of an entity within the international legal system. Culled from the *Reparations for the Injuries* case, scholars seem to be in agreement on what to look for in an entity that has legal personality in international law. An entity to be conferred with international legal personality must have capacity to act, and be able to have rights and duties under the international legal system. Measured against the three requirements above this study is of the view that MNCs do have some measure of international legal personality in international law.

## CHAPTER 5

### TOWARDS AN INSTITUTIONAL MECHANISM FOR MNC ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW

#### 1 INTRODUCTION

MNCs are a multifaceted phenomenon. Their different facets, particularly those that relate to their commercial activities such as tax, competition, trade and investments are regulated by a variety of national, regional and international instruments and institutions. A great concern for scholars though is the paucity of the regulatory framework for activities of MNCs in relation to human rights. Because of economic globalisation MNCs can move their capital, production plants, offices and personnel with relative ease across international borders. The very ability of MNCs to move across national borders exposes the weaknesses of the state-centric system of accountability which operates on the basis of territory and jurisdiction. Within the backdrop of this weakness, this study argues that conceptualising MNCs as having international legal personality has two advantages. Firstly, it creates prospects for narrowing the accountability gap that globalisation has created in relation to the extraterritorial activities of corporations. Secondly, it creates an opportunity for holding MNCs accountable in international law. For a state-centric legal system, the opening up of these possibilities inevitably requires a realignment of the existing rules and institutions. This then begs the question: In addition to domestic courts, should accountability of MNCs for human rights violations be located in any of the existing institutions, albeit with some readjustment, or does the international legal personality of MNCs in international law require a conceptualisation of a completely new institution? Further, what should the relationship of that institution be to the state which is the locus of accountability in international law?

This chapter will be presented in five subsections including the introduction. It would be recalled that in the opening chapter to this study, globalisation was listed as one of the factors that contribute towards the accountability deficit of MNCs within the state-centric system. It was remarked then that though not a legal concept, globalisation has legal ramifications. The first part of this chapter will present an overview of the possible legal responses to the challenges posed by

globalisation. The second section will seek to construct a theory of accountability in international law. It will be argued that given the ubiquitous operations of MNCs, an effective mechanism of MNC accountability in international law must be multidimensional. The third section will be a conceptualisation of the institutional mechanism to hold MNCs accountable for their human rights violations under international law. In the fourth section the study will discuss and evaluate the proposed model of accountability. This will be followed by a conclusion to the chapter.

## **2 LEGAL RESPONSES TO CHALLENGES BROUGHT BY GLOBALISATION**

In a strict sense, the human rights movement is a post Second World War phenomenon. This however does not mean that until then the international community was oblivious to international human rights issues. Like Shelton<sup>1</sup> has argued, if we agree that the abolition of the abhorrent slave trade was itself part of attempts to respond to globalisation, then responses to globalisation can be traced back to the nineteenth century.<sup>2</sup> It should also be noted that the industrial revolution with its flurry of transboundary economic activities was also followed by international attempts to improve working conditions and people's general standard of living.<sup>3</sup> Perhaps the post Second World War era marked the highest point of the achievement of the human rights movement, which is why it has received much coverage than earlier attempts.

Legal responses to the challenges posed by globalisation have followed mainly three trajectories, which Muchlinski<sup>4</sup> has categorized as follows: The revisionist approach to state and legal sovereignty, the supra-territorial legal approach and the legal pluralism in globalisation approach. The responses proffered by each of the approaches are informed by their view or analysis of the impact of globalisation on the current international legal system.

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1 Shelton D "Protecting human rights in a globalized world" 2002 (25) *Boston College International and Comparative Law Review* 280.

2 For a detailed discussion of the slave trade and the fight against it see Pete M and du Plessis M "International law and reparations for the Atlantic Slave Trade: A case study in legal obfuscation" 2006 (31) *South African Yearbook of International Law* 243-262.

3 Shelton 2002 *Boston College International and Comparative Law Review* 280.

4 Muchlinski PT "Globalisation and legal research" 2003 (37) *The International Lawyer* 221-240.

The revisionist approach to state and legal sovereignty (the revisionists),<sup>5</sup> is based on three assumptions of the impact of globalisation. Firstly, the revisionists see globalisation as having decentralised national law, thus unleashing two processes operating at the same time. Domestically, there has been an increased localisation of legal activity through principles of subsidiarity or devolution, and internationally there has been an increased delocalisation of legal activity through supranational regulation that has either direct or indirect bearing on legal rights and duties of national law.<sup>6</sup> The decentralisation process has had an impact on the distribution of sovereign power of the nation state and its legal authority.<sup>7</sup>

The second and third assumptions of the revisionists are based on the role of globalisation in the decentralisation of the nation-state. Historically the nation-state has been the locus of legitimacy and accountability and of democratic processes. Globalisation has, however, facilitated the rise to power of unaccountable and undemocratic entities such as NGOs, MNCs and international organisations. The rise in power of these non-state entities mean that human rights violations now emerge from an angle not originally contemplated by the human rights movement.<sup>8</sup> According to Muchlinski, privatisation of state functions, market liberalisation and deregulation have become the new economy. The revisionists are therefore concerned with holding these entities to account.<sup>9</sup> In light of the foregoing, the revisionists see human rights as being central to their project, so much so that some see human rights as being capable of creating a new global constitutional law capable of holding both states and non-state entities accountable.<sup>10</sup> If we attribute responsibilities to corporations in international law, then the basis upon which such responsibilities are attributed must be clearly articulated.<sup>11</sup> In this chapter it will be argued that human rights provide a point of convergence for

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5 Muchlinski 2003 *The International Lawyer* 229-230.

6 For more on the principle of subsidiarity see Meuwese A and Gomtsian S "Regulatory scrutiny and subsidiarity" 2015 (22) *Maastricht Journal of European and Comparative Law* 483-505; Marquardt PD "Subsidiarity and sovereignty in the European Union" 1994 (18) *Fordham International Law Journal* 616-640 and Mowbray A "Subsidiarity and the European Convention on Human Rights" 2015 (15) *Human Rights Law Review* 313-342.

7 Muchlinski 2003 *The International Lawyer* 230.

8 Shelton 2002 *Boston College International and Comparative Law Review* 279.

9 Muchlinski 2003 *The International Lawyer* 230.

10 Muchlinski 2003 *The International Lawyer* 230.

11 Ruggie JG "Business and human rights: The evolving international agenda" 2007 (101) *American Journal of International Law* 824 and Bilchitz D "Corporate law and the Constitution: Towards binding human rights responsibilities for corporations" 2019 (125) *South African Law Journal* 779.



international concepts, and therefore a good basis upon which to construct a theory of accountability under international law.

The second group advocates for the supra-territorial legal approach.<sup>12</sup> The work of Phillip Jessup<sup>13</sup> has played a major role in setting the foundations for this approach. The thesis of this approach is that in the event of a dispute involving an international transaction, regard should be given to a combination of national, regional, and international law sources governing the transaction in question and not just to a single legal system related to the transaction.<sup>14</sup> This approach has also been referred to as the new *lex mercatoria*, advocating for a system of settling disputes outside formal state laws.<sup>15</sup>

The third group advocates for legal pluralism as a response to globalisation. This group puts an emphasis on the simultaneous operation of more than one legal order on cross border transactions.<sup>16</sup> The approach proposes a variety of sites which would involve a “variety of institutions, norms and dispute resolution processes located and produced at different structured sites around the world”.<sup>17</sup> It is envisaged that these structured sites would have a constant interaction with each other and other global economic networks in creating a regulatory framework.<sup>18</sup> Kinley and Tadaki, for instance, having meticulously discussed the strengths and weaknesses of the United Nations, the World Bank, the World Trade Organisation and the International Labour Organisation as potential enforcers of human rights duties, conclude that “no single body can provide a comprehensive enforcement mechanism. Rather, the pursuit of enforcement must be targeted at the collective efforts of all institutions across their constituent fields, with each contributing their particular technical expertise and resources”.<sup>19</sup> Non-litigious approaches such as diplomacy, negotiations and sanctions would also add value

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12 Muchlinski 2003 *The International Lawyer* 233-235.

13 Jessup PC *Transnational Law* (Yale University Press New Haven 1956).

14 Muchlinski 2003 *The International Lawyer* 233.

15 Muchlinski 2003 *The International Lawyer* 234.

16 Muchlinski 2003 *The International Lawyer* 236.

17 Snyder F “Governing economic globalisation: Global legal pluralism and European law” 1999 (5) *European Law Journal* 342.

18 Muchlinski 2003 *The International Lawyer* 236-237.

19 Kinley D and Tadaki J “From talk to walk: The emergence of human rights responsibilities for corporations at international law” 2004 (44) *Virginia Journal of International Law* 1019.

according to this view.<sup>20</sup> Some aspects of this approach will be evident in the institutional mechanism proposed by this chapter.

From the above discussion, what is evident is that the state-centric system of accountability still has its place within the legal system. What is of importance to note is that none of the approaches above advocate for the abandonment of the traditional approaches of accountability through the state. In fact, Muchlinski cautions that it would be unwise to abandon the view that law is essentially a territorial phenomenon.<sup>21</sup> In this regard Kinley and Tadaki write that

[W]e do not suggest that international regulation of TNCs [MNCs] should substitute for state responsibility in controlling non-state actors within each state's jurisdiction. There is no doubt that governments have, and should have, primary responsibility for the protection of human rights. TNCs [MNCs] cannot, and ought not, replace governments in their roles as the chief guarantors of human rights.<sup>22</sup>

Attempts to hold MNCs accountable directly under international law are not aimed at displacing the state, but seek to create an environment where there are multiple bearers of responsibility and the state is one of them, not the only one.<sup>23</sup> A corollary to this is that the multiple bearers of responsibility should also be held to account for their own actions under the law.<sup>24</sup> The state continues to be the main role player in international law. Despite arguments that the state has been challenged as the centre of power, there is still evidence to indicate that the regulatory power of the state in certain matters is still strong.<sup>25</sup> The hefty fine of \$5.2 billion imposed by the Nigerian Communications Commission (NCC) on the South African company MTN in Nigeria illustrates this point.<sup>26</sup> The fine came

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20 Ratner SR "The International Criminal Court and the limits of global judicialization" 2003 (38) *Texas International Law Journal* 445.

21 Muchlinski 2003 *The International Lawyer* 237.

22 Kinley and Tadaki 2004 *Virginia Journal of International Law* 1021.

23 Deva S "Human rights violations by multinational corporations and international law: Where from here?" 2003 (19) *Connecticut Journal of International Law* 21.

24 Ratner SR "Corporations and human rights: A theory of legal responsibility" 2001 (111) *The Yale Law Journal* 472.

25 Muchlinski 2003 *The International Lawyer* 237.

26 Mohammed O "Nigeria says its record \$5.2 billion fine for MTN is about rule of law" available at: <http://qz.com/552557/nigeria-says-its-record-5-2-billion-fine-for-mtn-is-about-rule-of-law/>.

about as a result of the failure of MTN to cut off unregistered SIM cards, despite several warnings from the regulatory authority, the NCC. Of interest to note is that where there is a political will the state can assert its authority through its institutions, even against a company of the stature of MTN. The fine was subsequently reduced to \$3.4 billion.<sup>27</sup>

None of the international initiatives over the last four decades, including the now discarded Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms)<sup>28</sup> has ever proposed departing from the state as the locus of accountability. Generally, almost all of the approaches have followed the same state-centric paradigm and then proceeded to construct a theory of accountability. In this regard the OECD Guidelines for Multinational Enterprises states that

Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements.<sup>29</sup>

In this regard, the Ruggie mandate was very clear that its contribution “lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and business”.<sup>30</sup> This is not to say that these various initiatives are oblivious to the limitations of the state-centric nature of accountability. On the contrary, most of them depart from the basis that

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(accessed on 09 December 2016).

27 Osuagwu P “Why we reduced MTN’s N1.04trn fine—NCC” available at: <http://www.vanguardngr.com/2015/12/why-we-reduced-mtns-n1-04trn-fine-ncc-2/>. (accessed on 09 December 2015).

28 Commission on Human Rights, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights”, E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

29 “The OECD Guidelines for Multinational Enterprises” available at: <http://mneguidelines.oecd.org/2011Concepts&Principles.pdf> (accesses 28 December 2015).

30 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) at para 14 (Introduction to the Guiding Principles).

the state-centric legal system in its current form has its own limitations.<sup>31</sup> For instance, having acknowledged the existence of the possible multiple avenues to respond to the globalisation challenge, Shelton<sup>32</sup> puts forward two proposals: Firstly, she argues for an approach that would strengthen the state and insist on its responsibility to ensure that non-state actors do not commit human rights violations. In the alternative, she argues for an approach that would strengthen the weak states so that they can be in a position to protect human rights, while, at the same time, increasing the obligations of non-state actors through multilateral mechanisms.

By definition the conferment of MNCs with international legal personality inevitably means that corporations will have both rights and duties under the legal system. In any legal system, rights are of value if they can be claimed and enforced. Obligations too have meaning if they can be enforced following the rules of a legal system. One of the weaknesses of the state-centric system of accountability is what some scholars have called “the enforcement gap”.<sup>33</sup> The weak capacity to enforce its own decisions is one of the inherent limitations of the state-centric model of accountability under international law. About this limitation, Donoho writes:

The international system heavily relies upon the dubious promise that governments will faithfully implement international human rights standards within their own domestic systems and provide adequate domestic remedies to redress the violations. This reliance on voluntary compliance is theoretically bolstered by a network of international mechanisms and institutions that are, in reality anemic at best. Although not without exceptions, most international human rights institutions are generally limited to monitoring state compliance and promoting adherence to underdeveloped international standards through dialogue, condemnation, and moral suasion. Most of these

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31 See Deva 2003 *Connecticut Journal of International Law* 21.

32 Shelton 2002 *Boston College International and Comparative Law Review* 321-322.

33 Van den Herik L and Černič JL “Regulating corporations under international law: From human rights to international criminal law and back again (2010) 8 *Journal of International Criminal Justice* 726.

institutions suffer from limited or ambiguous decision-making authority and lack effective, independent enforcement mechanisms.<sup>34</sup>

Donoho further laments the fact that the state-centric system of accountability “leaves compliance largely within the discretion of the perpetrators”.<sup>35</sup> Interesting theories have been put forward on how to bridge the enforcement gap in international law generally, including the adoption of the criminal law enforcement model to enforce the rules of international law.<sup>36</sup> This proposal to adopt criminal law was dismissed by Lehman as demonstrating basic misconceptions of the nature of international relations and the nature of international law itself.<sup>37</sup> As discussed earlier, the voluntary codes of conduct of MNCs only work when corporations want them to work.<sup>38</sup> In the event that the state is unable or unwilling to act and the corporation in the same state disregards its own voluntary codes, victims of human rights violations are left with nowhere else to go. To this end Duruigbo writes that, “there is something wrong with a system that closes its eyes to obvious misbehaviour as states shirk their responsibility and corporations escape accountability”.<sup>39</sup> In this regard there is a need for the international legal system to conceptualise an institutional mechanism to directly hold MNCs accountable for their international operations.

The conceptualisation of MNCs as having international legal personality under international law provides an answer to only one aspect of the challenge to holding MNCs directly accountable under international law for human rights violations. By conceptualising MNCs as having international legal personality, the legal system is able to consider MNCs as one of its actors and therefore narrow the accountability gap. The fact that the legal system has a grip on MNCs though is only the first step

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34 Donoho D “Human rights enforcement in the twenty-first century” 2006 (35) *Georgia Journal of International and Comparative Law* 5.

35 Donoho 2006 *Georgia Journal of International and Comparative Law* 23.

36 See Koh HH “Why do nations obey international law? 1997 (106) *The Yale Law Journal* 2615 where reference is made to Clark G and Sohn LB *World Peace Through World Law* (Harvard University Press Cambridge 1958) who advocate for this view.

37 Lehman D “World Peace Through World Law, by G. Clark and L. B. Sohn. Harvard University Press, Cambridge, 1958. \$7.50” 1958 (19) *Louisiana Law Review* 239.

38 See Deva 2003 *Connecticut Journal of International Law* 17.

39 Duruigbo E “Corporate accountability and liability for international human rights abuses: Recent changes and recurring challenges” 2008 (6) *Northwestern Journal of International Human Rights* 521.

in holding them accountable under international law, the next hurdle relates to the construction of a theoretical basis for imposing direct human rights accountability for MNCs under international law. Inevitably a theory of accountability for human rights violations by MNCs under international law will have to make an attempt at bridging the conceptual gap that separates human rights related issues from issues that deal with economic policy and regulation.<sup>40</sup> Predictably, not all scholars agree on bridging this divide.<sup>41</sup>

### **3 TOWARDS A THEORY OF ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW**

The structure of MNCs and their ability to operate beyond the reach of both the domestic and international legal systems make it difficult to develop a comprehensive theory of accountability that covers all their different facets. Ratner is of the view that the route towards building a theory of accountability should take cognisance of decades of practice and doctrine about state and individual responsibility. Such a theory, he opines, would be able to recognise where decision-makers can apply principles of corporate responsibility and where they cannot.<sup>42</sup> In his view, such a theory would “turn on the similarity or differences between corporate behaviour in the area of human rights and individual or state behaviour”.<sup>43</sup> In a similar manner, this study is anchored on the similarities that have emerged over the years, particularly in relation to the terminology of accountability in international law. Despite the dissimilarities between states and non-state actors in international law, it is argued that the language of accountability in international law for both entities has a point at which it converges. The point of convergence provides a basis for constructing a theory of accountability. In the last fifty years, human rights have proven to be a good point of convergence to start from.

The state-centric model of international law has had an impact on the international protection of human rights. The concept of international human rights law arose in a context within which state power was at its zenith. As Charney recounts, nation-

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40 Shelton 2002 *Boston College International and Comparative Law Review* 280.

41 See Deva 2003 *Connecticut Journal of International Law* 1-19.

42 Ratner 2001 *The Yale Law Journal* 496.

43 Ratner 2001 *The Yale Law Journal* 496.

states held most of the political, economic, and military power.<sup>44</sup> It was an era in which the nation state “had the monopoly over violence and instruments of coercion”.<sup>45</sup> Despite this amassed power, there were no international law mechanisms to hold a state accountable for how it treated its own nationals within its territorial borders.<sup>46</sup> Other states could only intervene when the recalcitrant state had breached one of its international obligations as outlined by the rules of international law or violated peremptory norms. An obvious challenge with this approach was that, though equally worthy of protection, not all human rights violations fell within the ambit of state obligations as prescribed by the rules of the legal system. There was therefore a need to bridge the gap in as far as the protection of human rights was concerned.

The post Second World War developments, particularly the internationalisation of human rights through the adoption of the United Nations Charter<sup>47</sup> and the Universal Declaration of Human Rights,<sup>48</sup> brought about a shift to the human rights discourse.<sup>49</sup> Since the adoption of the UDHR, the relationship between a sovereign state and its nationals within its own borders became of interest to the international community. Despite being a milestone in the protection of human rights, even this latter development still had its own limitation in that it was state-centric. One major weakness was that the system did not have mechanisms to deal effectively with human rights violations that emanated from entities other than states. The extraterritorial operations of MNCs, discussed earlier, provide a good illustration of this point.

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44 Charney JI “Universal international law” 1993 (87) *American Journal of International Law* 759.

45 Mutua M “Standards setting in human rights: Critique and prognosis” 2007 (29) *Human Rights Quarterly* 550 and Deva 2003 *Connecticut Journal of International Law* 1.

46 For the concept of *domain reservè* see Reisman WM “Sovereignty and human rights in contemporary international law” 1990 (84) *American Journal of International Law* 869 and Ratner 2001 *The Yale Law Journal* 540.

47 United Nations, Charter of the United Nations, 1 UNTS XVI (1945), (entered into force 31 August 1965) (hereinafter the UN Charter).

48 The Universal Declaration of Human Rights, GAOR, 3d Sess., U.N. Doc A/810 (10 December 1948), (hereinafter the UDHR).

49 Henkin L “The Universal Declaration at 50 and the challenge of global markets” 1999 (25) *Brooklyn Journal of International Law* 21.

### 3.1 *The universality and primacy of human rights*

On 10 December 1948, the General Assembly of the United Nations set the international community on a human rights path when it proclaimed the UDHR Declaration. In a paper delivered to mark the fiftieth anniversary of this historic moment, Henkin refers to the UDHR as the “birth certificate” of the human rights movement. On the universality of the UDHR he writes, that “it is not a treaty among governments, it is a *declaration*; and it is *universal*, not international”.<sup>50</sup> This, in his view, means that human rights everywhere are the responsibility of everyone.<sup>51</sup> Though itself not a binding instrument, most of its provisions form part of customary international law.<sup>52</sup> It is beyond contest that the UDHR serves as an important point of reference in the international normative order.<sup>53</sup>

As the movement of goods, capital and people under the banner of globalisation increased, so did the need to ensure the promotion and protection of human rights, particularly by all international actors.<sup>54</sup> The understanding is that regardless of the context within which they operate, corporations too would play their role to promote the universal human rights standards.<sup>55</sup> In the Commentary to Principle One of the Global Compact, corporations are encouraged to “support the promotion of human rights within their sphere of influence”.<sup>56</sup> Since corporations can have an impact on a wide variety of rights, the rights they are expected to support and promote are the internationally recognised rights outlined in the international instruments.<sup>57</sup>

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50 Henkin 1999 *Brooklyn Journal of International Law* 20 (emphasis in the original).

51 Henkin 1999 *Brooklyn Journal of International Law* 21 (emphasis in the original).

52 See Van den Herik and Černič 2010 *Journal of International Criminal Justice* 734; Human Rights Council, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts”, A/HRC/4/35 (19 February 2007) at para 38 and also Kinley D and Tadaki 2004 (44) *Virginia Journal of International Law* 948-949.

53 Human Rights Council, “Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts”, A/HRC/4/35 (19 February 2007) at para 37.

54 Shelton 2002 *Boston College International and Comparative Law Review* 301.

55 Clapham A and Jerbi S “Categories of corporate complicity in human rights abuses” 2001 (24) *Hastings International and Comparative Law Review* 339.

56 “The Ten Principles of the UN Global Compact” available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1> (accessed on 28 June 2015).

57 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) at para 12 (Introduction to the Guiding Principles).



A point of concern raised by scholars though, is that human rights instruments like the UNDHR do not give guidance as to who of the different actors is obligated to ensure the enforcement and implementation of the rights promulgated by the instruments.<sup>58</sup> Bilchitz however, does not seem to be perturbed by this. In his view, it is the very nature and logic of human rights to allow for some flexibility in determining the obligations that flow from such instruments.<sup>59</sup> Nickel is of the view that for the human rights system to function optimally there has to be a division of labour as to who is responsible for what.<sup>60</sup> How this division of responsibility should take place and what the basis for such a division should be has been at the heart of the debate on business and human rights.

Historically, the division of responsibility was allocated in a predictable fashion that followed the international divide between the private and the public spheres.<sup>61</sup> According to this division, human rights became of great concern in the public sphere and thus did not get much attention in the private sphere, particularly in relation to the activities of corporations. In relation to MNCs, as Muchlinski points out, the argument was that corporations are in business and therefore have a responsibility to make profit for their shareholders.<sup>62</sup> To the dismay of Deva, the profit motif has even been put forward as the reason why corporations should respect human rights so that they can have a competitive edge over their competitors.<sup>63</sup> The second argument was that MNCs do not have positive duties to observe human rights.<sup>64</sup> In this regard, the Draft Norms sought to bridge this historic divide by transposing the same human rights obligations of states and imposing them on corporations. Inevitably, this led to a divisive debate that

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58 Nickel JW "How human rights generate duties to protect and provide" 1993 (15) *Human Rights Quarterly* 77.

59 Bilchitz D "A Chasm Between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles" in Deva S and Bilchitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 108.

60 Nickel 1993 *Human Rights Quarterly* 77–78.

61 Shelton D "Protecting human rights in a globalized world" 2002 (25) *Boston College International and Comparative Law Review* 280; Miranda LA "The hybrid state-corporate enterprise and violations of indigenous land rights: Theorizing corporate responsibility and accountability in international law" 2007 (11) *Lewis and Clarke Law Review* 162.

62 Muchlinski PT *Multinational Enterprises and the Law* 2nd Ed (Oxford University Press Oxford 2007) 515.

63 Deva 2003 *Connecticut Journal of International Law* 19.

64 Muchlinski *Multinational Enterprises and the Law* 515.

resulted in the abandonment of the Draft Norms.<sup>65</sup> The much debated Ruggie mandate was successful partly because it continued to allocate duties in line with the historic divisions alluded to above.<sup>66</sup> For this, the mandate has been criticised for perpetuating “an unhelpful competitive conception of the respective responsibilities of business and the state, rather than a collaborative one that is more likely to lead to the successful realisation of human rights”.<sup>67</sup>

Inherently, corporations and states are not the same. Each is designed and intended to serve a different societal purpose and function.<sup>68</sup> This, however, does not mean that the two cannot collaborate where there is a need to.<sup>69</sup> A conundrum emerges, however, in that in the era of globalisation a theory of accountability that does not allocate human rights obligations to corporations will always be inherently inadequate. Equally, a theory that transfers state obligations to corporations will not be acceptable. Striking a balance between the two becomes crucial.

The human rights theory provides a good point of convergence from which to construct a theory of accountability. This is so because the international community has set a threshold of human rights which both states and non-states alike cannot violate. These encompass gross violations of human rights. It is axiomatic that human rights are rights which human beings are entitled to simply because they are human.<sup>70</sup> The universality of human rights in this regard stems from the fact that the rights are held universally by human beings simply because they are human.<sup>71</sup> As Tasioulas writes, “human rights are moral rights, possessed by all human beings, simply in virtue of their humanity”.<sup>72</sup> The very notion that

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65 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) at para 3 (Introduction to the Guiding Principles).

66 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) at para 6 (Introduction to the Guiding Principles).

67 Blichitz *A Chasm Between ‘Is’ and ‘Ought’?* 108.

68 Kinley D and Tadaki J “From talk to walk: The emergence of human rights responsibilities for corporations at international law” 2004 (44) *Virginia Journal of International Law* 961.

69 For a detailed discussion of the public-private partnerships see Aziz D “Global public-private partnerships in International Law” 2012 (2) *Asian Journal of International Law* 339-374.

70 See Blichitz *A Chasm Between ‘Is’ and ‘Ought’?* 112-13 and Donnelly J “The relative universality of human rights” 2007 (29) *Human Rights Quarterly* 282.

71 Donnelly 2007 *Human Rights Quarterly* 283; Abioye F and Mnyongani F “Governance, human rights and the public sphere in Africa: The case of Zimbabwe” 2009 (3) *Malawi Law Journal* 186.

72 Tasioulas J “Human rights, legitimacy and international law” 2013 (58) *The American Journal of Jurisprudence* 2.

human rights are universal is itself contested.<sup>73</sup> Donnelly makes a good delineation of what is contested and what is not.<sup>74</sup> One of the points he raises is that the notion that human rights are universally held by human beings because they are human is not contested. What is contested is the notion of the universal enforcement of such universally held rights. A salient point he raises, which also underscores the point made in this study, is that enforcement of internationally held human rights is left to nation states. In this regard he writes that, “the implementation and enforcement of universally held human rights thus is extremely relative, largely a function of where one has the (good or bad) fortune to live”.<sup>75</sup> The argument advanced in this study is that in the era of globalisation, there is a need to have universal and binding standards against which MNCs can measure their conduct. If we agree with the proposition put forward by Henkin that human rights everywhere are the responsibility of everyone, then violators of human rights anywhere should be held to account. How they should account is what will be addressed below.

### **3.2 The obligatory nature of human rights**

The various international efforts to sensitise corporations to issues of human rights suffer from two inherent weaknesses, namely, they are voluntary and are not measured against any universally agreed to standards. Having acknowledged the role voluntary mechanisms have played in the debate over business and human rights, Bilchitz advances three arguments against the non-binding codes of conduct.<sup>76</sup> Firstly, he finds the notion that human rights protection can be assumed voluntarily to be “fundamentally flawed”. The core of his argument is that the logic of human rights implies that others have a duty not to violate those rights. The very language of duties implies obligations, not choice. His second concern relates to

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73 This is evident in the debate between the competing ideologies of universalism and cultural relativism. See in this regard Donnelly 2007 *Human Rights Quarterly* 281–306; Reza A “Relativity in universality: Jack Donnelly’s grand theory in need of specific illustrations” 2014 (37) *Human Rights Quarterly* 854-912, Matshekga JN “Quo vadis? A discussion of the universalism-relativism debate in the light of male circumcision in South Africa” 2003 (18) *South African Public Law* 393-403.

74 Donnelly 2007 *Human Rights Quarterly* 281-306.

75 Donnelly 2007 *Human Rights Quarterly* 283. See also Duke J “Enforcement of human rights on multi-national corporations: Global climate, strategies and trends for compliance” 2000 (28) *Denver Journal of International Law and Policy* 359 where the author writes that, “[w]hile many countries have signed the Convention Against Torture, it is not widely recognised as a crime in their national penal codes, thus is rarely enforced”.

76 Bilchitz 2019 *South African Law Journal* 760-761.

the vagueness of the content of the norms imposed on corporations. This is a view shared by Deva who writes that there is no consensus on the applicable human rights standards to apply to MNCs, and where there is some agreement, such standards are either vague or generic.<sup>77</sup> In this regard, Bilchitz is of the view that there is an urgent need for the clarification of the norms applicable to corporations. His third concern relates to the monitoring and enforcement of the voluntary codes of conduct. The very notion that companies are left to monitor their own activities raises questions of credibility and objectivity. Bilchitz then goes on to state that: “If corporations have responsibilities for human rights protection, then effective mechanisms need to be developed to ensure that they comply with their duties”.<sup>78</sup> In this regard, Duke is of the view that there is a need for an independent body to ensure adherence to standards and regulations.<sup>79</sup>

In the absence of consensus on applicable standards, various versions and sometimes even contradictory approaches have been put forward. The discussion on the status of the now discarded Draft Norms in international law provides a good illustration of contradictory views among scholars.<sup>80</sup> Important as the Ruggie mandate is to the debate, it too did not take the debate any further in this regard. Instead, to the dismay of many human rights activists,<sup>81</sup> the second leg of the mandate revolves around the “corporate responsibility to respect human rights because it is the basic expectation society has of business”.<sup>82</sup> To pin the responsibility of business to respect human rights on social expectations does not provide a clear guidance as to whether corporations also do have positive obligations to respect human rights.<sup>83</sup> There is therefore a dire need to properly conceptualise the obligations of corporations in relation to human rights. In this

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77 Deva 2003 *Connecticut Journal of International Law* 18.

78 Blichitz 2010 *South African Law Journal* 761.

79 Duke J “Enforcement of human rights on multi-national corporations: Global climate, strategies and trends for compliance” 2000 (28) *Denver Journal of International Law and Policy* 363.

80 See Ruggie 2007 *American Journal of International Law* 819, and Weissbrodt D “International standard-setting on human rights responsibilities of business” 2008 (26) *Berkeley Journal of International Law* 373 – 391.

81 Jägers N “Will Transnational Private Regulation close the Governance Gap?” in Deva S and Blichitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 298.

82 See Commission on Human Rights, “Protect, Respect and Remedy: A framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 9.

83 Bilchitz D and Deva S “The Human Rights Obligations of Business: A critical Framework for the Future” in Deva S and Blichitz D (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press Cambridge 2013) 3.

regard, this study is of the view that accepting the international legal personality of MNCs and prioritising the primacy of human rights make the need to consider outlining business human rights a necessary imperative. Given the omnipresence of MNCs, such human rights standards should be binding on corporations and must be articulated in international law. If such standards are binding, then there will be a need to reconceptualise the rules so that the international legal system can be able to directly enforce them against corporations. As the preceding chapters have pointed out, conceptually, philosophical, theoretically and legally there is nothing that prevents states from extending the rules of international law to cover corporations.

## **4 TOWARDS AN INSTITUTIONAL MECHANISM OF ACCOUNTABILITY**

### **4.1 *An overview of the status quo and the debates***

International law is replete with institutions of accountability.<sup>84</sup> Given the decentralised nature of the legal system, the different institutions of accountability vary according to their mandate and area of specialisation. For instance, the early international law institutional mechanisms of accountability were created at the time when state sovereignty was at its prime. In this regard, the institutions were mainly empowered to adjudicate matters to which states had consented and therefore the decisions of such institutions could not be legally enforced. As the scope of international law continued to widen, so did the various international law mechanisms of accountability. The one feature that has not been in tandem with the evolution though is the state-centric feature of the institutional mechanisms.

Given the multitudes of institutional mechanisms that have mushroomed over the years, the distinction made by Born becomes important. He differentiates between the first generation and the second generation adjudication mechanisms.<sup>85</sup> The first generation institutional mechanisms are those that were created by the

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84 For the different categories and types of these institutional mechanisms see Romano CPR "The proliferation of international judicial bodies: The pieces of the puzzle" 1999 (31) *New York University Journal of International Law and Politics* 709-751; Buergenthal T "Proliferation of international courts and tribunals: Is it good or bad?" 2001 (14) *Leiden Journal of International Law* 267-275; Born G "A new generation of international adjudication" 2012 (61) *Duke Law Journal* 775-878 and Booyesen H *Principles of International Trade Law: As a Monistic System* (Pretoria Interlegal 2003) 117-157.

85 See Born 2012 *Duke Law Journal* 775- 878.

international community pursuant to multilateral treaties such as the Permanent Court of Arbitration (PCA), the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). Other institutions of a similar hew were later created, such as, the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court (ICC) and regional courts and tribunals.<sup>86</sup> In line with the characteristic feature of international law at the time, these first generation adjudication mechanisms did not have compulsory jurisdiction and could not deliver enforceable decisions.<sup>87</sup> Driven by the high political and religious ideals, these first generation adjudication mechanisms aspired to have compulsory universal jurisdiction.<sup>88</sup> Having acknowledged the contribution made by the first generation mechanisms to international law, Born notes that, “none of these tribunals have enjoyed significant usage by states or have commanded particularly impressive compliance with their decisions”.<sup>89</sup>

Unlike the first generation adjudication mechanisms, the second generation mechanisms arose from a different political context inspired by “pragmatic commercial considerations”.<sup>90</sup> This category consists of treaty based arbitral tribunals such as the North American Free Trade Agreement (NAFTA), International Centre for Settlement of Investment Disputes (ICSID) Convention, the Iran-US Claims Tribunal, the UN Claims Commission, and the WTO.<sup>91</sup> These second generation adjudication mechanisms exhibit characteristic features which the first generation mechanisms do not have in that, though having a limited jurisdiction, their decisions can be enforced against states.<sup>92</sup> In this regard Bilateral Treaty (BITs) Investments play a major role. About this Born writes that

[s]tates that have concluded international commercial-arbitration agreements virtually always participate in arbitration proceedings and frequently voluntarily satisfy awards that are made against them. In the rare cases in which awards are not voluntarily

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86 Born 2012 *Duke Law Journal* 791–818.

87 Born 2012 *Duke Law Journal* 791.

88 Born 2012 *Duke Law Journal* 793.

89 Born 2012 *Duke Law Journal* 793.

90 Born 2012 *Duke Law Journal* 793.

91 See Born 2012 *Duke Law Journal* 819–878.

92 Born 2012 *Duke Law Journal* 779.

complied with, enforcement proceedings have been instituted and frequently have succeeded.<sup>93</sup>

Most of the second generation institutional mechanisms were created after the Second World War as an attempt to guard against prospects of war resurfacing again. These institutions were put in place to create rules to mitigate against political and economic conflicts.<sup>94</sup> At the same time that these institutions were being created, the international human rights movement was also gaining momentum. Despite having emerged at the same time, the human rights movement did not succeed in placing human rights at the centre of these institutions. These institutions had a defined mandate and human rights was not one of them. As Koh<sup>95</sup> writes, the United Nations together with the Security Council and the ICJ ensured the enforcement of the Charter particularly in relation to the maintenance of peace among nations. In this regard, the Charter sought to *inter alia* “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.<sup>96</sup> The Bretton Woods institutions, that is, the World Bank and the International Monetary Bank (IMF) were entrusted with mitigating against economic conflict. The General Agreement on Tariffs and Trade (GATT)<sup>97</sup> was to facilitate rules of trade. The division of responsibility was such that the World Bank would oversee issues of international development, the IMF would take care of issues of balance of payment and the GATT would take care of economic liberalism and market capitalism.<sup>98</sup> In executing their different mandates, the three institutions are expected to co-operate with each other in an effort to create a coherent global economic framework.<sup>99</sup>

Each of the three institutions was to later develop its own institutional mechanisms of accountability. The World Bank created the Inspection Panel, the IMF the Independent Evaluation Office and the WTO the Dispute Resolution mechanism.

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93 Born 2012 *Duke Law Journal* 831.

94 Koh 1997 *The Yale Law Journal* 2614.

95 Koh 1997 *The Yale Law Journal* 2614.

96 Preamble to the United Nations, Charter of the United Nations, 1 UNTS XVI (1945), (entered into force in 31 August 1965), (hereinafter the UN Charter).

97 On 01 January 1995 the GATT became the World Trade Organisation (WTO).

98 Koh 1997 *The Yale Law Journal* 2614.

99 Booyesen *Principles of International Trade Law* 133.

According to the 2014 Operating Procedures, the mandate of the Inspection Panel of the World Bank is two-fold:<sup>100</sup> Firstly, it serves as a forum to provide recourse to people who have suffered harm as a result of the activities of projects supported by the Bank. Secondly, the Panel seeks to provide an independent and impartial assessment of claims brought against the Bank. The Independent Evaluation Office (IEO) of the IMF, on the other hand, “seeks to serve as a means to enhance the learning culture within the Fund, strengthen the Fund's external credibility, and support the Executive Board's institutional governance and oversight responsibilities”.<sup>101</sup> The obvious limitation of the work of the Inspection Panel of the World Bank is that its work is confined to claims related to activities financed by the Bank. The IEO on the other hand is inward looking in that its mandate is aimed at enhancing the credibility of the institution. The limited scope of the work of the two institutions renders them inadequate to deal with issues of accountability of MNCs in international law.

In light of the inherent limitations of the two institutions of the Bretton Wood institutional mechanism, the WTO provides an interesting case for analysis. The mandate of the WTO is to oversee and facilitate international trade among states. In this regard, the WTO describes itself as “a place where member governments go, to try to sort out the trade problems they face with each other.”<sup>102</sup> Trade related disputes among member states are dealt with through the Dispute Settlement Body and its Appellate Body. The two bodies apply international law and function in a way similar to that of an international court.<sup>103</sup> While the main role players within the WTO are nation-states, the beneficiaries of the various trading agreements are mainly corporations.<sup>104</sup> It is on this basis that most scholars have found the WTO to be a potential tool to hold MNCs accountable for their human rights violations under international law.<sup>105</sup> Deva puts forward a compelling case of

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100 The Inspection Panel at the World Bank: Operating Procedures APRIL 2014 available at: <http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Ope rating%20Procedures.pdf> (accessed on 31 December 2015).

101 IEO Terms of reference available at: <http://www.ieo-imf.org/ieo/pages/TermsOfReference.aspx> (accessed 31 on December 2016).

102 Understanding the WTO available at: [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/tif\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm) (accessed 31 on December 2015).

103 See Booyesen *Principles of International Trade Law* 136-137.

104 Kinley and Tadaki 2004 *Virginia Journal of International Law* 1006.

105 Kinley and Tadaki 2004 *Virginia Journal of International Law* 1006; Deva 2003 *Connecticut*



why the WTO is an ideal institution to hold MNCs accountable for their human rights violations. His assertion is premised on the view that “violation of human rights by MNCs is related directly, or indirectly” to their trading activities, a domain which falls under the auspices of the WTO.<sup>106</sup> Given the fact that the human rights movement and the different post Second World War institutions have evolved in different directions, attempts to extend the mandate of these institutions to cover human rights issues have provoked interesting debates on both sides of the spectrum.<sup>107</sup> The one side of the spectrum argues in favour of keeping human rights and trade issues separate, while the other argues for merging the two. To bridge the conceptual divide, Deva proposes an institutional mechanism consisting of a partnership between the UN and the WTO in promoting human rights in a globalised world.<sup>108</sup> One of the five objections which Deva anticipates in the proposed model, is that the model may be unworkable, especially keeping in mind the mandate of the UN and the WTO.<sup>109</sup>

In addition to the two generations of adjudicatory mechanisms, other international law institutions were created that deal directly with the activities of corporate activity. These, include *inter alia*, labour tribunals, National Human Rights Institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development, offices of the Ombudsperson and government-run complaints offices.<sup>110</sup> Each of these institutions is constrained by the fact that they operate within a state-centric system of accountability. The force of their reports, findings and recommendations, rely on the goodwill of the individual state to implement or enforce them.<sup>111</sup> What has become manifestly clear is that the conventional state-centric system of human rights protection, with its many available options, is not coping with the

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*Journal of International Law* 22, Shelton 2002 *Boston College International and Comparative Law Review* 286.

106 Deva 2003 *Connecticut Journal of International Law* 23.

107 For an overview of the debate see Deva 2003 *Connecticut Journal of International Law* 1–57, Kinley and Tadaki 2004 *Virginia Journal of International Law* 1005–1023, Shelton 2002 *Boston College International and Comparative Law Review* 289–291, Hey E “The World Bank Inspection Panel: Towards the recognition of a new legally relationship in international law 1997 (2) *Hofstra Law and Policy Symposium* 61–74.

108 Deva 2003 *Connecticut Journal of International Law* 3.

109 See Deva 2003 *Connecticut Journal of International Law* 46–48.

110 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March 2011) at para 25 (Guiding Principles) 22.

111 Donoho 2006 *Georgia Journal of International and Comparative Law* 10.

challenges brought about by globalisation. The inability to cope is not because the challenges are insurmountable, but is mainly because the state-centric paradigm, though still relevant, is in some respects outdated to operate on its own. That the challenges posed by globalisation are multifaceted, multidimensional and overarching is now beyond contest. In a similar vein, it is axiomatic that the responses to these challenges should not be one-dimensional either.<sup>112</sup> Shelton, for instance, argues that the international community “should make concerted multilateral efforts to enhance its ability to respond to human rights violations, rather than unleashing each state to control what it views as the sins of the private sector”.<sup>113</sup>

Under domestic laws, individuals are empowered to lay a claim against any person or entity that poses a threat to the enjoyment of their guaranteed rights.<sup>114</sup> This is in accord with the state-centric approach to the protection of rights, because traditionally states bear the obligation to ensure that there are domestic structures to provide remedies for such violations. The inherent limitations of the state-centric system of accountability in dealing with extraterritorial activities of MNCs, necessitates a need to reconceptualise the rules and institutions of the legal system. In this regard, Kinley and Tadaki argue that international efforts should be directed to the “*effective protection* of human rights, rather than on the entities from which human rights have to be protected”.<sup>115</sup> This study advocates for a view that allocates human rights responsibilities to both states and MNCs within a bilateral context. The rationale is that where human rights have been violated, there is a need for a remedy.<sup>116</sup> To this end the Ruggie mandate states that, “[u]nless states take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the state duty to protect can be rendered weak or even meaningless”.<sup>117</sup> As the preceding chapters

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112 Ratner 2001 *The Yale Law Journal* 451.

113 Shelton 2002 *Boston College International and Comparative Law Review* 275.

114 Shelton 2002 *Boston College International and Comparative Law Review* 281.

115 Kinley D and Tadaki 2004 *Virginia Journal of International Law* 102 (emphasis in the original).

116 Shelton D *Remedies in International Human Rights Law* (Oxford University Press New York) 155, Shelton D “The Jurisprudence of Human Rights Tribunals on Remedies for Human Rights Violations” in Flauss J-F (ed) *International Protection of Human Rights and Victims’ Rights* (Bruylant Bruxelles 2009) 58.

117 Human Rights Council, “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Respect, Protect and Remedy’ Framework” A/HRC/17/31 (21 March

have illustrated, states may be unable or unwilling to provide remedies. Further, the international legal system does not have institutions and processes to hold non-state actors accountable for the harm caused.<sup>118</sup> In light of this inherent weakness within the state-centric system of accountability, a call has been made for the reconceptualisation of the legal system so as to accommodate MNCs.<sup>119</sup> Such a reconceptualisation may include the readjustment of the rules and institutions of the international legal system.

Inevitably, states would still play a pivotal role even in the reconceptualisation of the international legal system. It is therefore important that any proposal in this regard should be one that will be acceptable to the main role players in the legal system- states. States, it is argued, are more likely to heed to a call for reconceptualisation if the call does not bring about a radical paradigm shift to the existing model. Donoho is of the view that states are more likely to be amenable to creating an institutional mechanism if the powers for such a body are “*jurisdictionally constrained to enforce rights for which true international consensus exists*”.<sup>120</sup> Perhaps the relative success in establishing the International Criminal Court (ICC) may to some degree be attributed to the fact that the crimes it covers are those for which there is some relative international consensus. Where there seems to be a disagreement is in terms of how the ICC should go about executing its mandate.<sup>121</sup>

In the discussion of business and human rights, the International Criminal Court (ICC) is often mooted as offering some prospects for holding MNCs accountable for their human rights violations under international law.<sup>122</sup> And there is some merit

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2011) Commentary to para 25 (Guiding Principles).

118 Shelton 2002 *Boston College International and Comparative Law Review* 282.

119 Kinley and Tadaki 2004 *Virginia Journal of International Law* 936; Deva 2003 *Connecticut Journal of International Law* 2.

120 Donoho 2006 *Georgia Journal of International and Comparative Law* 8 (emphasis in the original).

121 For a detailed discussion of the tension see: Weldehaimanot SM “Arresting Al-Bashir-The African Union’s opposition and the legalities” 2011 (19) *African Journal of International and Comparative Law* 208–235; Swanepoel CF “South Africa’s obligation as member state of the International Criminal Court: the Al-Bashir controversy” 2015 (40) *Journal for Juridical Science* 50-68, Mangu AB “The Bashir case and backpedalling on human rights and the rule of law in post-Mandela South Africa” 2015 (2) *African Journal of Democracy and Governance* 179-200, Gichuki JW “African state sovereignty and the International Criminal Court: Case studies in analytical context” 2014 (1) *African Journal of Democracy and Governance* 103-120.

122 See Claphan A “The Question of Jurisdiction under International Criminal Law Over Legal

in this view. Despite the international legal system insisting on a conceptual divide between criminal and civil matters, in as far as gross violation of human rights is concerned, the distinction is gradually becoming blurred. Granted, not all human rights violations by MNCs are or will be criminal. To a large degree there may be an overlap between civil and criminal matters arising out of corporate violations of human rights. For instance, in its report on the Corporate Complicity in International Crimes, the International Commission of Jurists stated that “conduct that gives rise to a gross human rights abuse will also often involve breaches of international criminal law, and therefore will often constitute a crime under international law”.<sup>123</sup> For practical reasons, victims of corporate human rights violations generally pursue civil litigation in search of compensation. The intersection between human rights and international criminal law has therefore become a subject of research.<sup>124</sup>

Because of the convergence between gross human rights violations and criminal liability, the ICC stands out as a possible effective enforcement institution for the international operations of MNCs under international law.<sup>125</sup> The reasons advanced for considering the ICC reflect the multifaceted nature of MNCs and their operations. The ICC has some features that make it a potential tool to hold MNCs to account. For instance, Deva argues that there may be situations where a need may arise to criminally prosecute gross violations of human rights by MNCs.

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Persons: Lessons from Rome Conference on an International Criminal Court” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 139-195; Van den Herik and Černič 2010 *Journal of International Criminal Justice* 725-743.

123 The Report of the International Commission of Jurist Expert Legal Panel on Corporate Complicity in International Crimes titled: “Corporate Complicity and Legal Accountability” 1. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol1-publication-2009-eng.pdf>. (accessed on 16 June 2015).

124 See Van den Herik and Černič 2010 *Journal of International Criminal Justice* 725–743; Claphan *The Question of Jurisdiction under International Criminal Law over Legal Persons* 139-195 and Shelton 2002 *Boston College International and Comparative Law Review* 304.

125 Pak NS and Nussbaumer JP “Beyond Impunity: Strengthening the legal accountability of transnational corporations for human rights abuses” Hertie School of Governance – Working Papers, No. 45, November 2009, at 38. Available at: [http://www.hertie-school.org/fileadmin/images/Downloads/working\\_papers/45.pdf](http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/45.pdf) (accessed on 29 June 2015); Claphan A “The Question of Jurisdiction under International Criminal Law Over Legal Persons: Lessons from Rome Conference on an International Criminal Court” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 139-195; Van den Herik and Černič 2010 *Journal of International Criminal Justice* 725-743; Deva 2003 *Connecticut Journal of International Law* 44.

In this regard it may be suitable to invoke the provisions of the ICC.<sup>126</sup> Given the fact that the ICC has jurisdiction only over natural persons, Pak and Nussbaumer explore the possibility of invoking individual criminal responsibility to pursue corporate executives and employees as a tool to promote corporate accountability. In addition, they argue for the proposal to consider extending the ICC jurisdiction to cover legal persons in addition to natural persons.<sup>127</sup> Van den Herik and Černič, in turn, explore the possibility of having human rights law as the normative framework and international criminal law as the enforcement mechanism for corporate accountability.<sup>128</sup> Ruggie has however warned that care should be exercised “when analogizing standards from individuals to companies”.<sup>129</sup> While corporate criminal liability is beyond the scope of this research, the foregoing discussion has made it clear that the distinction between gross human rights violations and criminal liability, particularly in the activities of corporations, can no longer be sustained.

A theory of accountability in international law, if it is to be effective, must be able to navigate the divide between national and international institutions. One of the features of the ICC which made the institution to be appealing to states is the principle of complementarity. Ordinarily, prosecution of offenders lies with national jurisdictions, and the preamble to the ICC Statute takes cognisance of this fact.<sup>130</sup> Supposing that all the statutory requirements have been met in terms of jurisdiction and the referral of the case, the question then becomes: When must the court act? The ICC Statute emphasizes the fact that the ICC shall be complementary to national criminal jurisdictions.<sup>131</sup> This means that the court should only assume jurisdiction where the national system is unable to prosecute transgressors.<sup>132</sup> The court will only intervene where a state is “unwilling or

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126 Deva 2003 *Connecticut Journal of International Law* 44.

127 Pak NS and Nussbaumer JP pages 38, 40-47 [http://www.hertie-school.org/fileadmin/images/Downloads/working\\_papers/45.pdf](http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/45.pdf) (accessed on 29 June 2015).

128 Van den Herik and Černič 2010 *Journal of International Criminal Justice* 739-743.

129 Human Rights Council, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Clarifying the Concepts of influence’ and ‘complicity” A/HRC/8/16 (15 May 2008) at para 34.

130 Paragraph 6 of the preamble of the Rome Statute of the International Criminal Court A/CONF.183/9 (1998), (entered into force 01 July 2002), (hereinafter the Rome Statute).

131 Paragraph 10 of the preamble and article 1 of the Rome Statute.

132 Holmes JT “The Principle of Complementarity” in Lee RS (ed) *The International Criminal Court: The making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law

unable” to carry out the investigations or prosecutions.<sup>133</sup> Complimentarity, as Gutto points out, also means that the ICC can assume jurisdiction, without having to wait for the national system to fail.<sup>134</sup> Inevitably, complimentarity puts the ICC on a collision course with state sovereignty.<sup>135</sup> This is so because ordinarily states would argue that the duty to investigate and prosecute is part of their national sovereignty, unless as Ellis points out, there is self-interest on the part of the state to refer the matter to the ICC.<sup>136</sup> Under the principle of complimentarity, the ICC must undertake an investigation into the affairs of a state before it can arrive at a decision that the state in question is unwilling or unable to prosecute.<sup>137</sup>

Determining whether a state is unwilling or unable to investigate or prosecute can be controversial as it impacts on issues of sovereignty. The determination goes beyond issues of law and ventures into politics.<sup>138</sup> As such it is not easy to separate issues of law from politics when assessing the role of the ICC, especially in Africa.<sup>139</sup> It is important that an institution conducting these operations should be seen as legitimate by all the role players. In relation to the African continent, the legitimacy of the ICC has been dented. Makau Mutua<sup>140</sup> points out some similarities between the countries that are before the ICC. The first point he highlights is that all the countries are post-colonial states that have been wrecked by civil conflict for years. The second point he raises is that Kenya, Uganda, and Sudan are rated “critical” on the 2010 list of the Failed States Index,<sup>141</sup> with Uganda appearing as number twenty one and therefore on the list of the states “in

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International The Hague 1999) 42.

133 Art 17 of the Rome Statute.

134 Gutto S “Created and limited by politics: A view of the ICC from Africa” 2003 (12) *African Security Review* 127.

135 Udombana NJ “Pay back time in Sudan? Darfur in the International Criminal Court” 2005 (13) *Tulsa Journal of Comparative and International Law* 23.

136 Ellis MS “International Justice and the rule of law: Strengthening the ICC through domestic prosecutions” 2009 (1) *Hague Journal on the Rule of Law* 81.

137 See Article 17(1)(a)-(c) of the Rome Statute.

138 See Holmes JT “The Principle of Complementarity” in Lee RS (ed) *The International Criminal Court: The making of the Rome Statute, Issues, Negotiations, Results* (Kluwer Law International The Hague 1999) 41.

139 See Tladi D “The African Union and the International Criminal Court: The battle for the soul of international law” 2009 (34) *South African Yearbook of International Law* 57–69.

140 Mutua M “The International Criminal Court in Africa: Challenges and Opportunities” (September 2010) *Norwegian Peace building Centre Noref Working Paper 2* available at: [http://peacebuilding.no/var/ezflow\\_site/storage/original/application/d5dc6870a40b79bf7c1304f3befe0b55.pdf](http://peacebuilding.no/var/ezflow_site/storage/original/application/d5dc6870a40b79bf7c1304f3befe0b55.pdf) (accessed on 01 July 2015).

141 For a brief discussion of the failed state phenomenon see Udombana 2005 (13) *Tulsa Journal of Comparative and International Law* 5-6.

danger”. The third point and the most important for the purpose of this study, is that the judiciary in these countries is dictated to by the executive. In this regard, Makau Mutua writes: “The judiciaries are captive to the executive. Judges are corrupt and incompetent or lack capacity while the infrastructure of the legal system is threadbare. In a word, state structures are on life support”.<sup>142</sup> These points are not unique to the listed countries or criminal cases; they are at the core of states where the rule of law is non-existent. Amending the mandate of the ICC to accommodate activities of MNCs may therefore go a long way towards addressing the culture of corporate impunity under the auspices of international law.

When natural persons are tried and found guilty, they are arrested and then deprived of certain freedoms. Given the intricacies of the corporate form, this may not be easily achievable in relation to corporations. An amendment of the Statute to include corporate crimes should also look at a fitting punishment for corporations. Such a punishment may include awarding pecuniary fines against the corporations found guilty for violating *jus cogens* norms, for instance. Individuals cherish freedom and corporations value profit. A punishment that impacts on their profit margins will perhaps act as a deterrent. In this way even victims and/or their relatives will have some money to help them rebuild their lives.

While having a place as international institutional mechanisms of accountability, both the ICC and the WTO are hamstrung by the unidimensional nature of their mandate. The ICC, as discussed above, is mandated to deal with international crimes in relation to natural persons. The WTO, on the other hand, is mainly concerned with issues of international trade.<sup>143</sup> Whether the mandate of the WTO should be extended to cover issues of human rights or not, has been a subject of great debates over the years.<sup>144</sup>

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142 Mutua  
[http://peacebuilding.no/var/ezflow\\_site/storage/original/application/d5dc6870a40b79bf7c1304f3befe0b55.pdf](http://peacebuilding.no/var/ezflow_site/storage/original/application/d5dc6870a40b79bf7c1304f3befe0b55.pdf) 2 (accessed on 01 July 2015).

143 Kinley and Tadaki 2004 *Virginia Journal of International Law* 1016

144 See Deva 2003 *Connecticut Journal of International Law* 1-9.

## 4.2 *Introducing the institutional model of accountability*

As evidenced by the foregoing discussion, in the over forty years that the international community has been searching for a solution to the perennial debate on the relationship between business and human rights, an array of proposals have been put forward.<sup>145</sup> Consensus among scholars on what the architecture of the institutional mechanism of accountability should be, is still elusive. While the search is still on, the state-centric system of accountability continues to be riddled with gaps, asymmetries and inconsistencies that render it inadequate to singularly address the challenges brought about by the international operations of MNCs. In this regard the comment by Stephens becomes apt that “as corporate power becomes increasingly international and increasingly dissociated from the nation-state, regulation becomes more difficult”.<sup>146</sup> The situation is further compounded by the fact that at an international level there is paucity of policy direction for the international operations of MNCs.

Like individuals who have limited international personality in the realm of international human rights law, corporations have limited international legal personality in the realm of international investments. It is argued that an effective theory of accountability should take cognisance of this fact. In this regard, this study proposes arbitration as a model to hold MNCs to account. International investment law is one area which is dominated by corporations. It was discussed earlier that treaty and custom are two of the sources of international law. As Schlemmer points out:

[I]nternational rule-making on investment issues has developed extensively and now operates in bilateral, regional, interregional

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145 See, for instance, Shelton 2002 *Boston College International and Comparative Law Review* 273-322; Deva 2003 *Connecticut Journal of International Law* 1-19; Kinley and Tadaki 2004 *Virginia Journal of International Law* 931-1032; Muchlinski PT “Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 97-117; Claphan A “The Question of Jurisdiction under International Criminal Law Over Legal Persons: Lessons from Rome Conference on an International Criminal Court” in Kamminga MT and Zia-Zarifi S (eds) *Liability of Multinational Corporations under International Law* (Kluwer Law International The Hague 2000) 139-195; Bilchitz 2019 *South African Law Journal* 754-789; Ruggie 2007 *American Journal of International Law* 838-840.

146 Stephens B “The amorality of profit: Transnational corporations and human rights” 2002 (20) *Berkeley Journal of International Law* 58.



and multilateral levels. These rule-making instruments have taken the form of either binding treaties or voluntary instruments setting out the numerous commitments of the relevant parties.<sup>147</sup>

The Ruggie mandate, as discussed in chapter two of this study, has used the concept of the sphere of influence as “a spatial metaphor” to conceptualise the space where corporations dominate.<sup>148</sup> State practice, and therefore custom, confirms the dominance of corporations in this area as more than 173 states have entered into more than 2600 bilateral investment treaties.<sup>149</sup> The prevalence of treaties in this area of law, are an indication of the fact that there has been a shift in how states adjudicate matters internationally. Arbitration has now become the preferred mode of settling disputes.<sup>150</sup> Commenting on this shift, Born writes that:

The total number of PCA, ICJ, and ITLOS cases has remained largely stagnant since the late twentieth century. In contrast, the number of international investment and commercial arbitrations and litigations involving state entities has increased materially, both since 1990 and in more recent years. Put simply, usage of second-generation adjudicatory bodies is high and robustly increasing, whereas usage of the ICJ, ITLOS, and PCA is relatively low and stagnant.<sup>151</sup>

The rise of arbitration as a means to settle disputes means that the second generation adjudicatory mechanisms have become important, especially in the application and development of international law.<sup>152</sup> In this regard, this study argues that if a mechanism for accountability is to be effective at all, it must be constructed around institutions that are effective and not those that are in the process of becoming moribund. Arbitration seems to provide some hope in conceptualising a mechanism for holding MNCs to account for their human rights violations in international law.

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147 Schlemmer EC “A new international law on foreign investment” 2005 (3) *Tydskrif vir die Suid-Afrikaanse Reg* 532.

148 Commission on Human Rights, “Protect, Respect and Remedy: A framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 66.

149 See the discussion on chapter 4 of this study, and also Born 2012 *Duke Law Journal* 833.

150 Born 2012 *Duke Law Journal* 827.

151 Born 2012 *Duke Law Journal* 860–861.

152 Born 2012 *Duke Law Journal* 864.

Because of the historical divide between issues of business and human rights, the use of commercial arbitration as a potential tool to enforce human rights will not be universally accepted.<sup>153</sup> The subtext underlying this resistance is that human rights and commercial arbitration are not compatible.<sup>154</sup> Further, the flexibilities afforded by arbitration agreements have opened them up for criticisms. It has been argued that international agreements lack legitimacy and accountability, are not transparent, and do not have standard for appeals process.<sup>155</sup> An even more pointed argument is that investors use arbitrations so as to bypass national courts which are entities empowered to protect human rights.<sup>156</sup> In this regard, Fry cautions that care should be exercised “not to shift the burden entirely onto the shoulders of the international arbitration regime, thus relieving states of their responsibilities”.<sup>157</sup>

International investment agreements, as Tzevelekos<sup>158</sup> points out, unfold within a triangular relationship consisting of the host state, the investor and investor’s home state. International allocation of responsibilities within this relationship is skewed. The responsibilities of both the home state and the host states under international law can be established with relative ease. What is difficult to establish is the international responsibility of the investor and this, according to Tzevelekos, is because the international responsibility of the investor in international law is still underdeveloped.<sup>159</sup> The fact that the international responsibility under international law is underdeveloped is itself symptomatic of the struggle of the international legal system to conceptualise responsibilities for non-state actors. As discussed in the preceding chapter, there is nothing in international law that prohibits states from conferring rights on an individual or non-state actor by treaty.<sup>160</sup> A corollary to this is that nothing in international law prevents states from imposing obligations by treaty on an individual or non-state actor. The absence of such an international

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153 Fry 2007 *Duke Journal of Comparative and International Law* 77.

154 Fry 2007 *Duke Journal of Comparative and International Law* 120.

155 See Born 2012 *Duke Law Journal* 843 and also Fry 2007 *Duke Journal of Comparative and International Law* 82, 113-114.

156 See Fry 2007 *Duke Journal of Comparative and International Law* 113.

157 Fry 2007 *Duke Journal of Comparative and International Law* 113.

158 Tzevelekos V “In search of alternative solutions: Can the state of origin be held internationally accountable for investors’ human rights abuses that are not attributable to it?” 2010 (35) *Brooklyn Journal of International Law* 158.

159 Tzevelekos 2010 *Brooklyn Journal of International Law* 159.

160 See the discussion in Chapter 4 of this study.

instrument may be an indication that states prefer to impose obligations under national law and not under international law.

The proposed model will be driven by a triangular partnership consisting of the United Nations Conference on Trade and Development (UNCTAD) the United Nations Commission on International Trade Law (UNCITRAL),<sup>161</sup> as well as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.<sup>162</sup> UNCTAD boasts a membership of 194 states.<sup>163</sup> For a greater part of its more than half a century of existence, UNCTAD has been at the cutting edge on issues of trade, investment and development. Inevitably issues of trade, investment and development are at the core of the activities of MNCs, particularly in developing countries.<sup>164</sup> As indicated throughout this study, challenges related to the extraterritorial activities of MNCs are mainly experienced in developing countries. In this regard the objectives of UNCTAD become important. UNCTAD aims to

assist developing countries, especially the least developed countries, and countries with economies in transition, to integrate beneficially into the global economy. It also seeks to help the international community promote a global partnership for development, increase *coherence* in global economic policymaking, and assure development gains for all from trade.<sup>165</sup>

This study is of the view that at a policy level, human rights should form part of the coherence that UNCTAD should seek to promote.

Because of its mandate, UNCITRAL is also best suited to be part of this mechanism. The mandate of UNCITRAL is to formulate “modern, fair, and harmonized rules on commercial transactions”.<sup>166</sup> In line with the state-centric

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161 “Welcome” available at: <http://www.uncitral.org/uncitral/en/index.html> (accessed on 31 December 2015).

162 International Centre for Settlement of Investment Disputes (ICSID) 575 UNTS 159 (1965), (entered into force 14 October 1966), (hereinafter the ICSID), (the ICSID Convention).

163 “Membership of UNCTAD and of the Trade and Development Board” available at: <http://unctad.org/en/Pages/About%20UNCTAD/UNCTADs-Membership.aspx> (accessed on 14 January 2016).

164 See Muchlinski *Attempts to Extend the Accountability of Transnational Corporations* 97-117.

165 “Areas of work” available at: [http://unctad.org/en/Pages/Areas\\_Of\\_Work.aspx](http://unctad.org/en/Pages/Areas_Of_Work.aspx) (accessed on 16 January 2016) (emphasis added).

166 “Welcome” available at: <http://www.uncitral.org/uncitral/en/index.html> (accessed on 31

feature of international law, its main constituency is member states. UNCITRAL is made up of sixty member states elected by the General Assembly of the UN to a fixed term of office. The composition of membership is designed to be a representative sample of the “geographic regions and its principal economic and legal systems”.<sup>167</sup> Non-member states and international organisations are however invited to participate. The tasks of UNCITRAL include formulating the following:

- Conventions, model laws and rules which are acceptable worldwide;
- Legal and legislative guides and recommendations of great practical value;
- Updated information on case law and enactments of uniform commercial law;
- Technical assistance in law reform projects;
- Regional and national seminars on uniform commercial law.<sup>168</sup>

UNCITRAL runs workshops on a wide variety of topics such as insolvency law, arbitration and conciliation, small and medium enterprises and electronic commerce.<sup>169</sup> It is argued that the activities of MNCs and human rights can also be added to this list of what UNCITRAL can cover. In this way, UNCITRAL will keep nation-states up to speed with the ever changing MNCs.

The ICSID Convention is charged with resolving investor-state and state-state international disputes. This it does by conciliation, arbitration or fact finding.<sup>170</sup> A combination of the three institutions brings to the fore a point of convergence for the two sub-categories of international law, namely: international investment law and international trade law. Article 1(2) of the ICSID Convention states that “the purpose of the Centre shall be to provide facilities for conciliation and arbitration of

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December 2015).

167 “Origin, Mandate and Composition of UNCITRAL” available at: <http://www.uncitral.org/uncitral/en/about/origin.html> (accessed on 16 January 2016).

168 “Welcome” available at: <http://www.uncitral.org/uncitral/en/index.html> (accessed on 31 December 2015).

169 For a list of topics to be covered in 2016, see “Welcome” available at: <http://www.uncitral.org/uncitral/en/index.html> (accessed on 31 December 2015).

170 “Services overview” available at: <https://icsid.worldbank.org/apps/ICSIDWEB/services/Pages/default.aspx> (accessed on 31 December 2015).

investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.”<sup>171</sup> The ICSID Convention, seems to have succeeded in bridging the accountability gaps that exist in international law, particularly in relation to corporations. Firstly, under the ICSID Convention MNCs have limited international personality and therefore have rights and duties flowing from the international law. The jurisdiction of the ICSID Convention covers both natural and juridical persons.<sup>172</sup> Secondly, the mechanism has played into the strength of international law in that it is based on consent of the parties. Parties to the dispute must consent in writing that they submit the dispute to the centre, and once they have submitted their consent, no party may withdraw its consent unilaterally.<sup>173</sup> Thirdly, the award is not only binding in law but leaves enforcement to the state concerned. Article 54(1) of the ICSID Convention states that, “each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”

Given the fact that both the international trading arena and the international investment space are a bastion of corporate activity, UNCTAD, UNCITRAL and the ICSID Convention will; according to the proposed model, cooperate in ensuring that they infuse human rights into the business activities of corporations. UNCTAD will serve as the international policy formulation hub where guiding international standards are formulated and agreed upon. UNCITRAL will be tasked with drafting documents that incorporate universal standards for corporations and the ICSID Convention will operationalise the standards for both the state and the corporation. In this regard, UNCITRAL will design templates that will be used by both states and corporations as they enter into their treaty agreements on trade and investment. Of course such templates will not dictate to the parties on what to do, but will guide them on the central features that a human rights friendly agreement should have. By way of example, one principle that applies to both states and corporations, albeit with modifications, is the principle of due diligence.

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171 “ICSID Convention, Regulations and Rules” available at: <https://icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/ICSID%20Convention%20English.pdf> (accessed on 31 December 2015).

172 The ICSID Convention Article 25 (2) (a)-(b).

173 The ICSID Convention Article 25 (1).

State responsibility under the due diligence principle requires states, “to fight breaches of international law by implementing preventative and punishment measures”.<sup>174</sup> According to the Ruggie mandate, the responsibility of corporations to respect human rights requires due diligence.<sup>175</sup> In this regard a company should consider the following three factors:<sup>176</sup> A corporation should make a proper assessment of the country where it seeks to do business. Secondly, a company should assess the impact of its own activities on producers, service providers, employers and neighbours. Thirdly, a corporation must assess whether its own activities would contribute to abuse through the relationships connected to their activities. In the template, for instance, UNCITRAL could incorporate a clause that includes this important commitment and the consequences that flow from failure to adhere to the due diligence principle. The due diligence principle will therefore assist both the state and the corporation to reflect on the possible human rights challenges that may arise from their relationship and jointly reflect on the remedial steps. Each of the parties will of course draw from what their responsibilities require of them.

As discussed earlier, the ICSID Convention serves as an investor-state and state-state international dispute resolution mechanism. An even more important aspect to its mandate is that it offers fact finding proceedings to examine and report on facts before a dispute arises.<sup>177</sup> This important provision may be extended so that it can empower the ICSID to go on a human rights related fact finding mission. In certain situations this may have the effect of pre-empting human rights violations before they happen.

### **4.3 The proposed model and its possible pitfalls**

The proposed model will inevitably attract a number of criticisms. The first likely argument may be that the model is located in the private international law sphere as opposed to one of the typical public international law mechanisms. Four

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174 Tzevelekos 2010 *Brooklyn Journal of International Law* 176.

175 Commission on Human Rights, “Protect, Respect and Remedy: A framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 56.

176 Commission on Human Rights, “Protect, Respect and Remedy: A framework for Business and Human Rights”, A/HRC/8/5 (7 April 2008) at para 57.

177 “Services overview” available at: <https://icsid.worldbank.org/apps/ICSIDWEB/services/Pages/default.aspx> (accessed on 31 December 2015).

arguments which have already been raised in the course of this study counter this point. Firstly, the activities of MNCs straddle the international law divides with ease to an extent that in relation to their international operations these finer distinctions can no longer be maintained. Secondly, state practice reveals the fact that arbitration has become the hub of constant interaction between states and corporations. Thirdly, as the research by Born has pointed out, the use of arbitration as opposed to traditional international courts or tribunals has risen significantly in the recent past. In this regard, there is an international movement that insists that all institutions of power should ensure that their activities have a human rights focus. At the Addis Ababa Action of the Third International Conference on Financing for Development, for instance, member states affirmed

the need to promote peaceful and inclusive societies for achieving sustainable development, and to build effective, accountable and inclusive institutions at all levels. Good governance, rule of law, human rights, fundamental freedoms, equal access to fair justice systems, and measures to combat corruption and curb illicit financial flows will be integral to our efforts.<sup>178</sup>

The business component of this meeting had more than 800 registered participants and was billed as “the largest ever global gathering of high-level business leaders in the development context”.<sup>179</sup> Granted that arbitration is traditionally commercially oriented, in this regard the proposed model will afford both the state and the corporation with a platform where they can practically articulate their different enforceable responsibilities particularly in relation to human rights.

The second likely argument may relate to the fact that arbitration is narrow and has a limited jurisdiction. Human rights, the argument may continue, require an instrument with a universal reach as opposed to one limited to the issues the parties have agreed to. In response to this argument, it should be pointed out that

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178 “Third International Conference on Financing for Development, 13-16 July 2015, Addis Ababa, Ethiopia, at para 18. Available at: [http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA\\_Outcome.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf) (accessed 16 January 2016).

179 “International Business Forum, Third International Conference on Financing for Development, Addis Ababa, Ethiopia, 14 July 2015” available at: <http://www.un.org/esa/ffd/ffd3/wp-content/uploads/sites/2/2015/04/Business-Forum-Summary.pdf> (accessed on 16 January 2016).

operationalising universal jurisdiction in international law will always be controversial. As Donnelly has pointed out in the discussion above, that human rights are universal is not controversial, what is controversial is how such rights are enforced. Whether universality is entrenched in a statute, such as the ATCA (as is the case in the United States of America) or arises from a multilateral context such as the Rome Statute, there will always be challenges. This is where the strength of the proposed model becomes evident. States bear the responsibility to translate their international obligations at a national level. In line with the principle of due diligence, states have an opportunity to reflect on their obligations as they prepare to engage in each international commitment. Drawing from the many non-binding codes and the emerging language of corporate responsibility under the same principle of due diligence, corporations too have an opportunity to reflect on their own responsibilities in this regard. At an international policy level, UCTAD will outline what the international norms and standards are or should be. In line with the template that UNCITRAL would have prepared in this regard, both the state and the corporation will agree on what the possible remedies are in an event of a breach. Recognising the roles played by home institutions, Article 54 becomes helpful in this regard. As discussed earlier, the award arising from such arbitration have the effect of the court of a final instance in the court of the home state. The awards of the international commercial arbitrations are published on the website of the ICSID Convention and are therefore transparent to the public. Civil society, NGOs and interest groups will have an opportunity to scrutinise these awards.

The third argument may relate to the fact that human rights cannot be left to an agreement between two parties. The answer to this argument is three-fold: Throughout the years, most international law challenges have been overcome by agreements among nations. Even with *jus cogens* the international community came to an agreement that there are certain atrocities that simply cannot be allowed to be committed against human beings regardless of the entity involved. The importance of consent in international law can therefore not just be discarded. Secondly, both private and public international laws are premised on the principle of *pacta sunt servanda*.<sup>180</sup> The principle provides that all international agreements

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180 Booyesen *Principles of International Trade Law* 283-284.



must be honoured and implemented.<sup>181</sup> So the fact that the parties have agreed should not be seen as a point of weakness, but strength. As discussed above, compliance levels by states in this regard is impressive particularly when compared to compliance levels with the first generation adjudication mechanisms.<sup>182</sup> Thirdly, the proposed model plays into the strength of international law in that states are given an opportunity to outline their obligations and even design what the consequences are in relation to the breach. It is assumed that no state will deliberately aim low in outlining its obligations. With the passing of time, the proposed model may in essence have the effect of states competing to raise the human rights bar as opposed to the “race to the bottom” approach referred to in the earlier discussion. Corporations will also be afforded an opportunity to operationalise the non-binding codes by making them part of the agreements, and even more importantly by making such commitments enforceable in the event of a breach.

## 5 CONCLUSION

That human rights apply universally to all human beings is beyond contest, what is contested is how to enforce those universally held rights. This means that human rights must be protected wherever and whenever there is a violation. This chapter has illustrated that the state-centric mode of accountability, which relies on state institutions, has its place in the system of accountability, but the system also has its own limitations. The limitations of the system become exposed when dealing with the extraterritorial operations of MNCs. The universality of human rights provides a good point of convergence upon which a theory of accountability of MNCs can be constructed in international law. This point of convergence, it was argued, provides a good basis to infuse human rights into the activities of MNCs. The chapter has in addition explored a number of institutional mechanisms and their potential weaknesses in holding MNCs to account in international law. Having done this, the chapter has proposed the arbitration model as an effective means to hold MNC accountable for their human rights violations. The reasons advanced for this are mainly that arbitration is the popular and effective mode of adjudication that is used by both states and MNCs in settling their commercial disputes. The

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181 Booyesen *Principles of International Trade Law* 284.

182 See Born 2012 *Duke Law Journal* 835-836.

chapter has further outlined how the proposed mechanism will function in relation to both the state and MNCs.

## CHAPTER 6

### CONCLUSION

#### 1 INTRODUCTION

Public international law is an evolving discipline. For over three hundred years the legal system has remained relevant to the challenges of the time, partly because of its ability to adapt and adjust to new challenges. Because of the events that led to the signing of the Peace Treaty of Westphalia, the main focus of international law was the maintenance of peace among nation states. The legal system has since evolved from being concerned exclusively with matters pertinent to states and has accommodated non-state entities such as the individual and international organisations. Theoretically and conceptually, it is not clear as to what the basis of the evolution has been. At different stages of the evolution though, human rights seem to have featured prominently. What is also true though is that as the legal system evolved, its scope and coverage has widened to cover *inter alia*, issues such as human rights, development, democracy and international financial systems. Because of its wide scope and coverage, international law has become a point of reference against which international standards for the international community are set and measured. To this end, a myriad of international institutions with varying mandates, among which are the United Nations and its agencies, the international tribunals and the international courts have been created to oversee issues of accountability and compliance at an international level. Because of the primacy of human rights, the different international law institutions have had to ensure that they too incorporate human rights into their activities.

Notwithstanding its evolution, the one aspect of international law that has remained unchanged, albeit with variations, is its state-centric nature. Throughout the years, statehood has remained the coordinating principle of international law. The primary rules of the legal system are designed by and are aimed at states. How one understands the nature of international law and its scope has been a subject of polarised philosophical debates between the positivists and the natural law lawyers. To positivist scholars the nation-state is both the primary subject and duty bearer to which all the rules of international law are addressed. In this regard

state consent constitutes the very foundation of international law in that states are only bound by those agreements and decisions to which they have freely consented. The natural law inspired obligations *erga omnes* and *jus cogens*, however, constitute an exception to this view. The underlying assumption to obligations *erga omnes* and *jus cogens* is that there are certain norms and standards which should prevail regardless of whether states have consented to these rules or not. Obligations *erga omnes* and *jus cogens* revolve mainly around human rights issues and thus constitute an exception to a positivistic conception of international law that puts primacy on state consent. Notwithstanding these peremptory norms of international law, the rules-based positivistic conception of international law has dominated the discourse over the years. International institutional mechanisms of accountability reflect the dominance of positivism.

Since states were for a considerable time the only subjects of international law, it was argued by positivist scholars that only states had obligations under international law. This, according to a positivistic conception of international law, meant that only states could be held accountable under the legal system. But this view too has lost its ground as the international legal system has evolved to accommodate individuals and international organisations as its subjects, albeit for specific purposes. The state-centred conceptualisation of international law has had a great influence on the nature of a core component of international law: international human rights law. The concept of international human rights law arose within a context whereby state power had no rival. So powerful was the state that its own internal affairs were beyond the reach of other states. Other states could only intervene when the recalcitrant state had breached one of its international obligations as outlined by the rules of international law. The adoption of the United Nations Charter and the Universal Declaration of Human Rights (the UDHR), brought about a shift to the human rights discourse. Since the adoption of these two instruments, the relationship between a sovereign state and its nationals within its own borders became of interest to the international community. Human rights were universalised and under certain conditions became the concern of the international community regardless of where the violations took place. The internationalisation of human rights has had an impact on state power, and how that power is used.

Despite the above milestone, the protection of human rights had its own limitation in that it was state-centric. In this regard, to talk of human rights was to invoke the relationship between the individual and the state. Arising from its obligations in international law, states had a duty to promote and protect the rights of individuals, while individuals were empowered to defend their rights against the same state. Thus understood, the focus of international human rights law was to constrain the state in the use of its amassed power against the vulnerable individual. That is, the international human rights discourse became mainly concerned with the vertical relationship between the individual and the state, while the horizontal relationships, those that operate within the private sphere are regulated within the different jurisdictions of the municipal legal systems of state. The private sphere, as illustrated in this study, has become the locus of potent unregulated power. No matter how powerful, non-state entities do not have any direct relationship with international law. Under international law, non-state actors are indirectly regulated through the state.

Economic globalisation has facilitated the emergence of powerful non-state entities like MNCs whose power and stature rivals that of nation states. The emergence of MNCs challenges the traditional notion that political and economic power resides exclusively within the state. The atrocities of the Second World War have brought home the reality that entities other than states also have the ability to engage in gross violations of human rights of individuals, communities and minorities. Through these atrocities, a system designed to deal with the abuse of power by the nation state and its agents is confronted with power that emerges from private non-state entities such as MNCs. Internationally, the demand for accountability has gained momentum in that institutions that wield power are expected to be accountable to people impacted upon by their decisions. It is in this context that the rise in power of MNCs on the international scene over the last half a century has become a point of great concern – mainly because the rise has not been matched by a corresponding system of accountability. The asymmetry between the rising power and the paucity of accountability mechanisms has led to an accountability deficit in that MNCs are only held accountable under domestic laws even for their international operations. The difficulty with this approach is that some of the international operations of MNCs operate beyond the territory and

jurisdiction of the nation-state. There is a need to bridge this deficit. Because of globalisation, the traditional institutions and systems of accountability have been rendered inadequate to respond to the new challenges. On its own, the nation-state does not seem to cope with the ubiquitous activities of MNCs. There is a need to conceptualise new institutions or reconceptualise old ones so as to adjust to the new challenges.

The foregoing sets the context for the study of the accountability of MNCs for human rights violations under international law. The underlying assumption to this study is that international law is not static - just like it has done in history, the legal system is capable of adjusting its rules and institutions so as to respond to new challenges.

## **2 THE CORPORATE FORM AND THE LIMITS OF DOMESTIC ACCOUNTABILITY**

The traditional locus of accountability in international law is through the nation-state and its domestic institutions. Generally, corporations are creations of national statutes and are therefore held accountable under domestic laws of nation-states. Corporate law teaches that once a company is incorporated, it becomes a legal person with the capacity to bear rights and duties under the municipal legal system concerned. As a juristic person, it can incur debts, sue and be sued and incur liabilities in its name, that is, it becomes subject to the rules of the municipal law concerned in its own right. For business purposes, corporations can cluster together to form a bigger entity – a MNC. By definition, business operations of MNCs straddle multiple jurisdictions. Choosing a place of business by MNCs for their subsidiaries is often dictated to by the benefits that may be derived from the legal or political system of the host state. As illustrated in this study, human rights violations by corporations are often prevalent in low income countries with weak political systems and poor adherence to the rule of law. Admittedly, such countries will on their own struggle to effectively hold MNCs to account.

The very nature of a corporation and how it relates to its own shareholders and subsidiaries is legally complex. In the event that there are violations of rights, the

corporate façade shields the individuals behind a corporation from being held fully accountable. The shield provided by the façade of the corporate form potentially has some benefits for those involved in illicit activities. In a situation where a parent company decides to have a subsidiary, corporate law makes provision for the concept of limited liability. Legally, each of the subsidiaries of a corporation is a separate entity with its own liabilities separate and distinct from its parent corporation. To impose liability on the parent company is not entirely impossible, but is an onerous process. Such vicarious liability can be imposed by either piercing the corporate veil, or proving that there was an agency relationship between the subsidiary and the parent company. As this study has illustrated, to pierce the corporate veil or prove that there was an agency relationship, is a steep challenge for plaintiffs to overcome.

The fact that the international operations of MNCs straddle multiple jurisdictions poses a challenge to plaintiffs seeking to litigate against such corporations. Ideally, plaintiffs seeking to hold MNCs to account have an option to pursue such corporations either in their home state of incorporation or in the host state where they ply their trade. The divide between the home state of incorporation and the host state provides a *lacuna* which has the potential to serve as a haven for MNCs which are not too keen to be regulated. In addition, litigating against MNCs raises both procedural and doctrinal issues which may be frustrating to plaintiffs. Suing MNCs in a foreign country depends on a number of political, economic and legal variables. Home states' judicial systems may adopt a lenient approach to *forum non conveniens*, in which case the goodwill of the home state may play a role in facilitating access to justice for the plaintiffs. Conversely, because of the economic advantages that arise from hosting an MNC, some host states may be opposed to their own citizens litigating against corporations in a foreign land. If a plaintiff chooses to litigate in the host country, it may be difficult to enforce such a judgment against the subsidiary, which may threaten to discontinue business with the host country. In light of the fierce competition among developing states to attract business, the host state may opt to have the MNCs continue business, rather than assisting the individual to litigate against the MNCs. In the event that the defendant successfully raises the plea of *forum non conveniens* at all levels of the appeal process, the plaintiff who is still interested in pursuing the matter further

would have to institute the claim in an alternative forum. As this study has illustrated, often a stay of proceedings on the basis of *forum non conveniens* marks the end of the litigation, and therefore an end to the quest for justice.

### **3 GLOBALISATION AND THE SHIFTING PATTERNS OF POWER**

In international law accountability is based on territory and jurisdiction of nation-states. International operations of MNCs operate beyond the territorial and jurisdictional boundaries. The doctrine of state responsibility arises only when certain conditions are met. For private conduct to give rise to state responsibility there must be a connection between the breach complained of and the state in question. If no nexus exists, then the law of state responsibility will not arise. By their very nature, MNCs are private entities with very minimal interaction with the state. It is therefore only in very limited cases that state responsibility will arise in relation to the activities of MNCs. An example may be where the state is a shareholder in a corporation, or where an argument can be advanced that the state violated the due diligence principle.

Notwithstanding the pivotal regulatory role played by states, the involvement of states in the affairs of corporations has its own limits. According to liberal theory, economic globalisation thrives where there is little state involvement in the affairs of the economy. In addition, in the era of globalisation states have outsourced, privatised and contracted out some of the services, that ordinarily fall within their scope of competence, to private actors. Corporations have become powerful global players of great political and economic significance. More and more services such as social security, law and order and air traffic control are now delivered by corporations. Services which were traditionally of a public nature such as health, education and the running of prisons have now become privatised. As a result of globalisation, the traditional powers of the state have been severely affected. At the policy level, the nation-state has to comply with international demands and imperatives, some of which may even go against its national priorities such as trade policies. For accountability purposes, an asymmetry is created in that even though corporations have taken over state functions, such corporations are not held to account to the same standards that states are



expected to account to in international law. As discussed earlier, the greatest accountability hurdle of MNCs under international law is the division between the private and the public spheres. Because of the historical context within which it arose, the language of human rights protection has traditionally been concerned with the protection of human rights vis-à-vis the state in the public sphere.

The traditional notion of the state as the sole provider of services to the public is no longer applicable. The shifting of power from the state to the market has meant that the authority of the state is less felt where powerful entities such as MNCs operate. Because of the traditional divide between the two spheres, state involvement in the private sphere is very minimal. The inadequacy of the state-centric model of accountability becomes exposed in that the state is expected to be accountable even for activities where its power and authority is only minimally felt. Just as international human rights law is premised on the need to protect the individual against state power, scholars concerned with the impact of activities of corporations on human rights protection, have argued that the power of corporations must also be effectively regulated. For almost half a century, the international community has struggled to construct a mechanism to hold MNCs accountable for their international operations. The limitation with the various international mechanisms which have been adopted is that they are all voluntary and therefore cannot be enforced in law.

There is a general consensus among scholars that the rising power of MNCs should be matched by stronger measures of accountability. Whether such measures reside in municipal law or international law or both, is a subject of great debate among scholars. This study has presented a view that seeks to locate MNC accountability in international law. In this regard a two-fold argument that draws on two existing principles of international law, that is, the doctrine of state responsibility and the concept of international legal personality was presented. As it was discussed earlier, in the era of globalisation the ordering of the international community is undergoing multiple processes, all unfolding at the same time. These processes are simultaneously moving towards and away from the state. The argument presented is that for those processes that evolve towards the state, the traditional system of state responsibility must be strengthened to be able to hold

MNCs to account effectively. On the other hand, for those processes that evolve away from the state and therefore render state responsibility inadequate, the concept of international legal personality provides a handle through which to have a hold on activities of MNCs in international law. As demonstrated throughout this study, philosophically, theoretically and conceptually there is nothing in international law that prohibits the legal system from imposing direct obligations on MNCs under international law. Though not yet recognised as subjects of international law, state practice in the realm of international investment and trade seems to suggest that states view corporations as subjects of international law for specific purposes. In this regard, corporations can contract with states, enter into treaties and even enforce such agreements where states renege on their commitments. A growing trend in this regard, especially for agreements that fall under international investment law is that both states and corporations have opted to settle their disputes by means of arbitration, as opposed to litigation.

#### **4 TOWARDS A CONCEPTUAL MODEL OF ACCOUNTABILITY**

State consent constitutes one of the defining features of international law that has remained a constant throughout the years. If any international law model of accountability is to survive or function optimally, it has to take cognisance of this fact. In the private sphere, the activities of MNCs straddle the divide between private international law, international investment law, international trade law and even international criminal law. This study has argued that the notion of the primacy of human rights provides a point of convergence around which a conceptual model of accountability can be constructed. Internationally, institutions of power at all levels are exploring ways of incorporating human rights as part of their core functions. In this regard, this study proposes arbitration as a potential mechanism to hold MNCs to account under international law. Arbitration is based on consent of the parties, and in this way provides a point of convergence for responsibilities emanating from the different sides of the private-public divide. An even more important feature is that in this proposed model, both the state and MNC will outline responsibilities in accordance to their different spheres of influence. And such responsibilities will be enforceable in law. This as it was argued earlier, may in essence result in both states and corporations raising the

standard of human rights. In addition, it may eliminate difficulties attended to issues of jurisdiction as both parties will agree on which issues will be adjudicated where and by whom.

For this model to function optimally it is proposed that it be driven by a partnership consisting of the United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). UNCTAD being the reputable UN body responsible for trade, investment and development will be responsible for setting international standards that both states and corporations must comply with. Drawing from the strength of its mandate, UNCITRAL will assist in formulating human rights friendly templates that states may use. The proposed arbitration will be modelled after the ICSID Convention one. In this way, states will be relieved from the burden of having to decide on their own and sometimes at their own economic peril as they incorporate their international law commitments into their agreements with MNCs. This model will afford corporations with an opportunity to translate their non-binding responsibilities into legally enforceable obligations under international law, albeit through arbitration.

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