

**IN SEARCH FOR DIRECT CORPORATE RESPONSIBILITY  
FOR HUMAN RIGHTS VIOLATIONS IN AFRICA:  
WHICH WAY FORWARD?**

**A DISSERTATION SUBMITTED TO THE CENTRE FOR HUMAN RIGHTS,  
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(HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

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## TABLE OF CONTENTS

TITLE PAGE	
TABLE OF CONTENTS	
DECLARATION	i
ACKNOWLEDGMENTS	ii
DEDICATION	iii
LIST OF ABBREVIATIONS	iv
CHAPTER ONE. INTRODUCTION	1
1.1 Background of the study	1
1.2 statement of the problem	4
1.3 The aim and objective of the study	5
1.2.1 Research questions	6
1.2.2 Literature review	7
1.2.3 Methodology of the study	9
1.2.4 Limitation of the study	10
1.2.5 Summary of the chapters	10
CHAPTER TWO: THE RESPONSIBILITY OF CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS IN A GLOBAL CONTEXT	12
2.1 Introduction	12
2.2 Defining corporation	12
2.3 Globalisation, TNCs and human rights	13
2.1.1 TNCs and the responsibility concept	15
2.2.2 Conclusion	17
CHAPTER THREE: STATE RESPONSIBILITY	18
3.1 Introduction	18
3.2 An overview of the International rule on State responsibility	19
3.3 The relationship between rules of state responsibility and international human rights law	21
3.2.1 The due diligence standard	22
3.2.2 The obligation of states under IHRL for human rights violations by TNCs	24

3.3.3	Home and host state responsibility for human rights violations by TNCs	27
3.3.4	Case law of the African Human Rights Commission on State Responsibility: <i>SERAC and CESR v Nigeria</i>	29
3.3.5	Conclusion	31
CHAPTER FOUR: DIRECT CORPORATE RESPONSIBILITY BORNE By TNCs FOR HUMAN RIGHTS VIOLATIONS		32
4.1	Introduction	32
4.2	Asserting direct responsibility on non-state actors through International human rights law instruments	33
4.3	International criminal law and TNCs	36
4.2.1	Asserting direct responsibility on TNCs through a soft law approach	38
4.2.2	Conclusion	39
CHAPTER FIVE: CONCLUSION AND RECOMMENDATION		41
5.1	Conclusion	41
5.2	Recommendations: The way forward	41
5.2.1	Towards international legally binding regulations on TNCs	41
5.2.2	The need to more effectively revise the elements of duty and responsibility in the African Charter	44
BIBLIOGRAPHY		45



## DECLARATION

This is to certify that this the original work of **Fokwa Tsafack Jean B**, submitted to the Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa in partial fulfilment of the requirements of the degree of LL.M (2004) in Human Rights and Democratization in Africa. Where any secondary information has been referred in this work has been duly acknowledged.

Signed -----

Date-----

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I, **PROF KINGSLEY K.K. AMPOFO**, have read this dissertation and approved it for examination

Signed-----

Date-----

Prof KINGSLEY.K.K Ampofo

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If I could not mention everyone who assisted me in one way or the other due to insufficient space, please I hold each and every one of you in my heart and I am truly grateful for your support and encouragement.

## **DEDICATION**

This work is dedicated to Ken Saro-Wiwa and eight other Ogonis who were sentenced to death by a Special Tribunal in the Federal Republic of Nigeria on October 31 1995, and were later executed on November 10 1995.

*“The death of an activist is not the end of the struggle”.*

## **LIST OF ABBREVIATIONS**

AFCHPR	The African Charter on Human and Peoples' Rights
ATCA	Alien Tort Control Act
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CSR	Corporate Social Responsibility
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
FDI	Foreign Direct Investment
IACHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESRC	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	The International Law Commission.
IHRL	International Human Rights Law
ILO	International Labour Organization
IMF	International Monetary Fund
NGOs	Non Governmental Organization
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development
TNC	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
US	United States
WTO	World Trade Organization



## CHAPTER ONE: INTRODUCTION

### 1.1 Background of the study

The activity of transnational corporations (TNCs)<sup>1</sup> in the national economies of developing countries<sup>2</sup> has always been an issue of major concern pertaining to human rights violations. In the year 2000, foreign direct investment (FDI) grew by 18 per cent.<sup>3</sup> This was driven by more than 60.000 TNCs with over 800.000 affiliates abroad with over 73 million people employed. By the end of 1996, there were more than 170 Canadian mining companies in Africa with interests in over 440 mineral properties, located in 27 countries.<sup>4</sup> This is just a tip of an iceberg to illustrate the unprecedented economic power as well as the geographic scope of TNCs in Africa. These powerful functions of TNCs threaten the enjoyment of a broad range of human rights. Increasingly, the way in which corporations respond to established human rights practices and norms has become a topic of major concern. It is therefore not possible for private actors whose actions have a strong impact on the society to absolve themselves from the responsibility to uphold international human rights standards.<sup>5</sup>

Several efforts reflect a growing concern to revisit the manner in which rights relates to responsibility<sup>6</sup> pertaining to the activity of corporations. This ushers in corporate social responsibility (CRS)<sup>7</sup>, which is one of the responses to the imbalances in relation to rights

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<sup>1</sup> MNCs/ TNCs may be defined as '... a complex of legally discrete entities (i.e. companies established in several countries, forming a single economic unit, (enterprise) which engages in operations transcending national borders under the direction of a sole decision making centre' per A Fatouros, 'Transnational Enterprise in the Law of State Responsibility', 362 cited in Bergman 'Corporations and the Economic Social and Cultural Rights' available at <http://www.hrusa.org/hrmaterial.IHRIP/circles/circles.modules25.htm>>(Accessed on 19/08/2004).

<sup>2</sup> Developing nations are countries that have not achieved a significant degree of industrialization relative to their populations, and which have a low standard of living. Most developing nations are Asia, Africa, South America, and Central America. In this study, focus is on Africa

<sup>3</sup> 'World Investment Report', United Nations Conference on Trade and Development UNCTAD, (2001), Available at <http://www.unctad.org>>. (Accessed on 1/03/2004).

<sup>4</sup> André Lemieux, "Canada's Global Mining Presence", in Canadian Mineral Year Book (1996), Ottawa Natural Resources Canada, (1997), 86. In page 22 André Lemieux enumerates African countries hosting Canadian mining companies. These are Ghana; Tanzania; Zimbabwe; South Africa; Burkina Faso; Botswana; Mali; Zambia; Namibia; Central African Republic; Côte d'Ivoire; Guinea; Sierra Leone; Uganda; Ethiopia; Niger; Zaire (Democratic Republic of the Congo); Angola; Gabon; Mozambique; Eritrea; Kenya; Liberia; Senegal; Sudan; Swaziland; Tunisia. See Annexure for a detailed list of Canadian mining companies in selected African countries.

<sup>5</sup> UN Commission on Human Rights, Sub-Commission on the Protection and Promotion of Human Rights, 52nd Session, 1 August 2000, E/CN.4/Sub.2/2000/1/Rev.1,17.

<sup>6</sup> See the International Commission on Intervention and the Sovereignty, Commission Report on 'Responsibility to Respect' (discussing the issue of responsibility, although directed to humanitarian intervention, it can apply to the action of non-state actors, available at <<http://www.gc.cuny.edu/cisse/research/final/report/index.html>>.(Accessed on 18/08/2004).

and responsibility of non-state actors. The attempted promulgation of an International Declaration on Human Rights Responsibility by the Inter-Action Council (IAC) in 1998 was the result of multi-national initiatives to create a balance between rights and responsibility<sup>8</sup>. According to Andrew Clapham, the IAC draft declaration is deficient for not going far enough in pointing to the increasing power and responsibility of key international economic and financial actors such as TNCs and other multilateral financial institutions for the protection of human rights.<sup>9</sup> While the issues of the obligations, responsibility and accountability of international financial institutions such as International Monetary Fund (IMF) is brought into bold relief<sup>10</sup>, equally dramatic in terms of the responsibility debate has been the corporate accountability scandals associated with TNCs such as WorldCom, Enron and Joint Dutch British Oil Company Shell<sup>11</sup>. The issue of responsibility of corporations is of serious concern for the promotion and protection of human rights that is not quite addressed within the African human rights context.<sup>12</sup> There is no provision in the African Charter<sup>13</sup> that is expressly applicable to non-state actors such as TNCs.

Present day circumstances pose profound new challenges such as holding non-state actors responsible to the effective protection and promotion of human rights. This is because the analyses of human rights have been focused on the relationship between the state and the individual. However, corporations have gained a far-reaching impact on the well being of many citizens. Human rights are increasingly being incorporated into corporate law as

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<sup>7</sup> Corporate social responsibility refers to the comprehensive approach that a corporation takes to meet or exceed stakeholder expectations beyond measures of revenue, profit and legal obligation. The four pillars of CSR are community investment, respect for human rights and employee relations, adequate environmental practices and ethical conduct.. Note that in this study, responsibility denotes a breach of a legal duty and liability depicts the obligation to pay compensation or refers to obligations emanating from harmful consequences. The word responsibility, liability, accountability and obligation are used interchangeably in this study in the same context..

<sup>8</sup> See the Inter-Action Council, A Universal Declaration of Human Responsibilities, Sept.1, 1997 Available at <http://www.asiawide.or.jp/iac/UDHR/EngDc11.htm>. (Accessed on 23/08/2004)

<sup>9</sup> Clapham A, 'Globalisation and the Rule of Law', *61 Rev. of Int'l Comm'n of Jurist* (1999) he stipulates that "those who are interested in tackling the effects of globalisation on the vulnerable should concentrate on enforcing the rule of law against non-state actor" available<<http://www.hfhrpol.waw.pl/EN-2.htm>>. ( Accessed on 26/08 2004)

<sup>10</sup> Skogly S, 'The Human Rights Obligations of the World Bank and International Monetary Fund' (2001) 9.

<sup>11</sup> 'The President's leadership in Combating Corporate Fraud' available at ><http://www.whitehouse.gov/Inocus/corporateresponsibility>> ( Accessed on 06/062004).

<sup>12</sup> Oloka Onyango, ' Reinforcing Marginalised Rights In An age Of Globalisation: International Mechanisms, Non-state Actors, and the Struggle for People's Rights in Africa.' *18 America University International law Review* 851, (2003) 18.

<sup>13</sup> The African Charter on Human and Peoples' Rights (referred herein as the African Charter).

witnessed by the increasing emergence of corporate responsibility in the field of human rights.<sup>14</sup>

In Africa, there has been an upsurge of concern over human rights and corporations.<sup>15</sup> A number of significant cases have been documented of apparent collusion between TNCs and the host governments in major violations of human rights in Africa. Among the most publicised cases in Africa have been the operations of Joint Dutch British Oil Company, Shell in Ogoni land in Nigeria.<sup>16</sup> Consequently, major violations of human rights resulting from the activities of corporations have been brought to public attention through individuals, non-governmental organisations and intergovernmental actions.

To come to terms with such incidents, a variety of initiatives have been adopted in international law and IHRL with the aim of extending social responsibility standards to corporations for human rights violations in order to pave the way for asserting responsibility.<sup>17</sup> Within this context, governments, civil society actors, and the United Nations system have further noticed and are beginning to take effective action to plug this gap.<sup>18</sup> This has been expressed in numerous codes of conduct drawn up by intergovernmental organisation of which the most significant have been the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of 1977,<sup>19</sup> the Organisation of Economic Corporation and Development (OECD) Guidelines for Multinational Enterprises originally prepared in 1976,<sup>20</sup> and the UN Global Compact that was launched at UN Headquarters in New York on 26 July 2000<sup>21</sup>

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<sup>14</sup> This integration raises questions regarding the responsibility of corporations for human rights violations in international law and international human rights law (IHRL).

<sup>15</sup> On the concept, see e.g. Addo, M 'Human Rights and Transnational Corporation' in Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations*, (1999).p 3-37.

<sup>16</sup> See Human Rights Watch, 'Nigeria, the Ogoni crises: A Case Study of Military Repression in South East Nigerian', (1995,) See *Social and Economic Action Centre v Nigeria* (refer herein as *SERAC V Nigeria*) *Communication 155/96* to the African Commission on Human and Peoples' Rights.

<sup>17</sup> The violations that occur are sometimes of an outrageous or egregious nature such as havoc to homeland, blighting farms and rivers with leaking oil, which often causes devastating fires and environmental damages.

<sup>18</sup> Guisse E, Report of the Sessional Working Group on the Methods and Activities of Transnational Corporations on its Fourth Session, E/CN.4/Sub.2/2002.

<sup>19</sup> See ILO Declaration on Fundamental Principles and Right to work (Geneva: ILO, 18 June 1998).

<sup>20</sup> OECD Guidelines for Multinational Enterprises, 2000 : OECD,( 2000) which has been recently revised in 2000, available at<<http://www.oecd.org/investment/guidelines/mnetex.htm>>.(Accessed on 28/06/2004).

<sup>21</sup> See <<http://www.unglobalcompact.org> > (accessed on 15 May 2004). The Global Compact brings

Several corporations spurred on by consumer and shareholder's expression of concern, have also drafted codes of conduct.<sup>22</sup> In addition, national laws continue to display a concern for corporate responsibility through the extension of public law standards of accountability to privatised industries. In certain Commonwealth countries in Africa, notably Namibia and Uganda, privatisation has been accompanied by an extension of the jurisdiction of their respective national Ombudsman's office and Human Rights Commission to the activities of privatised entities.<sup>23</sup>

Some domestic courts in Africa have also been drawn into the effort to secure greater accountability through the filing of criminal charges against company officials. An example is the recent landmark case in Lesotho involving bribery charges against the officials of the Canadian transnational, Acres Corporation.<sup>24</sup>

Irrespective of the foregoing developments aimed at imposing responsibility for corporate human rights violations, these violations in Africa are frequently unaddressed due to the significant gaps in domestic and international legal regimes. This study is therefore inspired by the need to examine and assess the various avenues for asserting responsibility for corporate human rights violations and find solutions on how best to impose responsibility for these violations in the African context

## 1.2 Statement of the problem

Having suggested that corporation are prone to violating human rights, asserting responsibility for corporate human rights violations within the wider context of globalisation<sup>25</sup>, has brought about conflict between the responsibility of the host state on the

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companies together with UN agencies, labour and civil society to support nine principles in the areas of human rights, labour and the environment.

<sup>22</sup> McCorquodale R, '*Human Rights and Global Business*', in Addo, M (eds) (2001) 92-94.

<sup>23</sup> See John Hatchard, 'Privatisation and Accountability: Developing Appropriate Institutions in Commonwealth Africa' in M Addo, ed. *Human Rights Standards*, (2002) . 289-305.

<sup>24</sup> See *Rex v. Musupha Ephraim* (High Court of Lesotho; Ref. CTR/T/11/99 dated 33 May 2002 unreported. In this landmark case, on the 17th September 2002, Lesotho High Court convicted Sole an official of Acre International, a Canadian TNC on bribery charges for paying bribes to win contracts on a multi-billion dollar dam project. Acres were charged with paying nearly \$266,000 to Mr. Masupha Sole, the former chief executive of the Lesotho Highlands Water Project. Acres' defense was that they were not responsible for the payments to Mr Sole as these were made via an intermediary through a "representation agreement". Chief Justice Lehohla described this arrangement as a deliberate strategy to cover up the bribe payments. Sole was convicted on 11 counts of bribery and two of fraud for accepting about £3m in bribes over more than a decade from an array of European, Canadian and South African firms in return for contracts worth hundreds of millions of pounds.

<sup>25</sup> Globalisation revolves around development in the political, economic and cultural areas. Economic

one hand to promote and protect the rights of all citizens within its territory and jurisdiction, and the responsibility of corporations on the other hand to be directly responsible for human rights violations where they do occur. Since economic activities of TNCs are of the driving engines of globalisation, it is imperative to look at the avenues for asserting responsibility on the state or directly on the corporation for corporate human rights violations. Despite the existence of formal human rights commitments pertaining to the actions of corporations, corporate human rights violations are frequently unaddressed due to significant gaps in domestic and international legal regimes. Consequently, in terms of corporate human rights violations, the issue of where that responsibility arises from and the avenues on how such responsibility is asserted on the state or directly on the corporation in international law and IHRL is still a major problem. This quandary is the focus of this study that aims at examining and assessing the various avenues of asserting responsibility for corporate human rights violations. In a bid to ensure lasting and effective protection of human rights in African, an attempt will be made to suggest alternative ways that will ensure that corporations become directly responsible for human rights violations.

### **1.3 The aim and objective of the study**

This study centres on the presumption that, given the given the unprecedented economic power of corporations, it is vital to clarify the legal issues surrounding the responsibility of corporations for human rights violations and to look at avenues for asserting responsibility. Consequently, this study focuses on the responsibility concept for corporate human rights violations and the objective of this study is to explore, examine and assess various avenues for asserting responsibility for corporate human rights violations. The study recommends other avenues for asserting responsibility for corporate human rights violations in Africa.

The study therefore raises four issues. The first phase seeks focus on how globalisation has triggered the proliferation of corporations in national economies in Africa and the impact on human rights issues taking into cognisance the responsibility concept vis a vis corporations.

The second part seeks to examine state responsibility for the acts of corporations. This discussion will focus on the International Rules on State Responsibility and obligations of states under IHRL with reference to certain human rights instruments that confer a duty on states to respect and to ensure to all citizens within their territories and subject to their

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globalisation is concerned with the removal of barriers to trade and investment, growth in FDI and the movement of capital across national boundaries.

jurisdiction the rights recognised in these instruments.<sup>26</sup> This discussion basically seeks to review the dominant approach to human rights treaties and the relevant instruments to assess the available avenues in asserting responsibility on the state for corporate human rights violations. This study will assess home and host state responsibility and argue that the host state cannot certainly be regarded as the main bearer of responsibility for violation of human rights due to the powerful characteristics of corporations. The jurisprudence of the African Commission on Human and Peoples Rights will also be taken into consideration in examining the legal responsibility of states under IHRL for corporate human rights violations.

Part three of this study will address the question of asserting direct responsibility on TNCs for human rights violations. While some remarks will be made on non-legal responsibilities or soft law, my interest will however be to examine and assess the suitability of human rights principles and instruments that confer direct responsibility on corporations for human rights violations. The discussion will also take cognisance of some treaties<sup>27</sup> that confer direct criminal responsibility on corporations for human rights violations.

The fourth and concluding part will attempt to look at the need for international legally binding regulation of corporations. This discussion will attempt to focus on the application and implications of international legally binding regulation in Africa as a means of reforming and strengthening direct corporate criminal responsibility for human rights violations. Recommendations geared towards the legal reform of asserting direct responsibility on TNCs in Africa will then be made.

### **1.2.1 Research questions**

The study will attempt to explore the following research questions:

- (a) What is the relationship between the process of globalisation, corporations, and human rights?
- (b) What are the obligations of a state under the public international law of state responsibility and IHRL pertaining to corporate human rights violations?
- (c) Under what conditions and by what legal instruments are states responsible for human rights violations by corporations?

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<sup>26</sup> See for example Article 28 of the UDHR, Article 2(1) of the ICCPR and Art 2(1) of the ICESCR ,all of which relate to and define the obligations of state parties.

<sup>27</sup> See for example, the Basel Convention on the Control of Transboundary Movement of Hazardous Waste, which in its art 4(3) defines the traffic of waste as illegal and expressly in art 2(14) addresses corporate entities by defining the person violating the provision as “any natural or legal persons”.

- (d) How have human rights monitoring bodies such as the African Commission on Human and Peoples' Rights addressed the issue of state responsibility for corporate human rights violations, if at all?
- (e) What are the applicable human rights principles and international human rights instruments that confer direct responsibility on corporations for human rights violations and how appropriate are they?
- (f) What is the impact of soft law and international criminal law on corporate responsibility for human rights violations?
- (g) Is there the need for international legally binding regulation of TNCs and what are the likely implications for corporate human rights responsibility in Africa?
- (h) What is the way forward?

### 1.2.2 Literature review

The available literature in relation to this topic is huge. The idea of holding non-state actors such as corporations liable for violation of human rights has been discussed by Stephen Bottomley and David Kinley.<sup>28</sup> They argued that there is a relationship between human rights and corporations and concludes that corporations are prone to violating human rights. Although this work addresses the question of application of human rights norms to transnational corporations in a broader perspective, it makes mention of African jurisprudence, but does not address the avenues to be explored in international law and IHRL in asserting responsibility on the state or directly on corporations for human rights violations. Clapham,<sup>29</sup> in his work takes the position that corporations have an obligation to respect human rights.

The subject of accountability of corporations for human rights violations has also been discussed in the publications of Michael Addo<sup>30</sup> and in the work of Kamminga and Zia Zarifi.<sup>31</sup> M Addo's publication revolves around human rights standards of corporations and provides diverse views of human rights scholars on policy issues, regulation, application, issues of doctrine, globalisation and case studies on corporations and human rights. However, other than a few comments on the role of states, the book does not consider sufficiently the responsibility of the state. It is through the prism of the state that legal regulation of the responsibility of corporation for protecting human rights could occur. This

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<sup>28</sup> Stephen Bottomley and David Kinley, *Commercial law and Human Rights*, (2002).

<sup>29</sup> Andrew Clapham, *Human Rights in the Private sphere* (1993).

<sup>30</sup> See Michael Ado, 'The corporation as victim of human rights violations' in Addo ed, *Human rights Standards and the Responsibility of Transnational Corporations* (ed) (1999).

<sup>31</sup> Kamminga and Zia- Zarifi (ed) (2000).

study attempt to fill this lacuna in M. Addo's publication. Kamminga and Zia Zarifi's publication is not basically on asserting responsibility, but the regulation of TNCs in national economies. On a more specific note on economic, social and cultural rights, the work of Scot,<sup>32</sup> broadly addresses the reasons for the upsurge and emerging international and municipal law jurisprudence for violations of economic social and cultural rights. Scot's publication fails to look at the avenues for asserting responsibility for corporate human rights violations. Peter Muchlinski<sup>33</sup> looks at the subject in a broader perspective, starting from the origin of TNCs and touches on their development and how international law and international human rights law have developed to address the activities of corporations.

Nicola MCP Jagers<sup>34</sup> has also published a book that deals with corporate accountability for human rights violations. This publication analyses the human rights obligations of corporations under international law and IHRL. This study focuses on the avenues for asserting responsibility for corporate human rights violations on the state and directly on the corporations and looks at the implications of international legally binding regulations of corporations or corporate responsibility.

The International Council on Human Rights Policy (ICHRP) published a research project<sup>35</sup> that reviews human rights and the developing international legal obligation of companies in a global context. Other than as an overview of human rights instruments that attempt to assert direct responsibility on corporation, the project does not evaluate sufficiently the suitability of these mechanisms as a means of improving corporate social responsibility. It also does not consider the issue of international legally binding regulation of TNCs and its implications on corporate social responsibility for human rights violation.

The activities of non-state actors vis a vis human rights has been discussed by Odongo G. Odhiambo.<sup>36</sup> Odhiambo narrows down the problem of accountability to an African context and analyses the SERAC case<sup>37</sup> to bring to light within a human rights treaty monitoring

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<sup>32</sup> Scot in 'Economic, Social and Cultural Rights as Human Rights' in Eide et al (ed) 2001.

<sup>33</sup> P Muchlinski, *Multinational Enterprise and the Law* (1995).

<sup>34</sup> Nicola MCP Jagers, *Corporate Human Rights Obligations: In Search for Accountability* (2002).

<sup>35</sup> International Council on Human Rights Policy (2000) '*Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*' available at <<http://www.ichrp.org>> .(Accessed on 23/05/2004).

<sup>36</sup> Odhiambo Godfrey, (2002) LLM student, Centre for Human Rights, Faculty of Law, University of Pretoria. 'Making non-state actors accountable for violations of socio-economic rights: as case study of transnational corporation the African context' a dissertation submitted in partial fulfillment of the requirement of the Degree (LLM in Human Rights and Democratisation).



framework, the challenges of TNCs accountability within the context of Africa specifically for violations of ESCR. The shortcomings of the dissertation is that it does not consider sufficiently the responsibility of a state in a global context under international law and IHRL and does not look at the need of international legally binding regulations on TNCs and its implication on corporate social responsibility.

In an unpublished LL.M dissertation, Amang L. Tamufor<sup>38</sup> addresses the question of compensation. This dissertation, while looking at South Africa as a case study, basically examines selected cases on TNCs and the compensation issues. It analyses specific private international law suits which may influence the cases to be decided by American courts in suits filed by the apartheid victims of South Africa. The dissertation makes a few proposals to strengthen both national and international regulation on corporations to ensure a better compensation system for their human rights violations, but does not examine the applicable human right law, international law and non-legal instruments as determinants of responsibility. Only after the issue of responsibility is considered and the practical means to address this responsibility is clarified can it be decided whether a corporation is to be held accountable to compensate victims of human rights violations.

This study therefore contributes in giving more focus on the available avenues in international law and IHRL for asserting responsibility for corporate human rights violations. It seeks to examine and assess the avenues available under international law and IHRL and other relevant hard and soft law instruments as a forum of asserting responsibility for corporate human rights violations on the state and directly on the corporation. Secondly, it looks at the need for a binding international regulation of the conduct of corporations for human rights violations and its implications on corporate human rights responsibility.

### **1.2.3 Methodology of the study**

This study depends primarily on existing research related to the topic. This includes books, articles, and journals relevant to the study. These materials are being collected from a number of libraries and institutions. These libraries include the University of Pretoria Merensky Library, The library of the Faculty of Law, University of Witwatersrand, Johannesburg, South Africa, the Bame Library, University of Ghana, the Faculty of Law

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<sup>37</sup> See SERAC v. Nigeria( no 16 above).

<sup>38</sup> T. Amang Lindlyn (2003) ' LL.M student , Centre or Human Rights, Faculty of Law, University of Pretoria Ensuring Effective Compensation System for Human Rights Violation by TNCs: A Case Study of South Africa" (2003) a Dissertation submitted in partial fulfilment of the requirements of the degree LL.M ( Human Rights and Democratisation in Africa).

Library, University of Ghana, the British Council Library in Accra-Ghana and the Library of the Third World Network (TWN) Africa.

The Internet will also be very useful in this work. Newspaper articles in relation to TNCs will be very relevant. This work will also depend on conferences and seminars related to the study.

#### **1.2.4 Limitation of the study**

Private actors' responsibility for human rights violations is very broad and entails a wide range of non-state actors that would merit a broader field of research. However, the focus of this study is on TNCs avoiding other non-state actors that are relevant to this discussion. The ensuing discussion should not be read as being necessarily confined to TNCs alone. They are, for the purpose of this study, the main object of analysis. However, if the applicability of human rights in the private sphere is to be accepted, then these norms must be extended to all forms of non-state actors, whether foreign or domestic.

In a further attempt to limit the scope of this study, I will examine and assess principally the human rights treaties and other relevant instruments to assess the available avenues for asserting responsibility on a state and direct responsibility on corporations for corporate human rights violations in the African context.

#### **1.2.5 Summary of the chapters**

The study is divided into five chapters. Chapter one provides the context in which the study is set, the focus and objectives of the study, its significance and other preliminary issues including the research questions and the literature review. Chapter two focuses on discussion of corporations in a global context relating this to the responsibility concept. It further examines the relationship between human rights and TNCs. Chapter three looks at state responsibility as an avenue for attributing corporate human rights violation under international law and IHRL. This chapter also seeks to assess home and host state responsibility for corporate human rights violations. It further looks at the interpretation of case law of the African Commission on Human and Peoples' Rights pertaining to state responsibility for corporate human rights violations.

Chapter four begins by examining the question of corporate responsibility in the context of direct international obligations on corporations. While some remarks will be made on non-legal responsibilities or soft laws, the main interest will however be on the human rights

principles and instruments that confer direct responsibility on corporations for human rights violations and some international treaties and conventions that implicitly confer direct criminal responsibility on corporations. Secondly, this chapter assesses the notion of direct corporate responsibility. The fifth and last chapter of the study seeks to draw some conclusions drawn from the whole study and makes some recommendations on how a convergence can be achieved in asserting responsibility for corporate human rights violations.

## CHAPTER TWO: THE RESPONSIBILITY OF CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS IN A GLOBAL CONTEXT

### 2.1 Introduction

The reported negative impact of corporations on human rights lays the platform for this study. Corporate activities can also have a positive effect on human rights, but this will not be the focus of this study. The impact of corporate activities on human rights can be considerable, as a result of the pressure, which corporations exert on developing countries to lower national standards for the protection of human rights. Corporations have a presence in the vital sectors of the economy of African states and are thus in a position to block steps towards the respect for and protection of human rights.<sup>39</sup> This chapter seeks to address the issue of the increase in the number of corporations and this will be illuminated through the lens of globalisation, by looking at the impact of the activities of corporations on human rights and the responsibility concept. This discussion will focus on TNCs, as the non-state actors.

### 2.2 Defining corporations

The legal status of corporations is often identified as a threshold for settling responsibility issues.<sup>40</sup> The subject of this study will be based on TNCs, an expression which typically refers to a legal person that owns or controls production, distribution or service facilities outside the country in which it is based.<sup>41</sup> A corporation is qualified as a TNC if it has a certain minimum size, if it controls production or service plants outside its home state and if it incorporates these plants onto a unified corporation strategy.<sup>42</sup> Operating in different countries places these corporations outside the effective control of domestic and international law, which can amount to a deficiency in asserting legal responsibility for human rights violations by TNCs.

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<sup>39</sup> UN Doc. E/CN.4/Sub2/1998/6, 10 June 1999, para. 7.

<sup>40</sup> Engstrom V " *Who is Responsible For Corporate Human Rights Violations*" available at <http://www.abo.fi/instut/imr/norfa/ville.pdf>. (Accessed on 14/07/2004).

<sup>41</sup> The expression transnational corporations mostly preferred by the United Nations, which is linked to the movement in the 1970s for a new International Economic Order (NIEO).

<sup>42</sup> See Wildhaber 'Some Aspects of the Transnational Corporation in International Law' 27 *Netherlands International Law Rev Law*, review (1980), 79-88 at 80. On defining the term, see also Mushlinski P, *Multinational Enterprises and the Law*, (1995) 12-13, and Seidi-Hohenveldern, *International Economic Law*, (1992) 13-20.

TNCs can operate with a considerable amount of autonomy and can alternate their activities to different states.<sup>43</sup> The structure of a TNC creates a corporate veil, which portrays that the corporate structure conceals a variety of relationships, mostly notably between legal and natural persons. The corporate veil is a vital element in asserting direct responsibility on corporation.<sup>44</sup>

The doctrine of international legal personality is a vital component as the rights and duties that corporations may have depend on their position under international law. Whether an entity is eligible to have legal personality mainly depends on the definition that is used and on which elements of the definition are considered decisive. Even if one insists on examining the status of corporations in the light of the traditional concept of legal personality, the conclusion that corporations are not subject of international law is no longer valid. This implies that no inherent conceptual reason exists why corporations cannot be burdened with international human rights obligations.<sup>45</sup>

### 2.3 Globalisation, TNCs and human rights

The whole gamut of human rights is being affected as globalisation fosters the growth in the social and economic power of TNCs.<sup>46</sup> Rather than diminishing concern over duties and responsibility, globalisation has heightened attention to the activities of such actors in a context of seemingly unstoppable power.<sup>47</sup> This has led some people to perceive the activities of TNCs as “necessary evils” in the generation of power, the extraction of natural resources like oil or diamonds, or the production of goods for the export market<sup>48</sup>, with African countries as victims of these predicaments. However, increasing concern is being expressed about the manner in which these activities affect peoples’ access to and ownership of land, their right to a healthy environment and the conditions under which they are forced to work.<sup>49</sup> TNCs cause deleterious human rights impacts on the lives of

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<sup>43</sup> A TNC is a complex entity and because of its nature, the Organisation for Economic Cooperation and Development, OECD guidelines for transnational enterprises does not undertake any precise legal definition and it may be contended that any such attempts will confine the scope of corporations and will likely be arbitrary. Engstrom V, (no 40 above) 3.

<sup>44</sup> P Muchlinski (no 33above) 161.

<sup>45</sup> Nicola MCP ( no 34 above) 246.

<sup>46</sup> P Muchlinski, ‘Human Rights and Multinationals: Is There a Problem?’ 77 Int’l Af.31, 34 (2000) 31.

<sup>47</sup> Meaghan S, ‘The United Nations and the Global Compact and the Continuing Debate About The Effectiveness of Corporate Voluntary Codes of Conduct’, *Colo.J.Int’l and Pol’y* 1(2001) 59-162.  
Orford A, ‘Globalisation and the right to Development’ in *Peoples’ Rights*, Philip Alston (ed)(2001) 16.

<sup>49</sup> J. Oloka Onyango, see (no 12 above) *America University International law Review*, (2003), 886.

individuals through their employment practices, environmental policies, relationship with suppliers and consumers, and the interactions with governments and other activities.<sup>50</sup>

Globalisation has led to the increased role of TNCs in the economies of states especially in Africa. The search for comparative advantages by TNCs has been accompanied by negative repercussions. With respect to oil exploitation, there is growing evidence that in a number of poor but oil-rich developing countries, United Nation Development Program (UNDP) human development index ranking have fallen as oil revenues have increased.<sup>51</sup> Nigeria is Africa's biggest oil exporter, but the Niger Delta region - the centre region of the country's oil industry is one of the most underdeveloped areas of the country and is allegedly reported to be prone to violence.<sup>52</sup> Such consequences of "outsourcing" for example are captured in the criticism of the "race to the bottom" phenomenon, that is, the use of low cost services provided through poor environmental standards, low wages, or poor working conditions. In a worst-case scenario, this leads to competition between states with social and environmental standards in order to attract companies. As a consequence, large TNCs can escape national regulatory control by relocating their production to countries offering more favourable terms. The negative features of globalisation, combined with the circumvention of regulatory powers of states, have brought about a change in the balance between power and global reach on the one hand, and responsibility on the other hand. This has generated what the UN Secretary General termed a "backlash" against globalisation.<sup>53</sup>

Another illustration of this "backlash" is exploring avenues for asserting responsibility for corporate human rights violations by TNCs. The complex character of TNCs makes the responsibility question in this context additionally challenging because, in these times of globalisation, the role of the individual state has changed and, in some measure, diminished.<sup>54</sup> The traditional role of state sovereignty faces a serious threat with the emergence of forces that are global in scale and that affects the state's internal and

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<sup>50</sup> See El-Hadji Guisse, 'Report Of The Sessional Working Group On the Working Methods And Activities Of TNCs On Its Fourth Session', *E/CN.4/sub.2/2002/13 Aug 15, 2002*, in *Oloka Onyanko* (no 13 above).

<sup>51</sup> Halima W, 'Governing *Multinationals: the Role of Foreign Direct Liability*, Briefing Paper of the Royal Institute of International Affairs', No 18 Feb 2001) p,1 available at <<http://www.riia.org/index.php>> (Accessed on 21/07/2004).

<sup>52</sup> 'Nigerian troops patrol oil city' available at <http://www.news.bbc.co.uk/2/hi/africa> ( Accessed on 01/08/2004).

<sup>53</sup> Millennium Report of the UN Secretary-General to the General Assembly, '*We, the Peoples: The Role of the United Nations in the 21<sup>st</sup> Century*' (UN Doc. A/54/2000), 2000, United Nations Department of Public Information available at [www.un.org/millennium/sg/report/full.htm](http://www.un.org/millennium/sg/report/full.htm)>. ( Accessed on 25/04/2004).

<sup>54</sup> Skogly and Gibney, *Human Rights Quarterly* (2002) 781 783.

external dependence and thus makes it more difficult to attribute responsibility for corporate human rights violations.<sup>55</sup> This limited scope of choices of the individual state is particularly highlighted in the case of smaller and poorer states<sup>56</sup>

Nonetheless, the practical meaning of the link between business and human rights issues remains unclear for many and there is substantial debate over which human rights can and should apply to business, and in what way<sup>57</sup>. How to approach the issue of responsibility of TNCs for human rights violations is of course the subject of considerable debate.<sup>58</sup> At one end of the spectrum are those who argue that TNCs must play a much more active role in ensuring that human rights in the countries in which they operate are fully addressed.<sup>59</sup> At the other end of the spectrum, a number of scholars such as Marina Ottaway, have been critical of attempts to create 'missionaries' out of TNCs whose primary *raison d'être* is viewed as being the business of making a profit and rejects the campaign to get TNCs (particularly oil companies) to conform more to human rights standards. She likens these moves to the missionary crusade of the last century, arguing that it is singularly a bad idea to cast oil companies in the role of political and moral reformers by getting them to get involved in human rights questions.<sup>60</sup> Ultimately, these discussions point to the often limited utility of the operation of human rights claims in a context where there is such a skewed relationship between those who are violating rights and those who seek to have their rights recognised and validated.<sup>61</sup> Against the backdrop of this argument, it is imperative to address the issue of responsibility for human rights violations by TNCs.

### 2.1.1 TNCs and the responsibility concept

The term responsibility and liability are used synonymously in this study. Any difference linked to responsibility and liability has to emanate from a specific context that they are being used.<sup>62</sup> Attributing responsibility to TNCs for human rights violations requires

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<sup>55</sup> Skogly and Gibney (no 50 above) 406.

<sup>56</sup> Jochnick 21 *Human Rights Quarterly* (1999) 56- 57.

<sup>57</sup> 'Globalization -Business and human rights' available at <http://www.ohchr.org> (Accessed on 29/08/2004).

<sup>58</sup> Addo, M (no 15 above) 25-26, ( conveying the difficulty of " apply [ing] human rights standard of the commercial environment where individual and corporate goals sometimes conflict" ).

<sup>59</sup> McCorquodale R in Addo, M (ed) (no 15 above) 103.

<sup>60</sup> Marina R, 'Reluctant Missionaries', *Foreign Policy*, July/Aug, (2001) 44-45.

<sup>61</sup> Orford A, 'Globalisation and the Right to Development', in *Peoples' Rights* (Philip Alston (ed.) (2001). 176-177.

clarification on where that responsibility arises from, towards whom that responsibility exists, and how such responsibility is asserted. These aspects become interwoven in the process of asserting responsibility on TNCs for human rights violations. In imposing responsibility on TNCs, a similar approach is chosen for analysing the nexus between the alleged violations, the corporation and the host and home state of the corporation.

With reference to a state, the task is not only to identify the violations, but also to reflect on whether and under what conditions states can be responsible for human rights violations by TNCs.

Direct corporate responsibility can arise in different contexts. A corporation can be actively involved in violating human rights giving rise to primary responsibility. The company can also be passively involved meaning that it does not take action for protecting human rights if the corporation is not the immediate violator. The responsibility concept can be extended to situations of pervasive violators, in which the corporation is aware of ongoing violations in the host country, although unrelated to the corporation. In the latter situation the issue could be whether the corporation can be required to get involved in positive moves to enhance human rights in the host country. This entails soft approaches of asserting responsibility.<sup>63</sup>

Getting corporations involved in human rights discourse often raise the question of legal personality of the corporation involved in human rights violations. Absence of legal personality has been perceived as a barrier to asserting responsibility on corporations.<sup>64</sup> The ascertainment of legal personality depends on whether the corporation possesses and can enforce legal rights and duties under international law.<sup>65</sup>

The concept of responsibility is also related to the element of breach. It is apparent that a corporation can be guilty of violating different obligation, against different parties within different legal spheres, presumably raising different modes of responsibility.<sup>66</sup> In

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<sup>62</sup> A simple distinction is often made between responsibility as denoting a breach of a legal duty and liability as depicting the obligation to pay compensation or as referring to obligations emanating from harmful consequences.

<sup>63</sup> Engstrom V, (see no 40 above) 23.

<sup>64</sup> Meeren R, "*The Unveiling of Transnational Corporations: A Direct Approach*" in Addo M,(ed) (no 15 above)161-170.

<sup>65</sup> Jagers MCP '*The legal Status for the Multinational Corporation under International Law*' in Addo, M (see no 15 above) 259—270 at 263-267.

<sup>66</sup> For a discussion of the different degrees of company responsibility, see Frey, B 'The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights' In 6 *Minnesota Journal of Global Trade* (1997) p 153-188.



determining whether the parent company is responsible for its subsidiaries and how complicity with the host government impact on the responsibility question, the issues of home and host state relationship is hereby examined .This issue is determined by taking into consideration the nationality of the corporation along side the principle of territoriality<sup>67</sup> These issues will be addressed in chapter three of this study in assessing state responsibility as an avenues for asserting responsibility for corporate human rights violations.

### **2.2.2 Conclusion**

This discussion in this chapter portray that TNCs, the main actors in the process of globalisation are prone to violate human rights. This has led to an increase in the number of human rights violators beyond the state. Consequently, there have been difficulties in asserting responsibility for human rights violations by TNCs because of their characteristics. The frequently negative influence of TNCs on the enjoyment of human rights as articulated in this chapter, justifies the emphasis placed in this study on examining the avenues for asserting responsibility for human rights violations by TNCs.

On the basis of the foregoing, in the next chapter of this study, I will seek to examine and assess state responsibility as an avenue for asserting responsibility for corporate human rights violations under international law and IHRL

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<sup>67</sup> Nicola MCP. Jagers, (no 34 above) 166.

## CHAPTER THREE: STATE RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS BY NON- STATE ACTORS

### 3.1 Introduction

As has been noted, the process of globalisation has transformed the international society from a collection of sovereign states to one that includes influential non-state actors such as TNCs. Moreover, due to increasing privatisation, the traditional functions of the state are now being conducted by private entities.<sup>68</sup> However, the fear that states will lose international regulatory control must not be exaggerated. Irrespective of the identification of a shift in the relationship between power and responsibility, a suggestion that the state would be vanishing would be misleading. The role of states as primary actors in international law remains unthreatened. TNCs remain dependent on national and international regulations that can be effectively drawn up by states.<sup>69</sup> Even though states are losing power to other entities, they are still the cornerstones of the international legal system.<sup>70</sup> This view is in line with the classical doctrine, which stipulates that states are responsible for the protection of human rights at the national and international level.<sup>71</sup>

This chapter seeks to look at the law of state responsibility through the efforts of the International Law Commission, both with the recent adoption of the Articles on State Responsibility, and the current development of the law of state responsibility for acts of non-state actors such as TNCs. It also looks at the relationship between the law of state responsibility and human rights law. It further examines the due diligence concept vis a vis state responsibility and attempt an analyses of human rights instruments dealing with state responsibility. It proceeds to apply the principle of state responsibility on TNCs based on home and host state obligations and looks at case law of the African Commission on Human and Peoples' Rights aimed at portraying how it has dealt with the issue of state responsibility for human rights violations by TNCs.

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<sup>68</sup> Nicola, MCP see (no 34 above) 4. The ongoing privatisation process in Africa accelerates the participation of non-state actors in national economies that compete with the state.

<sup>69</sup> Peter M, 'Globalisation and the future role of sovereign states', in *International Economic Law With a Human Face*, Fried Weiss, Erik Denters and Paul de Waart [ ed (1998) 45-65.

<sup>70</sup> Sigruni. S in Addo, M (ed) ( no 15 above) . 262.

<sup>71</sup> This was once again reiterated in the *Vienna Declaration and Program of Action* part 1. Art 1 of the *Vienna Declaration and Program of Action*, of July 12 1993 is to the effect that, 'human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments. This prime responsibility of states was also stressed in the preamble of *The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, General Assembly Resolution 53/144, adopted on 8 March 1999: stressing that the prime responsibility and duty to promote and protect Human rights and fundamental freedoms lie with the state.

### 3.2 An overview of the international rule on state responsibility

In addition to the obligation emanating from IHRL, reference can also be made to what can be referred to as the law of state responsibility. In this respect, the International Law Commission (ILC) Draft on State Responsibility can be used as an indication of established and developed customary International Law.<sup>72</sup> The Draft Article on State Responsibility generally is to the effect that there is an internationally wrongful act of a state when conduct consisting of an action is attributable to the state under international law and constitutes a breach of an international obligation of the state.<sup>73</sup>

Theoretically, although the conduct of all human beings and corporations can be linked to the state by nationality, residence, or incorporation, the international law approach on state responsibility is different. The law on state responsibility lays emphasis on a nexus between the act of non-state actors and the state. As a commentator has noted, the conduct of a private person *per se* cannot be the source of state responsibility. A wrongful conduct by a non-state actor must be accompanied by wrongful conduct on the part of the state.<sup>74</sup> The state is not responsible for the acts of the private entity but for the failure to prevent the act. The act of the private entity then constitutes an external event, which acts as a catalyst for the wrongfulness of the state's conduct.<sup>75</sup> The ILC Draft Articles on State Responsibility cover *inter alia*, acts of state organs or entities exercising elements of governmental authority, acts carried out under the direction or control of the state, and acts acknowledged by a state as its own.<sup>76</sup> According to the Draft Articles, for an entity to be considered an organ of the state, it is not of essence what position that organ holds within the organisation of the state.<sup>77</sup> The relevant question to be addressed within the framework of this study is under which circumstances may acts by TNCs be attributed to the state and eventually lead to state responsibility?

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<sup>72</sup> The ILC has been working on this topic of State responsibility since 1949. In 1996 the ILC completed its first reading of an entire set of Draft on International State Responsibility. (UN Doc. A/51/10,6 May-26 July 1996). The A/CN.4/L.602/REV.1, 26 July 2001 second reading of the Draft Articles on International State Responsibility was concluded in 2001. UN Doc.( refer herein as (ILC) Draft Article)

<sup>73</sup> For the text of the Articles with commentary see Report of the International Law Commission( Fifty Third Session ) Official Record of the General Assembly fifty sixth Session, Supplement No. 10, UN Doc.A/56/10 (2001).

<sup>74</sup> Nicola MCP, see (no 34 above) 145.

<sup>75</sup> Nicola, MCP, see (no 34 above) 145.

<sup>76</sup> See chapter 2 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, UN.Doc. A/CN.4/L.602/REV.1,26 July 2001.

<sup>77</sup> See Article 4, para 1 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts is to the effect that a state irrespective of the position of a non state actor in a state apparatus, the has an obligation to regulate its activities.

Firstly, in a situation where individuals or groups empowered by the law of the state exercise elements of governmental authority, this may be considered to be an act of the state. These entities are not part of the formal state machinery but due to 'the special nature' of their activities, their conduct is attributed to the state and the state is responsible for such conduct.<sup>78</sup>

Secondly, state responsibility can be deduced in the case where the action of non-state actors is in fact directed or controlled by the state. In certain circumstances, states may supplement their own action by authorising operations by private persons. These persons are not state organs but act on behalf of the state conferring authority.<sup>79</sup> It can be argued that security arrangements between oil companies and the host state depict this category of acts that can be attributed to the state. Oil and mining companies most often rely on the security forces from the host countries to protect their installations against sabotage, hostage taking and intimidation. The close collaboration between the host state and the oil companies as well as the secrecy surrounding the issue of security, makes it difficult to separate the public and the private spheres, making it hard to establish responsibility for human rights violations by TNCs. An illustration of this situation is the security arrangements for example made by oil companies in Nigeria.<sup>80</sup> The Niger Delta has for some years been the site of major confrontations between the people who live there and the security forces of the Nigerian government, resulting in extra-judicial executions, arbitrary detentions, and draconian restrictions on the rights to freedom of expression, association, and assembly. These violations of civil and political rights have been committed principally in response to protests against the activities of Joint Dutch- British Company, Shell in the Delta region of the Federal Republic of Nigeria.<sup>81</sup> Government soldiers remain deployed in the riverine areas of Bayelsa and the Delta states and they are responsible for the ongoing human rights violations<sup>82</sup>, placing responsibility on the Nigerian government for the acts of Shell, a TNC.

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<sup>78</sup> See Article 5 of the *Draft Articles on the Responsibility of States for Internationally wrongful Acts*.

<sup>79</sup> Nicola M.C.P. Jagers (no 34 above) p 140. See also Article 8 of the Draft Articles ( no 76 above).

<sup>80</sup> According to Human Rights Watch, The Nigerian government has formed several special task forces such as the notorious River State Internal Security Task Force team, Operational Flush, The Mobile Police- called "Kill and Go" by the Niger Delta population, Operation Strom, Operation Salvage. The activities of these forces have led to human rights violations in the Ogoni land, in Nigeria. See *The price of Oil* available at<[http://: www.hrw.com](http://www.hrw.com)>. (Accessed on 16/06/2004).

<sup>81</sup> "*The price of Oil*" available at<[http://: www.hrw.com](http://www.hrw.com)> Accessed (18/06/2004).

<sup>82</sup> Ganesan A, '*Human Rights, the Energy Industry, and the Relationship with Home Governments*' in *Human Rights and the Oil Industry* Asborn Eide, et al.ed (2000) 54-60.

Thirdly, private conduct can be attributable to the state if, in the absence of fault of official authorities, circumstances call for the private entity to exercise governmental authority.<sup>83</sup> This situation is prevalent in a situation of war or natural disaster where TNCs take over the functions of the state. This phenomenon is common in failed states<sup>84</sup> where there is the absence of regulation of corporate activity. When a state has contributed to its ineffectiveness, the obligations of the state to regulate TNCs remain valid and state responsibility can be invoked for a breach of its obligations.<sup>85</sup>

### 3.3 The relationship between rules of state responsibility and human rights law

Despite the seeming correlation between international human rights law and international rules on state responsibility, the question yet to be answered is, should ILC Draft Articles be applied in the human rights context? Clapham, making reference to the ECHR context, has argued that the international law on state responsibility is not appropriate in the context of human rights law.<sup>86</sup>

Irrespective of these arguments, practice has shown that the international human rights bodies apply the general principles of state responsibility.<sup>87</sup> The case law of the European Court of Human Rights (ECtHR) has been interpreted so as to be consistent with the principles spelt out in the ILC (without expressly referring to them) in relation to the duty of a state to secure the rights and freedoms of the ECHR in domestic law, or to take reasonable and appropriate protection of these rights. The fact that the jurisprudence of the ECtHR considers failure to legislate as giving rise to state responsibility, which is in

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<sup>83</sup> See Article 9 ( no 76 above).

<sup>84</sup> Failed States" are defined by the patterns of governmental collapse within a nation which often bring demands (because of the refugees they foster, the human rights they abridge and their inability to forestall starvation and disease) which threaten the security of their surrounding states and region. The failed state is considered "utterly incapable of sustaining itself as a member of the international community" (Helman and Ratner, *Foreign Policy*, 1992). For example, one finds states such as Somalia characterised by a complete disintegration of the state institutions and further examples such as Democratic Republic of Congo, Angola, Liberia and Sierra Leone where long periods of war have resulted into breakdown of effective state control.

<sup>85</sup> Nicola M.C.P. Jagers (34 above) 142.

<sup>86</sup> For a discussion in the ECHR context of state responsibility for acts of non state actors unconnected to the state, see Andrew Clapham, *Human Rights in the Private Spheres*, Clarendon press (1993) p 188. His argument is that the ECHR does not primarily operate at the inter-state level, as it grants remedies to individuals; effective protection demands that the Convention control private actors; the Convention takes effect in the national order of the contracting parties and constitute a kind of *ordre public*; a public/private dichotomy is arbitrary unreasonable discriminatory, and perpetuates the exclusion of certain kinds of violation of rights'.

<sup>87</sup> See Lawson R. *Out of control. State Responsibility and Human Rights: Will the ILC's Definition of the " Act of State. Organisation and Foreign Policy: essay in honour of peter Baehr*, Monique castermans, Fried Van Hoof and Jacqueline Smith, [eds], (1998) 91-116.

conformity with the ILC draft indicates that there is no conflict between ILC Draft Article and the ECtHR principles.<sup>88</sup>

The commentary to the ILC Draft Articles portrays that they do not define the content of (“primary rules”) giving rise to state responsibility. On the contrary, they constitute general (“secondary”) rules on international law.<sup>89</sup> One can therefore argue that this distinction is important as it indicates that the rule on state responsibility is not geared towards the substitution of any other obligations. In this way, any argument against state responsibility provisions from being insufficient for protecting human rights is inappropriate.

The ILC Draft Articles apply to all areas of international obligations of states, irrespective of whether that obligation is owed to the state, to an individual, a group or to the international community as a whole. Especially, part one of the draft is intended to apply also to human rights violations, thus, it does not only cover international obligations owed to other states, but all obligations of the state.<sup>90</sup>

The aim of the aforementioned discussion is not to show the compatibility of human rights law and the rules of state responsibility, rather it aims at indicating that the ILC’s recognition of omission of state organs as a ground for invoking responsibility may be invoked, for a breach initially not imputable to the state, on the grounds of lack of due diligence to prevent a violation by TNCs.

### **3.2.1 The due diligence standard**

Irrespective of the relationship between rules of state responsibility and human rights law, it is not an absolute rule to use human rights law to hold states responsible for every crime committed by TNCs. Doing so would trivialise the notion of human rights.<sup>91</sup> The due diligence criteria or standard had been developed under IHRL to determine when a state is responsible for the actions of non-state actors such as TNCs and what states must do to ensure that these actors respect human rights.<sup>92</sup> The due diligence test stipulates that a

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<sup>88</sup> See the case of *Castello-Roberts V the United Kingdom* (12 march 1993), publication of the European Court of Human Rights, Series A, Vol. 247-C.

<sup>89</sup> See ILC Draft Articles (no 76 above) .

<sup>90</sup> ILC Draft Articles (no 76 above) 59-62 and 214.

<sup>91</sup> International Council on Human Rights Policy (2000), ‘Beyond Voluntarism Human Rights and the Developing International Legal Obligation of Companies’, available at <<http://www.ihrp.com>>. (Accessed on 12-07-2004)

<sup>92</sup> The standard of due diligence was developed with regard to the protection of aliens, but now it is

state must have taken reasonable or serious steps to prevent or respond to an abuse by a private actor, including investigating and providing a remedy such as compensation. It gauges the effort and willingness of a state to act. The due diligence test in terms of international law and human rights law was first formulated within the framework of the American Convention of Human Rights in the *Velasquez Rodriguez case*.<sup>93</sup> When Angel Manfredo Rodriguez forcibly disappeared and was probably killed in 1981 by the Honduran Army or unknown attackers, the Inter- American Court of Human rights articulated this test for the first time. The court stipulated that, even if the attackers were private individuals, the total failure of the authorities to try to find the victim or perpetrator or give any remedy to the family was itself a violation.<sup>94</sup> The Inter-American court reiterated that, among other duties, there is an obligation on the state to prevent human rights violations by non-state actors. According to the Court:

A state violates human rights when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Convention. An illegal act which violates human rights which is initially imputable to a State (for example because it is an act of private person or because the person responsible has 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. 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 serious investigation of the violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim gets adequate compensation. This obligation implies the duty of the state parties to organise the governmental apparatus and, in general, all the structures through which public power is exercised so that they are capable of juridically ensuring the free and full enjoyment of human rights.<sup>95</sup>

According to the Draft Article of the ILC, there is therefore a positive obligation on a state to take the necessary, timely and reasonable measures to prevent human rights violations and to ensure adequate compensation for victims of human rights violations committed by non-state actors such as TNCs. The question to be addressed at this juncture is thus: If international law requires that states to prohibit certain conduct by private actors, is that conduct itself a violation? The court in the *Velasquez Rodriguez case* clearly made mention

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applied to state Responsibility arising from private acts in the context of human rights. The due diligence test in terms of international law of human rights was first formulated within the framework of the American Convention of Human Rights (ACHR) in the case of *Velasquez Rodriguez*, Annual report of the Intern- American Court of Human Rights, OAS/Ser.L/V/III.19, doc 13 (1988).

<sup>93</sup> *Velasquez Rodriguez*, Annual report of the Intern- American Court of Human Rights, OAS/Ser.L/V/III.19,doc 13 (1988).

<sup>94</sup> *Velasquez Rodriguez* (no 93 above) para 172 and 177.

<sup>95</sup> *Velasquez Rodriguez* (no 93 above) paras 166,172,174 and 175.

of the acts of private actors violating the treaty. There is some authority for the quite logical argument that if a state is required to prevent and stop conduct by private actors, the conduct itself is indirectly prohibited by the international law rule. Honduras would also have been liable if it had acquiesced in the private abuse.<sup>96</sup> In this way, a state is responsible for an act of a TNCs if it assent to an act that amount to a violation of its international human rights obligations

The point of contention is whether questions of due diligence should be assessed in the light of the capabilities of a particular state, or whether this determination should be left to an international standard. The International Court of Justice (ICJ) has analysed due diligence in terms of “means at the disposal” of the state.<sup>97</sup> This makes it difficult to maintain some minimum standard reaction from government for human rights violations by TNCs. It could well be assumed that for non-derogable human rights the positive obligation of states would go further than in other areas.

### **3.2.2 The obligation of states under IHRL for human rights violations by TNCs**

A wide range of human rights treaties which are legally binding on states that ratify them, explicitly or through interpretation, require states to regulate the actions of TNCs and to stop or prevent them from abusing human rights guaranteed in the various human rights treaties.

The Universal Declaration of Human Right (UDHR)<sup>98</sup>, International Covenant of Civil and Political Rights (ICCPR)<sup>99</sup> and the International Covenant of Economic, Social and Cultural Rights (ICESR)<sup>100</sup>, all relate to, and define the obligations of state parties to ‘respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant’.<sup>101</sup> The wording of the aforementioned treaties is to the effect that it is up to states to carry out the obligations established by the convention. The obligations on the state to respect and to ensure to all individuals rights recognised by these covenants

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<sup>96</sup> Velasquez Rodriguez See ( no 93 above) para 176.

<sup>97</sup> See the *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgement, ICJ Reports 1980, where at page 106 of the judgement, it is articulated that adequate compliance to the due diligence test by a state by a test depends on the available means at the disposal of the state in question.

<sup>98</sup> The Universal Declaration of Human Rights (UDHR) Article 28.

<sup>99</sup> Article 2(1) of the ICCPR.

<sup>100</sup> Article 2(1) of ICESR.

<sup>101</sup> See (no 100 above) article 2(1).



portray slightly different things. The obligation to respect is a negative obligation asserting a direct prohibition on state for human rights violations. The obligation to ensure goes further, indicating that the state parties must take positive steps to give effect to the rights in the covenant.<sup>102</sup> This implies an obligation on state parties to adopt the necessary ‘ legislative and other measures’<sup>103</sup> to provide effective remedies to victims and establish institutional safeguards to protect individuals against violation of their rights by TNCs.

The UN Convention for Elimination of Discrimination against Women (CEDAW) requires states ‘to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise’<sup>104</sup>. The responsibility of states in relation to private actors is most fully accepted in relation to violence against women. On this issue, the UN Committee that monitors implementation of the treaty has stipulated that:

Discrimination under the convention is not restricted to action by or on behalf of governments...Under general international law and specific human rights covenants, states may be responsible for the actions of private actors...<sup>105</sup>

This has been supported by a highly authoritative UN declaration prohibiting violence against women that includes in the definition of violence against women acts occurring ‘in public or private life’.<sup>106</sup> This implies that a state is responsible for violence and discrimination against women by non-state actors such as TNCs.

The UN Convention prohibiting racial discrimination obliges States to ‘prohibit and bring to an end...racial discrimination by any person, groups or organisations’.<sup>107</sup> The UN Committee on the Elimination of Racial Discrimination has supported this assertion by saying:

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<sup>102</sup> See Human Rights Committee and General Comments Adopted at the National Level, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc, HRI/GEN/1/Rev. 1 at 4 1(994).

<sup>103</sup> See (no 99 above) article 2(2).

<sup>104</sup> CEDAW article 2(e).

<sup>105</sup> See (no 104 above) article 5(a).

<sup>106</sup> UN Committee on the Elimination of Discrimination Against Women, UN General Assembly Resolution 48/104 of 20 December 1993, UN doc: A/RES/48/104.

<sup>107</sup> International Covenant for the Elimination of Racial Discrimination (ICERD) Article 2(1)(d). The Convention also obliges states to criminalise the spreading of ideas of racial superiority and inciting others to racial discrimination and violence and make racist organisations illegal (Art. 4), by government officials or by individual group or institution’ (Art 5(b). States must also ensure that victims of racial discrimination have effective remedies, including compensation f (Art.6). It further call on states to protect against racially motivated violence’ whether inflicted by government.

To the extent that private institutions influence the exercise of rights or the availability of opportunities, the state party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.<sup>108</sup>

Most International Labour Organisation (ILO) treaties on workers' rights expect states to ensure that both private employers and public institutions respect labour rights whether they deal with collective bargaining, forced labour, or health safety.<sup>109</sup>

According to the UN Committee on Economic, Social and Cultural Rights, states parties should take steps to ensure that 'activities of the private business sector and civil society are in conformity with the right to food'<sup>110</sup> The Committee warned that violations by the state of the right to food will include '...failure [of a state] to regulate activities of individuals or groups so as to prevent them from violating the right to food of others'.<sup>111</sup>

Other human rights treaty monitoring bodies have also considered the question of responsibility for corporate human rights violations. There exist decisions of the Human Rights Committee<sup>112</sup>, the European Court on Human Rights<sup>113</sup>, and the Inter-American Commission<sup>114</sup>, reiterating state responsibility to ensure that corporate conduct does not violate human rights.

The Maastricht Guidelines on violations of Economic, Social and Cultural Rights conclude that:

The obligation to protect includes the states' responsibility to ensure that private entities or individuals, including transnational corporations over which they

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<sup>108</sup> Committee on the Elimination of Racial Discrimination General Recommendation 20, 'Non discriminatory Implementation of Rights and Freedoms, (Art. 5)' 15 March 1999.

<sup>109</sup> For example Convention (No. 87) concerning Freedom of Association and protection of the Right to organise (Adopted 9 July 1948 by the General Conference of the ILO), require in Article 11 that every state party 'undertake all necessary and appropriate measures to ensure workers and employers may exercise freely the right to organise.'

<sup>110</sup> UN Committee on Economic Social and Cultural Rights, General Comment 12, 'the Right to Adequate Food' 12 12 May 1999, UN Doc: E/C.12/1999/5, CESR, para 27.

<sup>111</sup> See (no 110 above) para 19.

<sup>112</sup> *Hopu and Besset v France*, UN Doc, CCPR/C/60/D/549/1993.

<sup>113</sup> *Guerra and Another v Italy*, Judgement of 19 February 1998, European Court of Human Rights, Report of Judgement and Decisions 1998-1, No.64.

<sup>114</sup> Report of the Situation of Human Rights in Ecuador, OAS Doc.OEA/Ser.LV/II(1997) Inter-American Commission on Human Rights.

exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights.<sup>115</sup>

### 3.3.3 Home and host state responsibility for human rights violations by TNCs

The chain of operation of TNCs involves more than one country, thereby broadening the avenues to be explored in the course of asserting responsibility for human rights violations. The question to be addressed is, can only the host state, where the TNC operates, be held liable or should the TNC's home state, that is the place it is incorporated<sup>116</sup> also be held responsible for failing to adopt legislation that regulates the activities of TNCs?

On the one hand, TNCs are subject to national law under which they operate. When a TNC violates human rights, the first reaction would be to look at the regulatory failure of the jurisdiction within which it functions. In this case, the host state would be liable if it fails to protect citizens within its territory, taking into consideration the due diligence standard as pointed out above. In this scenario, the character of the responsibility is indirect because the state is not the immediate agent of the harm. Existing experience suggests that claims are less likely to succeed in host states for a variety of reasons.

Steiner and Alston<sup>117</sup> have listed five problems to be faced when dealing with the question of enforcing corporate responsibility by the host states. Firstly, states are unwilling to take the necessary measures to ensure compliance by TNC to human rights standards. Secondly, access to the victim/claimant may be more difficult in the host countries because of the cost involved which is beyond the resources and capabilities of governments in developing countries. Thirdly, collusion is likely to be greater, partly because developing countries, which are usually host states in the globalised economy. Many small, weak national economies are dependant on TNCs and it is understandable, if regrettable, that they are scared of alienating them.<sup>118</sup> The situation is even worse in the case of developing countries, which in their quest and scramble for economic investments from TNCs, are too

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<sup>115</sup> *Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26 1997, para 18. If a government fails to ensure that private employers comply with basic international labour standards, this could amount to a violation by that State of the right to work or the right to just and favourable conditions of work ( para 6).

<sup>116</sup> Case concerning the Barcelona Light and Power Co Ltd.( Belgium v Spain) I.C.J Report 1970) .3, para.70.

<sup>117</sup> Steiner, H and Alston, P *International Law* (3rd edn) (2000), 1349.

<sup>118</sup> See controlling corporate wrongs: The liability o Multinational corporations. Legal possibilities, initiatives and strategies or civil society. A report o the international IRENE seminar on corporate liability and workers' right held at the University of Warwick, Coventry, UK, 20 and 21 March 2000 available at <<http://www.cleanclothes.org/publication/corp-2.htm>> (Accessed on 16/08/2004).

enfeebled to regulate or control the companies. Indeed the companies are more likely to show a preference for those countries with lax regulation over transnational business activity. The absence in developing countries of the technical expertise and legal developments necessary to monitor or regulate complex activities such as environmental pollution also militates against any effort by these countries to control the activities of TNCs.<sup>119</sup> Fourthly, the multinational complexity of the corporate transaction in an era of globalisation further makes it increasingly difficult to identify who is responsible for what activities and where. Lastly, there is the difficulty of ascertaining the minimum acceptable standards from one country to another.

On the other hand, recourse to holding home states responsible for failing to control their corporate citizens abroad could prove to be an effective way of controlling corporate activities with regard to human rights violations. The home state of the TNC, mostly developed nations should have the power and resources to act against TNCs that violates human rights.<sup>120</sup> In some cases, corporate human rights violations in host countries may be the result of decisions taken by the parent corporation in the home state.<sup>121</sup> The benefit of this approach would be based on the perception that home states of the largest TNCs, most of which are located in developed countries,<sup>122</sup> have the better legislative and administrative resources to hold TNCs accountable for human rights violations. Moreover, the home states are the prime beneficiaries of TNCs operation, which could add a moral duty for controlling how the profit is made.<sup>123</sup>

In determining corporate human rights responsibility the principle of territoriality needs to be examined due to the link between responsibility and territorial control of TNCs. International practices show that the state is presumed to have actual control over its state organs even though they are committed outside the territory of the state concerned. This has been confirmed by the ILC in its work on state responsibility. The ILC has taken the position that the attribution to the state of the acts of its organs is not subject to any territorial

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<sup>119</sup> Emeka D, Multinational 'Corporations and Compliance with International Regulations Relating to the Petroleum *Industry*', Annual Survey of International and Comparative. law (2001),101-139.

<sup>120</sup> Mccourdale' feeling the Heat of Human Rights: Bringing TNCs Within the Human Rights Fence" 2001) *Human Rights and Human Welfare* 26, also available at<<http://www.du.edu/gsis/hrhw/volumes/2001/1-4/mccorquodale-addo.pdf>>. ( Accessed on 17/072004).

<sup>121</sup> Nicholas MC Jagers (no 34 above ) 166.

<sup>122</sup> A country with a high level of per capita income, industrialization, and modernization. An area of the world that is technologically advanced, highly urbanized and wealthy, and has generally evolved through both economic and demo- graphic transitions.

<sup>123</sup> Son rajah 'Linking State Responsibility for Certain Harms Cause by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States' in Craig Scot (ed) *Torture as Tort: Comparative Perspective on the Development of Transnational Human Rights Litigation*, (2001)553-566.

limitation.<sup>124</sup> Human rights now operate beyond all borders of states acknowledging in principle at least that “the promotion and protection of all human rights is a legitimate concern of the international community”.<sup>125</sup> Home states are required not only to protect a corporation, but to prevent it from engaging in injurious conduct abroad.

The *Nicaragua case*<sup>126</sup> is authority for the position that non-state actions can result in state responsibility even when committed outside the territory of the state where the state is shown to and does have control over non-state actors. There are other codified examples especially in the environmental sphere which impose an obligation not to permit citizens and corporations to export toxic waste to other countries.<sup>127</sup>

The Human Rights Committee has found that the ICCPR notion that “... all individuals within its territory and subject to its jurisdiction...” does not imply that a state party concerned cannot be held accountable for violation of rights under the Covenant which its agents commit upon the territory of another state, whether with the acquiescence of the government of the state or in opposition to it.<sup>128</sup>

### **3.3.4 Case law of The African Human Rights Commission on State Responsibility: SERAC and CESR v. Nigeria**

The petition of the African Commission was filed in 1996 in the aftermath of the Sara-Wiwa<sup>129</sup> execution and against the backdrop of the rapidly deteriorating human rights situation in the Delta region of the Republic of Nigeria. It specifically alleged that the operations of the Nigerian government through the state oil company, the Nigerian National Petroleum Company as major shareholders in a consortium with the joint Dutch-British Company, Shell Petroleum Development Corporation had caused environmental

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<sup>124</sup> UN Doc.A/CN.4/Ser.A/1975,YBIL,Vol.II, 1975, 83, para 1.

<sup>125</sup> *Vienna Declaration and Program of Action* (no 71 above) para 4

<sup>126</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgement, ICJ Reports 1986, at 14.

<sup>127</sup> This is exemplified by the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal 1989 28 ILM 1989) at 657 (hereinafter Basel Convention).

<sup>128</sup> *Lillian Celiberti de Casareigo V. Uruguay*, ( Human Rights Committee, Session 13), Communication no.56/1979( 29July 1981), UN Doc.CCPR/OP/1 at 92 (1984) para 10.3

<sup>129</sup> Sara-wiwa was a Nigerian Environmental activist. On the 10<sup>th</sup> November he and eight others were hanged, despite international appeals, in connection with murder allegations, after he led a demonstration against the activity of The Royal Dutch Shell Group (The Shell Group) in Ogoniland in Nigeria.

degradation and health problems resulting from contamination of the environment among the Ogoni people<sup>130</sup>

The petition further alleged several acts of murder, intimidation and harassment committed by members of the Nigeria military. The communication focused on several violations of the African Charter, including the right to life (Article 4), the right to health (Article 16) and healthy environment (Article 24), the right to property (Article 14) and housing, the right to food and the protection of the family (Article 18)

Intricately linked with the violation of these rights are a number of salient violations of other rights including the rights to culture, compensation concerns over local communities and the indigenous community rights of the local population.<sup>131</sup>

In determining government's obligation to IHRL, the African Commission basing its decision on the state's duties to respect, protect, promote and fulfil all human rights obligations<sup>132</sup> found that Nigeria had violated these obligations. The African Commission was particularly critical of the manner in which the Nigerian government related to the oil consortium stating that the government had failed to exercise the necessary degree of care required in the circumstances.<sup>133</sup>

Additionally, the Commission stated that the obligation of care extended to the design of "legislation and provision of effective remedies" and the government has an obligation to protect its citizens from damaging acts 'perpetuated by private parties'<sup>134</sup>.

The Commission held that the Government of Nigeria facilitated the destruction of the Ogoniland contrary to its Charter's obligations. By any measure of standards, its practice falls short of the minimum conduct expected of government, and therefore, is in violation of the African Charter.<sup>135</sup> There is consequently an obligation on states to prevent private actors from abusing human rights<sup>136</sup> and a further duty to respond to violations that may be committed by them.

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<sup>130</sup> See *SERAC V Nigeria* see (no 16) above) Page 1 provides a factual background of the case.

<sup>131</sup> Idowu (1999) 17(2) *Netherlands Quarterly of Human Rights* 161 166.

<sup>132</sup> See ( no 16 above) paras 44-47.

<sup>133</sup> See (no 16 above) para 56.

<sup>134</sup> See no 16 above) para 47.

<sup>135</sup> See (no 16 above) para 60.

The decision therefore demonstrates the importance of the host state responsibility in implementing the human rights obligations of non-state actors. The decision reaffirms the issues of state responsibility for human rights violations by TNCs in this era of globalisation.

### **3.3.5 Conclusion**

The foregoing discussion indicates that a state cannot absolve itself of its human rights responsibilities through reference to private entities.<sup>137</sup> States are under the obligation to protect citizens against corporate activities that violate human rights by exercising due diligence in taking legislative and other preventive measures. Due to the powerful nature of TNCs, the host state approach seems to be ineffective for practical reasons as mentioned above. As demonstrated above, it is feasible that an obligation exists for the home state to adopt legislation controlling harmful corporate practises. This will entail stretching the responsibility for ensuring human rights beyond the traditionally territorial scope of the obligation. Although in some cases, such a regulatory approach has been argued to be legally possible, it seems safe to conclude that human rights law itself is still evolving to attain this objective.

The law of state responsibility offers an interesting avenue to assert responsibility, yet it is ineffective in developing countries<sup>138</sup> due to several obstacles enumerated above. This precipitates an alternative approach to the problem of corporate responsibility. On the basis of the foregoing, the next chapter examines direct responsibility of corporations themselves for human rights violations.

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<sup>136</sup> This relates to the due diligence duty discussed in section 3.4 in this chapter.

<sup>137</sup> Peter M, (no 33 above) 42.

<sup>138</sup> See ( no 2 above) for a definition of a developing nation.

## CHAPTER FOUR: DIRECT RESPONSIBILITY BORNE BY TNCs FOR HUMAN RIGHTS VIOLATIONS

### 4.1 Introduction

Human rights law has traditionally concentrated on action by states. The assumption has been that it is governments and their officials that have primary responsibility both for protecting human rights and for ensuring that human rights are not infringed, either by state agents or by third parties. But in the global age, it becomes difficult to concentrate only on state action alone when a plethora of non-state bodies such as TNCs now act on the international stage<sup>139</sup> and in some situations, have also been granted the benefit of certain rights that are found in IHRL, along with access to international tribunals to enforce them.<sup>140</sup> The European Court of Human Rights has recognised that corporations can enjoy rights such as the right to fair trial, privacy and aspects of freedom of expression.<sup>141</sup> Due to the increased role of non-state actors in the human rights arena, the question of private actor responsibility for human rights violations has triggered considerable attention<sup>142</sup>. This evolution is a challenge to the traditional notion of human rights law, geared towards regulating the relationship between the state and the individual<sup>143</sup>.

The rise of non-state actors, such as TNCs have further diminished the ability of states to create and enforce the regulatory structures needed to protect human rights.<sup>144</sup> Since states are unable to take effective action against corporations, the question of direct responsibility arises. To what extent does IHRL and international criminal law impose obligations directly on corporations to respect human rights? This chapter will examine this question.

This first section of this chapter seeks to examine and assess a number of international human rights instruments that assert direct responsibility on non-state actors for human rights violations. It will look at international criminal law vis a vis direct responsibility on non-

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<sup>139</sup> Non-state actors and international human rights law available at <[http://www.lse.ac.uk/Depts/human-rights/Forthcoming\\_events/Robert\\_McCorquodale.htm](http://www.lse.ac.uk/Depts/human-rights/Forthcoming_events/Robert_McCorquodale.htm)> (accessed on 29/08/2004).

<sup>140</sup> See International Council for Human Rights Policy (no 32 above) 56.

<sup>141</sup> *Autronic AG v Switzerland*, Eur.CT.HR. Series A.178 (1990): 121 (1990) E.H.H.R 485 at para 47, where the material issue in question concerned the protection of the rights of corporations.

<sup>142</sup> Skogly in Addo, M (ed) (see no 15 above) 239.

<sup>143</sup> Skogly in Addo (ed) (see no 15 above) 299.

<sup>144</sup> 'Shifting Responsibility: State and Non-state Actors' <<http://www.cceia.org>> available at (accessed on August 29/2004).



state actors. It further examines soft law initiatives demonstrated by codes of conduct. The second part of this chapter will attempt to assess direct corporate responsibility and argues that international human rights instruments are not designed for holding non-state actors responsible for human rights violations.

#### **4.2: Asserting direct responsibility on non-state actors through International human rights law instruments**

A wide range of human rights instruments could be construed to impose direct responsibility on non-state actors such as TNCs. While the extant international legal framework imposes legal obligations to respect human rights mainly on states, the Universal Declaration of Human Rights (UDHR) which is the substratum of most human rights norms extends these obligations on non-state actors. The preamble stipulates that:

the [United Nations] General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and 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>145</sup>

Commenting on this part of the preamble during the 50th anniversary celebration of the Universal Declaration in 1998, Professor Louis Henkin emphasised that:

*every individual*' includes juridical persons. *Every individual and every organ* excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all<sup>146</sup>

The preamble's language exhorts non-state actors such as TNCs to promote and protect human rights. It is therefore not possible for private actors whose actions have a strong impact on the enjoyment of human rights by the larger society, to absolve themselves from the duty to uphold international human rights standards.<sup>147</sup> It is unacceptable for TNCs to shirk their responsibilities under IHRL.

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<sup>145</sup> The Universal Declaration of Human Rights, adopted on the 10<sup>th</sup> of December, UN.G.A Res 217 A (III), GAOR, 3<sup>rd</sup> Session, UN. Doc.A/810 (1948).

<sup>146</sup> See International Council for Human Rights Policy (no 32 above) p 58.

<sup>147</sup> Curtis M, ' *Trade For Life: Making Trade Work for Poor people*' (2001) available at [www.christian-aid.org.uk/indepth/0111trbk/00\\_Prelims.pdf](http://www.christian-aid.org.uk/indepth/0111trbk/00_Prelims.pdf) >.( Accessed on 19/05/2004)

The UDHR, also affirms that 'everyone has duties to the community'<sup>148</sup> and recognises that no right of 'any ... group or person ... [exists] to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth' in the Universal Declaration.<sup>149</sup> This provision like most human rights instruments contains an interpretative command that '[n]othing ... be interpreted as implying for any state, group or persons any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein'<sup>150</sup> This implies that the correlative reach of the UDHR is to any group or person including TNCs.

In addition to the foregoing, there are a wide range of other human rights covenants that assert direct responsibility on non-state actors. The Preamble to the International Covenant on Civil and Political Rights (ICCPR) expressly affirms 'that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present covenant.'<sup>151</sup> The ICESR<sup>152</sup> also impose direct responsibility on non-state actors. These provisions can be interpreted as establishing a duty to respect the rights of others. The aim of such a duty is to ensure that everyone including non-state actors in the course of their activities should promote and protect human rights. In this way, the activities of TNCs must not be detrimental to individuals or the society at large. This impliedly affirms the duty of any group such as TNCs or persons not to violate human rights and asserts direct responsibility on non-state actions.

The Convention on the Elimination of All forms of Racial Discrimination (CERD)<sup>153</sup>, the Geneva Conventions of 1949<sup>154</sup> and their additional protocols of 1977<sup>155</sup> and the Genocide Convention<sup>156</sup>

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<sup>148</sup> See ( no 98 above) Article 29 (1).

<sup>149</sup> See (no 98 above) Article 30.

<sup>150</sup> See (no 98 above) Article 39.

<sup>151</sup> International Covenant on Civil and Political Rights, Dec 19, 1996,999 UNTS 17 (entered into force Mar 23,1976). See Article 5(1) and Article 2(1) which provides for direct responsibility on non-state actors for human rights violations

<sup>152</sup> See Article 5(1) of the ICESR. These articles provides for direct responsibility on non state actor to respect human rights.

<sup>153</sup> International Covenant on the Elimination of all forms pf racial Discrimination 660 UNTS (entered into force4/01/1969), Art 2. ( no 102 above) p 23.

<sup>154</sup> The four Geneva Conventions comprise the following; the Geneva Convention for the Amelioration of the Condition of the and sick in Armed Forces in the field; The Geneva Convention for the Amelioration of the Wounded, Sick and Ship Wrecked Members of Armed Forces at the Sea, The Geneva Convention relative to the Protection of Civilian Persons in Time of War. The Geneva Convention for the Protection of Victims of Armed Conflict Conventions I-IV, adopted 12/09/1949,75 UNTS 31, 85, 138,287, (entered into force 21/10/1950. These instruments confirmed that Humanitarian provisions may be applied for the benefit of the victims of armed conflict' and make no distinction between state and non-state actors.

<sup>155</sup> Additional protocol to the Geneva Conventions Relating to the protection of Victims on International

also assert direct responsibility on non-state actors The issue of direct corporate responsibility is also reiterated under the Convention Relating to the Status of Refugees<sup>157</sup> and its Amending protocol<sup>158</sup> both of which clearly stipulate that agents of persecution for the purpose of defining a 'refugee' can be a state or can be non-state actors.<sup>159</sup>

Although such a general duty could be inferred from the foregoing discussion, human rights instruments do not directly impose obligations upon non-state actors to protect human rights. Despite the focus on the role of TNCs in the global context in chapter two of this study, the fact still remains that the primary and only direct responsibility bearer in IHRL is the state. It would seem logical that a provision such as the UDHR quoted above referring to the responsibility of non-state actors, in order to be meaningful, should as a minimum include peremptory norms.<sup>160</sup> As evidenced by the UNOCAL case<sup>161</sup> in US law, peremptory norms can be used through Universal jurisdiction<sup>162</sup> to invoke responsibilities of companies. Nevertheless, the mechanism in this case works via the state. Nor can a corporation be a defendant before human rights treaty bodies. Thus, any direct responsibility emanating out of the human rights instruments would lie in the political or moral sphere.<sup>163</sup>

It can be argued that, in the context of the ECHR, the hypothetical *drittwirkung* (third party) or horizontal effect of the Convention have rendered it applicable in the private sphere or to human rights violations by TNCs. The *drittwirkung* concept itself is undefined and its desirability and effectiveness in imposing direct responsibility on TNCs for human rights violations is disputed.<sup>164</sup> In a more extensive setting, the *drittwirkung* can be defined as a possibility for an individual to

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Armed Conflicts( protocol I), 1125 UNTS 3 ( entered into force 7/12/1978); Additional Protocol to the Geneva Conventions Relating to the protection of Victims of Non-International Armed Conflicts (Protocol II); 1125 UNTS609 ( entered into force (7/12/1978) both of which place certain duties on all persons taking active part in conflict while not affecting the legal status of the

<sup>156</sup> Convention on the Prevention and Punishment of the Crime of Genocide ( Genocide Convention) 78 UNTS 277 (entered into force 12/01/1951)/ Articles 4 and 5.

<sup>157</sup> 189 UNTS 150 (entered into force 22/04/1954).

<sup>158</sup> Protocol Relating to the Status of Refugees, 606 UNTS 267 (entered into force 4/10/1967).

<sup>159</sup> Office of the UN High Commissioner for Refugees ( UNHCR) *Handbook on Procedures and criteria for Determining Refugee Status*, UN Doc. H/IP/4/Eng.Rev. (1988) 11-17.

<sup>160</sup> Engerstrom V see (no 40 above) p 27.

<sup>161</sup> *Doe v Unocal Corporation* 963 F Supp 880 (CD Cal 1997).

<sup>162</sup> The doctrine of universal jurisdiction allows national courts to try cases of the gravest crimes against humanity, even if these crimes are not committed in the national territory and even if they are committed by government leaders of other states.

<sup>163</sup> Engerstrom, V see ( no 40 above) 27.

<sup>164</sup> Engerstrom ,V see ( no 40 above) 27.

enforce his rights against other individuals.<sup>165</sup> However the ECHR does not provide for the possibility to lodge complaints against other individuals. According to certain authors, there can be no such horizontal effect of the ECHR on TNCs at the international level as no enforcement mechanism against non-state entities is provided for.<sup>166</sup> Apart from the possibility of directly invoking the ECHR before national courts, the *drittwirkung* mechanism at the level of the ECtHR still works through the state.<sup>167</sup>

#### 4.3 International criminal law and TNCs

The development of corporate criminal responsibility for human rights violations has become a useful tool for a growing number of prosecutors and courts in several countries. In the Common Law world, following the standing principle in tort law, English courts began sentencing corporations in the middle of the last century for statutory offences.<sup>168</sup> On the other hand, a large number of European continental countries have not been able to and are not willing to incorporate the concept of corporate criminal liability in their domestic laws.<sup>169</sup> While a good number of African countries are lagging behind to incorporate criminal liability into their domestic legislation, a few such as Lesotho have exemplified this move in the recent land mark case involving a Canadian multinational<sup>170</sup>.

Corporate criminal liability has become international in nature. With the existence of powerful non-state actors such as TNCs, another avenue to impose responsibility on TNCs for human rights violations could be through international criminal responsibility. Historical precedent exists

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<sup>165</sup> For a general overview in the ECHR context Pieter van Dijk and Fried Hoof, *Theory and Practise of the European Convention on Human Rights*, (1998) p 22-26.

<sup>166</sup> D.J Harris, M O' Boyle and C. Warbick, *Law of the European Convention on Human Rights*, (1995) 921. They hold the view that, the absence of an enforcement mechanism at the international level acts as an impediment to the application of human rights to non-state actors.

<sup>167</sup> Van DIJK and Van Hoof *International 'Human Rights Obligations for Companies and Domestic Courts: An Unlikely Combination?'* in Castermans- Holleman, Van Hoof and Smit ( eds) *The Role of the Nation State in the 21<sup>st</sup> Century: Human rights, International Organization and Foreign Policy* (1998) 91-116.

<sup>168</sup> *Rex v. Mustapha* see ( no 24 above).

<sup>169</sup> Markus W, 'Corporate Criminal Liability: National and International Response,' available at <http://www.icclr.Law.ubc.ca/publication/reportsCriminal.pdf>>. Accessed on (06/09 2004)1 . Markus, W hold the view that states are not willing to incorporate corporate criminal liability in their domestic law because international law is virtually silent with respect to corporate criminal liability fir human rights violations.

<sup>170</sup> See *Rex v. Musupha Ephraim* See (no 24 above). Lesotho is a few example in Africa that has taken the initiative to incorporate corporate criminal liability in its domestic law. The Lesotho government has been widely praised for pursuing the case. The trial was closely followed by observers around the world. It has implications far and beyond the borders of Lesotho as its shows the political will of OECD governments - now bound by the OECD Convention - and international organisations such as the World Bank who so far have failed to demonstrate that they truly aim to hold companies directly liable.

following the aftermath of the World War II, the United States Military Tribunal at Nuremburg in *the I.G Farben Trial* considered the corporate defendant, Farben, as a legal entity with the capacity to violate the laws of war. The court found that Farben were guilty of knowingly participating in crimes by belonging to an organisation or group connected with the commission of war crimes.<sup>171</sup>

The jurisdiction of the International Criminal Tribunal for Yugoslavia (ICTY)<sup>172</sup> and Rwanda (ICTR)<sup>173</sup> is restricted to natural persons. The Rome Conference on the International Criminal Court (ICC) did not address the issue that corporations are bound by international Criminal Law.<sup>174</sup> The draft provision did not consider legal persons within its jurisdiction due to disagreement on questions of how indictments are to be served, who is to represent the interest of the legal persons, how to prove intention, and how to ensure that natural persons do not hide behind group responsibility. In addition, the fact that most states have not criminalised corporate crimes in their national penal codes makes the preference that the ICC provides for national criminal procedure unworkable.<sup>175</sup>

At the international level these are some treaties, such as the already mentioned Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal, which defines illegal traffic of waste as 'criminal'<sup>176</sup> and also expressly examines corporate entities by defining the persons violating the provisions of the Convention as 'any natural or legal person'.<sup>177</sup> The concept of corporate criminal liability is also articulated in the 1998 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in article 5 of the Convention on Transnational Organised Crimes.<sup>178</sup> This development recognises that corporations can commit crimes and also provides for avenues to be explored to address this problem.

In this era of globalisation, these international documents have exercised a considerable amount of pressure on a number of African countries, which currently do not contain provisions pertaining

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<sup>171</sup> The I.G. Farben Trial, US Military Tribunal, Nuremburg, 14 August 1947 -29 July 1948, case no )57) at 1132-1133, referred to in Clapham In kamminga and Zia Zarifi, (ed) see (no 31 above) 139- 195 at 67.

<sup>172</sup> Article 5 of the Statute of the ICTY is to the effect that, the jurisdiction of the court is restricted to natural persons.

<sup>173</sup> Article 6 of the Statute of thee ICTR restricts the jurisdiction of the courts to natural persons

<sup>174</sup> Markus, W (no 169 above) 5

<sup>175</sup> See Rome Statute of the ICC (1988) 37 ILM 999 (1998) Articles 17 and 25.

<sup>176</sup> See (no 121 above) Article 4(3) of the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal

<sup>177</sup> See (121 above) Article 2 (14) of the Basel Convention on the Control of Transboundary Movement of Hazardous Waste and their Disposal

<sup>178</sup> UN Doc.A/45/49/ (Vol.1) (2000).

to corporate criminal liability to consider reforms in their criminal law. The procedure of international criminal responsibility, although limited in scope, represents the only procedure by which the foregoing direct obligation of non state actors may be enforced at a legally binding level.

#### **4.2.1 Asserting direct responsibility on TNCs through a soft law approach**

A wide range of soft laws mechanisms<sup>179</sup> have attempted to impose direct responsibility on TNCs for human rights violations. The historical trend of this development could be traced back to the New International Economic Order (NIEO) initiative, which was one of the interactive initiatives aimed at formulating a code of conduct on TNCs<sup>180</sup>. This initiative was dropped following the collapse of the NIEO but the move continued and has been advocated by corporations, international organisations and non-governmental organisations.

In this group of initiatives is the UN Draft code of conduct on TNCs<sup>181</sup>, which enumerates a number of human rights responsibilities of companies but does not address the question of bindingness at all. In 1977, the International Labour Organisation (ILO Declaration)<sup>182</sup> adopted a Tripartite Declaration of Principles Concerning Multinational Enterprise and Social Policy which calls upon governments, employers and workers to respect the sovereign rights of states, respect the national laws and regulations and give due consideration to local practices and to respect relevant international standards.<sup>183</sup> The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises<sup>184</sup> also targets corporations and reiterates that enterprises should respect the human rights standards of those affected by their activities in conformity with the host government's international obligations and commitments.<sup>185</sup> The Global Sullivan Principles of Corporate Social Responsibility<sup>186</sup> also emphasised the need for companies to respect human rights. According to Reverend Sullivan, the Sullivan Principles aimed

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<sup>179</sup> Soft laws are non-binding codes of conduct developed by the United Nations, states, civil society and private actors themselves, aimed at asserting responsibility on non-state actors for human rights violations.

<sup>180</sup> See Muchlinski P 'Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD' in Kamminga and Zia-Zarifi (no 28 above) 97-117 at 98-102.

<sup>181</sup> UN Draft Responsibilities of Transnational Corporation and other Business Enterprises With regard to Human Rights, UN Doc. E/cn/4/Sub.2/2002/13 available at <<http://www.business-humanrights.org/Draft-UN-Human-Rights-Responsibilities-of-business-Aug-2002.htm>>. (Accessed on 02/09/2004).

<sup>182</sup> See <http://www.ilo.org/public/english/standards/norm/sources/mne.htm>. for a detailed text.( Accessed 09/09/2004).

<sup>183</sup> ILO Declaration para 11.2.

<sup>184</sup> For a complete text of the OECD guidelines see <http://www.oecd.org>> (Accessed on 28/08/2004).

<sup>185</sup> OECD Guidelines, para 11.2.

<sup>186</sup> In 1977, the Reverend Leon Sullivan launched the original Sullivan Principles, which were designed to

at encouraging companies to support economic, social and political justice wherever they do business.<sup>187</sup> The Sullivan Principles in addition to the ILO Declaration and the OECD Guidelines explicitly state that they are non-binding on states or private sectors.

Several reasons have been advanced to explain the driving force behind compliance with voluntary initiatives, one of which is the fact that, given the limited capacity to regulate effectively the activities of corporations, self regulation through a voluntary code is an attractive and low cost way to try to affect corporate strategies, restrain the backlash against globalisation and maintain an open economical society.<sup>188</sup> Voluntary codes also foster long term interactive relationship, secure the reputation of corporations facilitate social consensus on the underlying norms, and pave the way for institutional structures which encourage transparency and accountability.<sup>189</sup>

Although voluntary codes indicate a positive attempt in asserting direct corporate responsibility on TNCs, it is not devoid of criticism. Bearing in mind that corporations are business oriented and there is in principle nothing to deter them from setting voluntary codes aside, it has been argued that the codes will often be ignored in a in a competitive business environment, particularly when profits are at risk.<sup>190</sup> The impact of these codes depends on the interest of the participants and the incentives of compliance because they are non-binding.

#### 4.2.2 Conclusion

The foregoing discussion attempt to assess the various avenues in IHRL, international criminal law and soft law approaches that assert direct corporate responsibility for human rights violations. International human rights instruments are not designed for holding corporations responsible. Although this does not however release a corporation from complying with human rights obligations.

Moreover, a few common law and some civil law jurisdictions recognise corporate criminal liability, but the absence of the legal measures in most countries to prosecute corporations

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help persuade US companies with investments in South African to treat their African employees the same as they would their American counterparts. These principles were then re-launched in 1999 as the Global Sullivan Principles for Corporate Social Responsibility.

<sup>187</sup> 'The Global Sullivan Principles of Corporate Social Responsibility' available at <http://www.mallenbarker.net/csr/CSRfiles/Sullivan.html> (Accessed on 15/07/2004).

<sup>188</sup> Haufler, B 'International Business Self Regulation: A contribution to Public Policy' available at <http://www.ceip.org> (Accessed on 18/08/2004)

<sup>189</sup> Weiss E B, 'Conclusion: Understanding Compliance with Soft law' in Dinah S, (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (2000) 539-546.

<sup>190</sup> Emeka, D (no 119 above) 119.

for human rights violations creates a problem with corporate criminal proceedings. The absence of criminal corporate liability results mainly from the different approaches that national legal systems have taken to corporate criminal liability. In an attempt to solve this problem, victims resort to civil proceedings. Relying on civil proceedings to assert responsibility on TNCs is not the best avenue. Civil process is basically a mechanism of providing compensation for victims, and not so much an avenue of enforcement

On the basis of these lacunae in asserting direct corporate responsibility, chapter five of this study attempt to make some recommendations on how a convergence can be achieved in asserting effective and direct responsibility on TNCs for corporate human rights violations in Africa.



## **CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 Conclusion**

The examples of corporate influence on human rights violations that have been discussed in this study show the need to explore the various avenues for asserting responsibility for corporate human rights violations. Focus in this study has been on the state and directly on the corporation as avenues for asserting responsibility for corporate human rights violations. From the foregoing discussion of these avenues, it has become evident that no single avenue provides for an adequate and comprehensive answer to the question of redressing corporate human rights violations in Africa.

It becomes obvious that within the framework of state responsibility for human rights violations by TNCs, IHRL is unable to deal fully with the changes to state sovereignty by the process of globalisation.

Despite the expansion of the application of human rights law to include private actors, IHRL is yet to develop mechanisms for enforcing these direct obligations. This is with the exception of nominal procedure in individual criminal liability available at the international level. The process of getting non-state actors involved in human rights is still in the making

As we consider the evolution of IHRL and its relationship to corporate human rights violations, we are confronted with difficult dilemmas but with few solutions. The challenges of ensuring corporate responsibility for human rights violations in Africa is indeed tremendous, but not an impossible task. While corporate human rights violations is on the increase, the numerous difficulties discussed in this study in asserting direct responsibility for corporate human rights violations could be overcome.

### **5.2 Recommendations: the way forward**

#### **5.2.1 Towards international legally binding regulations on TNCs**

Given the many problems inherent in the state regulatory approach, and IHRL, there is need at the international level for an internationally legally and enforceable regulation of TNCs. This approach could lead to more uniform practices for corporate responsibility. International legally binding regulation on TNCs could work in two ways.

Firstly, international law and IHRL have developed obligations that are binding on states. Through this system, legally binding agreement could be developed that imposes an obligation on states to regulate the activities of TNCs in their various jurisdictions. IHRL already provides for some of these rules but the emphasis would be to develop a Convention that imposes an obligation on states to regulate the activities of TNCs. This Convention could be invoked to assert indirect responsibility on the state for failing to take due diligence to address the issue of corporate human rights violations. Through this Convention, victims of corporate human rights violation could bring an action against a state at the national level for failing to comply with its human rights obligations

The second approach takes a different dimension as it imposes direct obligation on TNCs for human rights violations. Through this approach, there is need to draft and enact a legally binding instrument within which companies would be directly responsible for human rights violations. As pointed out in chapter three of this study, corporations have already been given rights and duties under international law and IHRL that paves the way for the creation of binding obligations on non-state actors. The most effective approach would be to establish a treaty that specifies the human rights obligations of corporations and requires states parties to provide criminal, civil and administrative remedies for corporate human rights violations and also mandates some form of effective enforcement mechanisms through criminal civil and administrative remedies. This approach would avoid the controversy over corporate criminal liability that arose during the negotiation on the International Criminal Court discussed in chapter four of this study.

The treaty should completely prohibit violations of international humanitarian law, such as genocide, war crimes, and crimes against humanity as well as gross violations of civil and political rights, such as killings, tortures, disappearances, and arbitrary arrests and detentions. It should also proscribe particularly draconian violations of economic, social and cultural rights, such as the destruction of indigenous people's habitats or environmental degradation and pollution that gravely threatens human health.<sup>191</sup>

The treaty should take into consideration the issue of jurisdiction in the determination of corporate human rights violations. Firstly, territorial jurisdiction<sup>192</sup> would be an alternative, but it would not be devoid of certain flaws because most of the host states of TNCs are African countries, which are enfeebled and cannot properly regulate the activities of powerful

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<sup>191</sup> 'Corporate Criminal Liability for Violations of International Human Rights *Law*' 114 *Harvard Law Review* 2025, 2036.

<sup>192</sup> This relates to the duty of courts in a state to adjudicate on violations if committed within its national territory.

TNCs. Due to these weaknesses, the treaty should place an obligation on the home states of TNCs that are state parties to exercise national jurisdiction over TNCs for human rights violations. This ushers in the second option, which is national jurisdiction. Through this avenue, home states, usually developed countries, would have the power and resources to act against TNCs for human rights violation in Africa. This form of jurisdiction will be simplified, less complicated and generally accepted if a significant number of states sign the treaty. The third option would be universal jurisdiction<sup>193</sup>, which is also not devoid of certain flaws. It would confine the types of corporate human rights violations in the treaty to violations of international humanitarian law and certain gross violations of civil and political rights. Concerning violations of economic, social and cultural rights, state parties will be reluctant to approve universal jurisdiction because of the variations involved in the enforceability of socio-economic rights.

This multilateral approach will address the problem of corporate violations of human rights and broaden the number of legal avenues available for victims of corporate human rights violations. State parties would be obliged to provide domestic remedies to victims of corporate human rights violations. This approach provides a mechanism for holding corporations directly responsible in Africa where most of the host state of these TNCs are too weak to regulate or control the TNCs or are unwilling to do so.

### **5.2.2 The need to more effectively revise the elements of duty and responsibility in the African Charter**

In the African context, a more concise engagement with the issue of duties in the African Charter would greatly assist in addressing the various dimensions of corporate malfeasance as articulated in the Ogoni case, as well as bring corporate human rights responsibility within the scope of IHRL. The African Human rights system should specifically confront corporate human rights violations, rather than continuing to focus wholly and solely on the state. The establishment of the African Human Rights Court will be a forum to address the issue of corporate human rights violations at the regional level after exhausting local remedies at the national level. In this respect, it becomes apparent to revisit the African Charter and other human rights instruments that provide for responsibility and duty and strike a balance between state responsibility and the responsibility on TNCs. This initiative would uphold the Vienna Declaration on the responsibility of the state and

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<sup>193</sup> Universal jurisdiction relates to the notion that certain crimes are so universally abhorred that they constitute crimes against international law is now widely recognised the principle stipulates that it is the right or even the duty of states to bring to justice those responsible for international crimes when they are not prosecuted in their own.

would also reiterate that there are additional actors such as TNCs which need to be responsible for corporate human rights violations.<sup>194</sup>

**Word counts – 17 972 (including footnotes)**

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<sup>194</sup> Olaka Onyanko (no 12 above) 17.

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