

**The prospects and challenges of a regional human rights mechanism for  
corporate responsibility in Africa**

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## **DEDICATION**

To Uncle Sam; your commitment to business, humanity and Africa will endure.

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I acknowledge the indispensable direction of God in this entire year of challenges and opportunities.

I am grateful to the Professor Viljoen and the entire staff of the Centre for Human Rights for granting me this study great opportunity and for making the programme truly worthwhile.

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## LIST OF ABBREVIATIONS

African Charter - African Charter on Human and Peoples' Rights

African Commission - African Commission on Human and Peoples' Rights

African Court - African Court of Human and Peoples' Right

Draft Norms - Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

Guiding Principles - UN Guiding Principles on Business and Human Rights

ICJ - International Court of Justice

ILO - International Labour Organisation

ILO Declaration - Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

MNE - Multinational enterprise

NCP - National Contact Point

NHRI - National Human Rights Institution

OECD - Organisation for Economic Co-operation and Development

OHCHR - Office of the High Commissioner for Human Rights

SRSG - Special Representative of the Secretary-General

SERAC - Social and Economic Rights Action Centre

PCIJ - Permanent Court of International Justice

TNC - Transnational enterprise

UDHR - Universal Declaration of Human Rights

UK - United Kingdom

UN - United Nations

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## Chapter 1: Introduction

### 1.1 Background of the study

International efforts to promote, protect and fulfil human rights have focused primarily on the responsibility of the state.<sup>1</sup> Since the 1970s, efforts to bring transnational corporations (TNCs) under the ambit of international law have had various degrees of success with voluntary codes proliferating in the past decade and a United Nations (UN) draft treaty<sup>2</sup> abandoned and characterised as a ‘train wreck’.<sup>3</sup> The most recent international effort in the human rights regulation of business activities began in April 2005 with the establishment of a mandate for John Ruggie as the Special Representative of the Secretary-General (SRSG) on Transnational Corporations and Human Rights.<sup>4</sup> Ruggie’s report was adopted by the Human Rights Council (HRC) and operationalized as the UN Guiding Principles on Business and Human Rights (Guiding Principles).<sup>5</sup> In its final resolution on the Ruggie mandate, the Human Rights Council expressed concern that weak national legislation and implementation mechanisms cannot effectively mitigate the negative impact of globalisation on vulnerable economies and called for further efforts to bridge governance gaps at the national, regional and international levels.<sup>6</sup> The Resolution also establishes a working group of experts whose mandate includes the exploration and recommendation of options at the national, regional and international levels for enhancing access to effective remedies for those whose human rights are affected by corporate activities.<sup>7</sup>

Increasingly cases implicating TNCs in human rights violations are being heard in courts outside Africa. The United States Supreme Court for example is currently considering cases implicating the Royal Dutch Shell Company in human rights abuses in Nigeria<sup>8</sup> as well as 30 defendant companies implicated in the apartheid regime.<sup>9</sup>

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<sup>1</sup> DM Chirwa ‘State responsibility for human rights’ in MA Baderin & M Ssenyonjo (eds) *International human rights law: six decades after the UDHR and beyond* (2010) 397-410.

<sup>2</sup> Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights E/CN.4/Sub.2/2003/12 (2003).

<sup>3</sup> Remarks delivered by J Ruggie at a forum on corporate social responsibility co-sponsored by the Fair Labour Association and the German Network of Business Ethics, Bamberg, Germany (14 June 2006) available at <<http://198.170.85.29/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf>> (accessed 03 October 2012).

<sup>4</sup> Human Rights and Transnational Corporations and Other Business Enterprises (2005) E/CN4/RES/2005/69.

<sup>5</sup> Special Representative of the Secretary-General ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’ (2011) UN Doc A/HRC/17/31.

<sup>6</sup> Human Rights and Transnational Corporations and Other Business Enterprises (2011) A/HRC/17/4, preamble.

<sup>7</sup> n 6 above, art 6(e).

<sup>8</sup> *Esther Kiobel v Royal Dutch Petroleum*. No. 10–1491

<[http://www.supremecourt.gov/oral\\_arguments/hearinglists/HearingList-October2012.pdf](http://www.supremecourt.gov/oral_arguments/hearinglists/HearingList-October2012.pdf)> (accessed 03 October 2012).

<sup>9</sup> *In re South African Apartheid Litigation* (2004) 346 F Supp 2d SDNY.



Human rights standards that may be violated by TNCs include labour rights which affect people within the company structure and non-labour rights which may affect people outside the company.<sup>10</sup> TNCs have frequently been implicated in human rights abuses in Africa with countless examples of corporate complicity in labour exploitation, political corruption, environmental destruction and social disruption in the last century.<sup>11</sup> The penetration of powerful TNCs in Africa is however, an inevitable feature of globalisation characterised by the growing interpenetration of states, markets, communications, and ideas across borders.<sup>12</sup> Few phenomena have been as influential in determining the trajectory of human progress in the twentieth and twenty-first centuries as globalisation has been.<sup>13</sup> The challenges of globalisation and the rising influence of non-state actors is worsened by the persistence of armed conflicts in resource rich regions, pressures for democratic reform and development, and a world growing increasingly more apathetic to the challenges existing on the continent.<sup>14</sup> Globalisation has led to the rise of powerful non-state actors outside the control of individual states such as TNCs on whom the rights of people have become dependent as never before.<sup>15</sup> Currently, there are at least 50,000 multinational enterprises (MNEs) with 450,000 affiliates around the world.<sup>16</sup>

Globalisation has also facilitated the establishment of international and regional human rights regimes.<sup>17</sup> Activism for international mechanisms for holding TNCs responsible for human rights abuses have focused on the UN level with attempts to adopt binding treaties failing twice.<sup>18</sup> Regional human rights systems have however proven to be effective in taking into account regional specificities in human rights norms and bringing mechanisms of accountability closer to many people.<sup>19</sup> The case of *Social and Economic Rights Action Centre (SERAC) v Nigeria (Ogoni case)*<sup>20</sup> was a landmark ruling which set a precedent for holding states responsible for the failure to protect people from violations committed by non-state actors. However, it is increasingly becoming clear that in context of globalisation, focusing on the state's 'responsibility to protect' alone as was applied in the *Ogoni case*

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<sup>10</sup> This division is adopted by the SRSF a survey titled 'Business recognition of human rights: global patterns, regional and sectorial variations' A/HRC/4/35/Add 4.

<sup>11</sup> D Aguirre 'Corporate social responsibility and human rights law in Africa' (2005) 5 *African Human Rights Law Journal* 241.

<sup>12</sup> A Brysk 'Transnational threats and opportunities' in A Brysk (ed) *Globalization and human rights* (2002) 1.

<sup>13</sup> J Oloka-Onyango 'Who's watching "big brother"?' globalization and the protection of cultural rights in present day Africa' 27 *Human Rights Quarterly* 1245 (2005).

<sup>14</sup> J Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: international mechanisms, non-state actors, and the struggle for peoples' rights in Africa' 18 *American University International Law Review* (2002-2003) 851 886.

<sup>15</sup> D Kinley *Civilising globalisation: human rights and the global economy* (2009)13.

<sup>16</sup> <<http://www.ilo.org/global/topics/employment-promotion/multinational-enterprises/lang--en/index.htm>> (accessed 22 October 2012).

<sup>17</sup> MW Doyle & AM Gardner 'Human rights and international order' in J-M Coicaud et al (eds) *The globalization of human rights* (2003) 1-23.

<sup>18</sup> The Draft Norms (n 2 above) and the United Nations Draft International Code of Conduct on Transnational Corporations (1984) 23 ILM 626.

<sup>19</sup> F Viljoen *International human rights law in Africa* (2012) 9-10.

<sup>20</sup> *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

may be inadequate for the protection and realisation of human rights and thus calls for more effective mechanisms for corporate responsibility for human rights have persisted.<sup>21</sup>

## 1.2 Problem statement

At the end of the cold war, the ‘third wave of democratisation’<sup>22</sup> had a significant impact in Africa. It led to a retreat of the state leaving more space for private actors.<sup>23</sup> These developments intensified the pace of globalisation in Africa and with it, an increased influx of powerful MNEs into the private sphere created by the shrinking of states.<sup>24</sup> This means that TNCs increasingly have a greater impact on the rights of individuals and peoples in Africa.<sup>25</sup> The African Charter on Human and Peoples’ Rights (African Charter)<sup>26</sup> predated these developments and did not explicitly impose human rights obligations on corporations. However, concerns over responsible conduct of TNCs in Africa have grown since the adoption of the African Charter. Thus the proposed criminal chamber of the yet to be established African Court of Justice and Human Rights is to have jurisdiction over cases of corporate criminal liability.<sup>27</sup>

The Ruggie framework’s overdependence on the responsibility of states for the protection of human rights is of limited impact in the African context where weak states with weak regulatory mechanisms are often unable to prevent and in some cases are even complicit in human rights violations such as was the case of Royal Dutch Shell Company in the Niger Delta<sup>28</sup> and the dumping of toxic waste in Abidjan by Trafigura BV in 2006.<sup>29</sup> With the emergence of new economic powers such as India and China, a new and more competitive scramble for African markets and resources is underway. The Guiding Principles do not adequately take into account the specificities of the regulatory state in Africa and therefore there is the need for regional efforts to deal with peculiar regional challenges as envisioned in Resolution 17/4 of the UN Human Rights Council. However, little effort has been made at the regional level towards an enhancement of the Ruggie framework and the Guiding Principles to

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<sup>21</sup> J Nolan ‘Regional approaches to the obligation to protect social and economic rights’ (2009) 9 *Human Rights Law Review* 228-230.

<sup>22</sup> A term coined by SP Huntington to describe the third major surge in democratization which saw more 60 countries become democratic in the late twentieth century; SP Huntington *The Third Wave: Democratization in the Late Twentieth Century* (2002).

<sup>23</sup> A Mazrui ‘African security: the erosion of the state and the decline of race as a basis for human relations in Africa’ in C Thomas & P Wilkin (ed) *Globalization, human security, and the African experience* (1999) 170.

<sup>24</sup> S Adong ‘International health and Africa: who is leading who in Africa’ in B Bakut & S Dutt *Africa at the millennium: an agenda for mature development* (2001) 239.

<sup>25</sup> As above.

<sup>26</sup> 1981, OAU Doc CAB/LEG/67/3 rev 5.

<sup>27</sup> Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (2012) Exp/Min/IV/Rev 7, art 46C.

<sup>28</sup> *Ogoni* case (n 20 above).

<sup>29</sup> ‘The toxic truth about a company called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d’Ivoire’ A report by Amnesty International & Greenpeace Netherlands 99-105  
<<http://www.amnesty.ch/de/laender/afrika/elfenbeinkueste/dok/2012/trafigura-muss-fuer-den-giftmuellskandal-gerichtlich-zur-verantwortung-gezogen-werden/bericht-a-toxic-truth.-september-2012.-auf-englisch>> (accessed 16 October 2012)

suit the challenges of Africa. In addressing the prospects and challenges of establishing a regional mechanism regime for corporate human rights responsibility in Africa, the study addresses the following research questions.

### 1.3 Research questions

1. What are the strengths and limitations of existing international initiatives to promote corporate responsibility for human rights?
2. Why are existing mechanisms inadequate for regulating corporate human rights responsibility in Africa?
3. What are the strengths of the Ruggie framework and the Guiding Principles as a basis for an African instrument for corporate human rights responsibility?
4. What are the prospects and challenges of a regional human rights regime for corporations in Africa based on the Guiding Principles?

### 1.4 Objectives of the study

This study is aimed at examining the prospects and challenges of the adoption of a human rights instrument that sets standards for corporations and states and provides an enforcement mechanism for those standards. It aims at advancing arguments in support of the position that the realities of the twenty-first century make such an instrument necessary, desirable and feasible in Africa. It is thus aimed at evaluating the challenges of states in Africa which make such a regime imperative. The study is also aimed at promoting the Guiding Principles and the Ruggie framework as the basis for an African human rights instrument to ensure that TNCs respect international human rights law in their operations in Africa.

### 1.5 Significance of the study

The status of non-state actors in international law has been an area of increasing interest in recent decades.<sup>30</sup> These developments have led to the discrediting of the traditional statist approach to international law.<sup>31</sup> The imposition of duties on non-state actors such as TNCs however continues to face challenges of legitimacy and implementation arising from the traditional theories and practices of international law.<sup>32</sup> In the context of Africa however, it may be necessary to explore the establishment of international mechanisms to complement national and corporate level mechanisms if human rights

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<sup>30</sup> M Noortmann & C Ryngaert 'Non-state actors: international law's problematic case' in M Noortmann & C Ryngaert (eds) *Non-State actor dynamics in international law: from law-takers to law-makers* Ashgate (2010) 1-8.

<sup>31</sup> R McCorquodale 'An inclusive international law system' (2004) 17 *Leiden Journal of International Law* 503.

<sup>32</sup> C Ryngaert *Imposing international duties on non-state actors and the legitimacy of international law* in Noortmann & Ryngaert (eds) (n 30 above), 69-90.

violations by corporations are to be curbed. The practical and theoretical challenges involved require careful study to inform a workable mechanism that ensures the protection of human rights without stifling economic development. Since the conclusion of the Ruggie mandate, however, little attention has been given to the enhancement of the Guiding Principles to suit the conditions of Africa. With Africa currently witnessing a renewed scramble for its natural resources and the persistence of weak state regulatory mechanisms, such a study is essential and relevant.

## 1.6 Methodology

The study adopts a historical, analytical and comparative approach. Both primary and secondary sources were used with a lot of research on the internet as the field of study is a rapidly evolving one. Primary sources such as human rights treaties, declarations, resolutions, reports and recommendations of international bodies in the field of business and human rights were examined. Relevant case law on corporate violation of human rights was also consulted. Textbooks and journals articles were also utilised.

## 1.7 Literature Review

International efforts to regulate the conduct of TNCs to comply with international human rights law have received considerable scholarly attention as an emerging area of international law.<sup>33</sup> However, none specifically discusses the need for a regional mechanism for corporate accountability as the focus has been on global efforts. Amao's discussion of the African human rights system and TNCs focuses on the potential of the present mechanism of state responsibility.<sup>34</sup> There appears to be broad agreement on the need for TNCs to act more responsibly and the need for some form of regulation in a globalised world is largely uncontested.<sup>35</sup> In *Human Rights Standards and the Responsibility of Transnational Corporations* edited by Addo for instance, all the 28 contributors agree on the need for TNCs to be held responsible for their adverse impacts on human rights.<sup>36</sup> However, differences emerge with the approach to be taken with some favouring soft law approaches as most acceptable<sup>37</sup> while others such as Cernic<sup>38</sup> and Deva<sup>39</sup> maintain that international enforcement mechanisms are required to address gaps in global governance that have emerged with the pervasiveness of globalisation and the

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<sup>33</sup>A de Jonge *Transnational corporations and international law: accountability in the global business environment* (2011); Kinley (n 15 above).

<sup>34</sup> OO Amao 'The African regional human rights system and multinational corporations: strengthening host state responsibility for the control of multinational corporations' 12 *International Journal of Human Rights* (2008) 761-788.

<sup>35</sup> Aguirre (n 11 above).

<sup>36</sup> M Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999).

<sup>37</sup> T Campbell 'A human rights approach to developing voluntary codes of conduct for multinational corporations' (2006)16 *Business Ethics Quarterly* 255.

<sup>38</sup>LJ Cernic 'United Nations and corporate responsibility for human rights' (2011) 8 *Miskolc Journal of International Law* 25.

<sup>39</sup> S Deva *Regulating corporate human rights obligations: humanising business* (2012).

rise in power of non-state actors. This study follows the view of Deva and Cernic but adapts their proposals for an African (regional) mechanism.

The phenomenon of globalisation and the challenges it presents to traditional international law theories and practices has also been extensively discussed. In the context of human rights in Africa, Mazrui<sup>40</sup> and Oloka-Onyango<sup>41</sup> point to the growing power of non-state actors and the diminishing control of the state in many social sectors. Oloka-Onyango<sup>42</sup> extensively discusses the issue of human rights responsibility for TNCs with a focus on marginalised rights and vulnerable groups in Africa.

Ruggie's mandate and his reports have also been closely followed in academic circles with opinions divided over its suitability. Robinson<sup>43</sup> favours the Guiding Principles and the Ruggie framework as a realistic consensus in the area of business and human rights while Bilchitz<sup>44</sup> criticises it as retrogression in international efforts to hold corporations accountable for human rights violations in the name of compromise.

McCorquodale<sup>45</sup> advances arguments on the need to part with traditional notions of international law which seek to exclude all other entities but states from international obligations. Other challenges to holding TNCs accountable such as the choice of norms are also considered with some studies favouring the enumeration of specific norms that can be applied to TNCs<sup>46</sup> and others favouring a more flexible approach of identifying instruments that are applicable and suggesting more flexible schemes of enforcement based on the premise that all human rights may be violated by the activities of TNCs.<sup>47</sup> Deva<sup>48</sup> and Ratner<sup>49</sup> however advance their arguments beyond challenges to make detailed suggestions on how to develop international mechanisms for enforcement of corporate responsibility for human rights violations. Assessments of regional mechanisms for the enforcement of human rights by Viljoen<sup>50</sup> as well as Nolan<sup>51</sup> also indicate an awareness of the risk of lowering global standards and evading global mechanisms as well as an acknowledgement that regional human rights systems have made a positive contribution to the advancement of human rights by their ability to establish

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<sup>40</sup> A Mazrui 'African security: the erosion of the state and the decline of race as a basis for human relations in Africa' in C Thomas & P Wilkin (ed) *Globalization, human Security, and the African experience* (1999) 163.

<sup>41</sup> Oloka-Onyango (n 13 above) 1245-1273.

<sup>42</sup> Oloka-Onyango (n 14 above).

<sup>43</sup> M Robinson 'Business and human rights' in R McCorquodale (ed) *The rule of law in international and comparative context* (2010) 25.

<sup>44</sup> D Bilchitz 'The Ruggie framework: an adequate rubric for corporate human rights obligations' (2010) 12 *SUR Journal of International Law* 199-229.

<sup>45</sup> n 31 above, 503.

<sup>46</sup> N Jagers *Corporate human rights obligations: in search for accountability* (2002) 75-92.

<sup>47</sup> Deva (n 39 above).

<sup>48</sup> As above.

<sup>49</sup> SR Ratner 'Corporations and human rights: a theory of legal responsibility' 111 *Yale Law Journal* 443 (2001) 531.

<sup>50</sup> n 19 above.

<sup>51</sup> n 21 above.

regionally specific standards, bring remedies closer to victims and mobilise pressure for the enforcement of human rights standards. There is therefore broad agreement on the need to promote regional mechanisms as permanent features of the global human rights enforcement architecture.

The focus of this study therefore is to draw applicable lessons from the assessments and debates on the existing mechanisms for corporate human rights to inform the creation of an effective regional regime for Africa. The study builds on arguments advanced in support of bringing non-state actors under the ambit of international law due to their influence on human rights especially in the African context. These arguments are presented as a demonstrable case for regional regulation in Africa. The study also relies on the arguments in support of regional human rights systems to promote a regional mechanism and enhance its prospects. Finally the study adapts and contextualises various suggestions on the nature and scope of international mechanisms for corporate human rights accountability to propose a viable and effective regional mechanism for as part of the African human rights system.

## 1.8 Definitions

According to the International Labour Organisation (ILO), multinational enterprises or transnational corporations ‘include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based.’<sup>52</sup> However, both the ILO and the Organisation for Economic Co-operation and Development (OECD) hold the view that, a precise definition of TNCs is unnecessary for the purpose of imposing human rights standards on them.<sup>53</sup> The Guiding Principles are also applicable to other business entities, apart from TNCs.<sup>54</sup> A flexible approach is therefore adopted in this study. The terms transnational corporation and multinational enterprise are both used in this study as the legal instruments discussed in the study use both of them with the same meaning intended.

## 1.9 Organisation of the study

**The first chapter** of the study provides a background and the context of the study with a statement of the research problem and questions, objectives of the study, methodology, significance of the study and literature review.

**The second chapter** presents a critical evaluation of previous international efforts to hold corporations responsible for human rights violations. It evaluates the strengths and limitations of initiatives such as the ILO Tripartite Declaration, the United Nations Global Compact and the Organisation OECD Guidelines for MNEs.

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<sup>52</sup> Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Declaration) (1977) as amended in 2006, art 6

<sup>53</sup> As above; OECD Guidelines for Multinational Enterprises (2011), sec I(4)

<sup>54</sup> Para 15 of introduction

**The third chapter** evaluates the key parameters of the Guiding Principles to determine how it addresses the challenges of corporate human rights abuses. The reasons which make existing regulatory mechanisms inadequate are discussed and the case for a regional instrument is advanced.

**The fourth chapter** studies the challenges of a regional human rights regime for corporate responsibility in Africa. It addresses the challenges that such a mechanism will encounter with respect to international law, the choice of norms and implementation and enforcement mechanisms. It also advances arguments that there are no insurmountable challenges to the establishment of a regional mechanism and proposes an integrated approach with various levels of mechanisms and the application of various kinds of sanctions.

**The final chapter** presents conclusions of the study and recommendations on how to advance the agenda of corporate responsibility for human rights in Africa.

## Chapter 2: A critical evaluation of international efforts to impose human rights regulations on corporations

The function of international law is to provide a legal basis for the orderly management of international relations. The traditional nature of that law was keyed to the actualities of past centuries in which international relations were inter-state relations. The actualities have changed; the law is changing.<sup>55</sup>

### 2.1 Introduction

Attempts to regulate corporations to comply with societal expectations date back to ancient Roman times but in the past two decades, codes of responsible business conduct have proliferated at a rate never witnessed before.<sup>56</sup> These developments point to an increasing awareness of the necessity for international law to part with its traditional statist approach and embrace a more inclusive approach to deal with the current realities of human rights violations. Past international approaches to corporate human rights responsibility have taken various forms and had varying degrees of impact. In Africa however, these instruments failed to make a significant and widespread impact on the behaviour of TNCs in the context of weak governance systems. The marginal impact of the international regulatory initiatives may also be partly due to the fact that none of them is an African initiative with enforcement mechanisms based in the region. It is a notable paradox that while a key factor in the growth of corporate codes of conduct has been the demand from developing countries for such initiatives,<sup>57</sup> no major initiative has been undertaken from Africa to regulate the conduct of TNCs on the continent as past international efforts prove inadequate for the peculiar situation of the continent.

The inadequacy of existing mechanisms also stem from their inherent weaknesses. As Deva explains, past approaches to international regulation of business conduct have had three broad deficiencies.<sup>58</sup> First, there have been insufficient or contestable rationales for compliance with human rights obligations. The second defect has been the lack of precise measurable human rights standards and finally, they have had deficient implementation mechanisms. This chapter presents a critical evaluation of some major international initiatives to promote corporate responsibility for human rights with an assessment of their strengths and limitations as any effort to regulate corporate human rights responsibility in the region may benefit greatly by taking into account the strengths and weaknesses of earlier initiatives.

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<sup>55</sup> PC. Jessup 'The subjects of a modern law of nations' (1947) 45 *Michigan Law Review* 384 cited in E Duruigbo 'Corporate accountability and liability for international human rights abuses: recent changes and recurring challenges' (2008) 6 *Northwestern University Journal of International Human Rights* 222-261.

<sup>56</sup> MB Baker 'Private codes of conduct: should the fox guard the henhouse?' (1993) 24 *University of Miami Inter-American Law Review* 406.

<sup>57</sup> P Hansen & V Aranda 'An emerging international framework for transnational corporations' (1990/1991) 14 *Fordham International Law Journal* 885.

<sup>58</sup> n 39 above, 64.



## 2.2 The ILO Tripartite Declaration

### 2.2.1 Nature and Scope

In 1977, the governing body of the ILO adopted the Tripartite Declaration directed to member governments of the ILO both as home states and host states of TNCs, and to TNCs as employers in those countries.<sup>59</sup> The Declaration has a lesser status than ILO Conventions as unlike the ILO Conventions it was adopted by the Governing Council rather than the ILO Annual Conference composed of all member states.<sup>60</sup> The ILO Declaration encourages TNCs to observe its principles on a voluntary basis.<sup>61</sup> Hepple explains that the non-binding approach adopted by the Declaration is a reflection of the politically charged nature of attempts to regulate corporate practices at the international level.<sup>62</sup> The purpose of the Declaration is to encourage the positive contribution of TNCs to social and economic development in view of UN resolutions advocating the New International Economic Order, the Millennium Development Goals and the Global Compact.<sup>63</sup> It also aims at minimising and resolving difficulties that may arise in the operations of TNCs.<sup>64</sup> In accordance with the objectives of the ILO, the Declaration focusses on labour standards particularly the promotion of employment and security of employment, equality of opportunity and treatment, training, wages and conditions, child labour, freedom of association and collective bargaining.<sup>65</sup> Although its principles are drawn from binding declarations as applicable to states, the ILO Declaration expresses these principles as they apply to corporations rather than governments.<sup>66</sup>

The Declaration establishes two mechanisms for implementation; periodic surveys by the Committee for MNEs and the interpretation of provisions of the Declaration when disagreements arise. With respect to periodic surveys, the ILO requests government, workers and employers' organisations to respond to questions relating to the implementation of the Declaration.<sup>67</sup> The summary of the responses is then published and serves as a record of good practices, new trends and practical experiences.<sup>68</sup> Under the request for interpretation, complaints against MNEs must first be raised with the corporation itself before the host government and if a resolution is not achieved, the complaint may be raised with the ILO Sub-Committee on MNEs.<sup>69</sup> The Committee then provides interpretations

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<sup>59</sup> ILO Declaration, para 4.

<sup>60</sup> de Jonge (n 33 above) 29.

<sup>61</sup> Art 7.

<sup>62</sup> BA Hepple *Labor laws and global trade* (2005) 83.

<sup>63</sup> ILO Declaration, art 2.

<sup>64</sup> As above.

<sup>65</sup> de Jonge (n 33 above) 30.

<sup>66</sup> As above.

<sup>67</sup> As above.

<sup>68</sup> A Guide to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2002) 27.

<sup>69</sup> CR Coxson 'The 1998 ILO Declaration on Fundamental Principles and Rights at Work: promoting labour reforms through the ILO as an alternative to imposing coercive trade sanctions' 17 *Dick Journal of International law* (1999) 481.

of the Declaration with the approval of the Governing Council to settle the dispute.<sup>70</sup> These interpretations are aimed at dispute resolution and do not result in any binding decisions.<sup>71</sup>

### 2.2.2 Strengths

A major strength of the Declaration derives from its tripartite nature as an instrument negotiated and supported by governments, MNEs and labour organisations and therefore considered widely as a strong consensus that TNCs have human rights obligations.<sup>72</sup> Ratner therefore points to the repeated references to the Declaration by governments, TNCs and labour organisations as an indication of its wide acceptance.<sup>73</sup> The Declaration also adopts a strong and widely acceptable normative basis by requiring TNCs to observe the provisions of the International Bill of Rights.<sup>74</sup> Additionally, unlike the OECD settlement process, the ILO settlements are published in the Official Bulletin of the ILO thus mobilising public pressure to encourage compliance.<sup>75</sup>

### 2.2.3 Limitations

A shortcoming of the Declaration is its limited scope to labour rights.<sup>76</sup> Although it refers to instruments adopted by the UN such as the Universal Declaration of Human Rights (UDHR), its narrow focus on labour issues disregards the interdependence of rights. Although this is understandable in the context of the ILO as a labour organisation, it is notable that the ILO has adopted other conventions such as the ILO Convention 169 on the rights of indigenous people<sup>77</sup> which go beyond the narrow focus on labour rights. Further, with the exception of Convention provisions binding on states, all the provisions of the Declaration are drafted in non-binding terms and as such do not assert any authoritative claim.<sup>78</sup>

Another major limitation of the Declaration is the lack of robust and accessible enforcement mechanisms.<sup>79</sup> It makes no provision for effective external monitoring mechanism and the Committee on MNEs provided for under Procedure for Examination of Disputes has its role limited to providing interpretations of the provisions of the Declaration.<sup>80</sup> The capacity to request interpretations is also

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<sup>70</sup> Procedure for the Examination of Disputes concerning the Application of the ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy Document (1986) vol LXIX Series A No 3 196-197, art 7&8 <[http://training.itcilo.it/ils/foa/library/tridecl/procedure\\_en.htm#Endnote1](http://training.itcilo.it/ils/foa/library/tridecl/procedure_en.htm#Endnote1)> (accessed 03 October 2012).

<sup>71</sup> As above, art 1.

<sup>72</sup> Unpublished: DM Chirwa 'Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: a survey of emerging laws' unpublished LLD thesis, University of Western Cape, 2005 279.

<sup>73</sup> n 49 above, 487.

<sup>74</sup> ILO Declaration, para 8.

<sup>75</sup> PH Rudolph 'The Tripartite Declaration on Principles for Multinational Enterprises' R Mullerat & D Brennan *Corporate social responsibility: the corporate governance of the 21st century* (2005) 245.

<sup>76</sup> Deva (n 39 above) 90-91.

<sup>77</sup> Indigenous and Tribal Peoples Convention, No. 169 (1989).

<sup>78</sup> Deva (n 39 above) 91.

<sup>79</sup> As above.

<sup>80</sup> n 70 above, art 1.

severely restricted with admissibility conditions which seem to favour only requests by national governments of member states.<sup>81</sup>

The implementation mechanism of the Declaration has so far proven to be weak and ineffective in achieving a change in corporate human rights responsibilities within the limited field of labour standards.<sup>82</sup> The responses to the Eighth Survey published in November 2005 for example, point to a major weakness of the Declaration as out of 192 member states of the UN, only 62 countries responded.<sup>83</sup> Under the dispute settlement mechanism as well, only five complaints had been received as at 2009 with four of them declared inadmissible.<sup>84</sup> As Chirwa explains, there is a lack of civil society interest in the dispute resolution mechanism of the Declaration due to the lack of a mandate to hold TNCs responsible for violations of the Declaration, to make findings on infringements of the Declaration, to grant relief to victims of the infringements or even to shame the perpetrators of the infringement.<sup>85</sup>

Another weakness of the Declaration is its recommendation that MNEs follow labour standards of host states rather than emphasising international standards.<sup>86</sup> This weakness is common in weak and poor countries such as many in Africa where local labour standards may fall far below acceptable international standards and thus an emphasis on local standards completely undermines the usefulness of the Declaration as an international mechanism.

## 2.3 United Nations Global Compact

### 2.3.1 Nature and scope

In July 2000, the UN Secretary-General, Kofi Annan, launched the Global Compact as an initiative targeted at TNCs as well as non-business entities such as (non-governmental organisations) NGOs, academic institutions, cities and labour organisations.<sup>87</sup> These entities are invited to sign up to a set of ten principles in the areas of human rights, labour standards, the environment and since early 2005, anti-corruption.<sup>88</sup> This voluntary initiative was an attempt by the Secretary-General to revive the role

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<sup>81</sup> n 70 above, art 5-6.

<sup>82</sup> BA Hepple (n 62 above) 83.

<sup>83</sup> de Jonge (n 33 above) 31.

<sup>84</sup> LJ Cernic 'Corporate responsibility for human rights: analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2009) 6 *Miskolc Journal of International Law* 31.

<sup>85</sup> Chirwa (n 72 above) 280.

<sup>86</sup> Art 33.

<sup>87</sup> UN Global Compact *How to participate* <<http://www.unglobalcompact.org/HowToParticipate/index.html>> (accessed 16 October 2012).

<sup>88</sup> UN Global Compact *Corporate sustainability in the world economy* (2011) 6.

<[http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf)> (accessed 16 October 2012).

of the UN in addressing corporate human rights abuses.<sup>89</sup> The Compact has subsequently received continuous endorsement with UN General Assembly resolutions.<sup>90</sup> The Compact principles are drawn from four international legal instruments namely the UDHR, the ILO Declaration of Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention against Corruption.

Participants in the scheme undertake to incorporate its ten principles in their operations and report publicly on their implementation.<sup>91</sup> They undertake to submit annual Communications on Progress (COP) to be placed on the website of the Compact and circulated among stakeholders.<sup>92</sup> The Compact establishes a mechanism which serves to achieve two objectives: to '[m]ainstream the ten principles in business activities around the world' and to '[c]atalyse actions in support of broader UN goals, including the Millennium Development Goals (MDGs)' in order to ensure that business benefits societies everywhere and promotes a more sustainable and inclusive global economy.<sup>93</sup>

A violation of Compact policy including failure to report may result in the delisting of a participant.<sup>94</sup> In response to criticisms of the Global Compact as a toothless mechanism at the disposal of opportunistic companies, the requirement of public reporting, strict rules on the use of the Compact logo as well as a complaint mechanism were introduced as Integrity Measures.<sup>95</sup> Section 4 of the Integrity Measures established a process for complaining about 'egregious abuse of the Global Compact's overall aims and objectives.'

### 2.3.2 Strengths

A major strength of the Global Compact is that it has managed to secure widespread support and is the most popular voluntary code of social responsibility with more than 8,500 signatories in over 135 countries.<sup>96</sup> The Compact also plays a valuable facilitative role for entities who want to respect human

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<sup>89</sup> S Deva 'Global Compact: a critique of UN's public-private partnership for promoting corporate citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107-104.

<sup>90</sup> General Assembly Resolution (A/C.2/66/L.43/Rev.1): *Towards Global Partnerships* (December 2011); previous endorsements were given in Resolutions 55/215 of 21 December 2000, 56/76 of 11 December 2001, 58/129 of 19 December 2003, 60/215 of 22 December 2005, 62/211 of 19 December 2007 and 64/223 of 21 December 2009.

<sup>91</sup> Corporate Sustainability in the World Economy: UN Global Compact (2011) 4.

<sup>92</sup> UN Global Compact: How to Participate: Business organisations  
<[http://www.unglobalcompact.org/HowToParticipate/How\\_to\\_Apply\\_Business.html](http://www.unglobalcompact.org/HowToParticipate/How_to_Apply_Business.html)> (accessed 03 October 2012).

<sup>93</sup> UN Global Compact *Corporate Sustainability in the World Economy* (2011)

<[http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf)> (accessed 03 October 2012).

<sup>94</sup> U Hanid & O Johner 'The United Nations Global Compact communication on progress policy: origins, trends and challenges' in A Rasche & G Kell (eds) *The United Nations Global Compact: achievements trends and challenges* (2010) 271.

<sup>95</sup> de Jonge (n 33 above) 32.

<sup>96</sup> n 93 above.

rights by distilling fundamental principles in key human rights instruments into a form that is easily applicable to a broad range of businesses.<sup>97</sup>

### 2.3.3 Limitations

The major limitation of the Compact is the lack of an effective external mechanism for monitoring and enforcement. The Global Compact is not a regulatory instrument and does not enforce or measure corporate behaviour but rather ‘relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society’.<sup>98</sup> Indeed, the Compact lacks the capacity and resources to monitor and verify the claims of the thousands of participant companies.<sup>99</sup> The introduction of Integrity Measures such as the complaint mechanism have not proven to be effective in holding corporations accountable as the Compact Office refrains from being proactive.<sup>100</sup> As evidence of this problem, Deva points to cases such as the allegations made against PetroChina of complicity in human rights violations in Sudan where the Compact Office responded that other companies were doing same and being a new member, it was rather appropriate to maintain PetroChina in the Compact so that it can learn.<sup>101</sup> Deva also argues that the Compact is built on a contradiction of terms as it expresses itself as not being a regulatory framework and yet in fact it tries to regulate with sanctions of delisting and a complaints mechanism.<sup>102</sup> Also, nine of the ten principles of the Compact are based on declarations (soft law) and therefore have a weak basis in international law.<sup>103</sup>

Finally, the principles of the Global Compact especially the human rights principles are formulated in vague language that do not specify any particular obligations on participants. The lack of precise formulation of the requirements of the Compact gives participants a wide margin of appreciation in interpreting and applying the Compact.<sup>104</sup> Pace therefore cautions that the popularity of the Compact must be viewed with caution as it may be serving as a public relations tool for corporations without any meaningful action on their part.<sup>105</sup>

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<sup>97</sup> UN Global Compact’s *Guidance materials*

<[http://www.unglobalcompact.org/issues/human\\_rights/tools\\_and\\_guidance\\_materials.html](http://www.unglobalcompact.org/issues/human_rights/tools_and_guidance_materials.html)> (accessed 03 October 2012).

<sup>98</sup> UN Global Compact: UN Global Compact *The UN Global Compact Operational Guides For Medium-Scale Enterprises* (2007) <[http://www.unglobalcompact.org/docs/news\\_events/8.1/Operational\\_guide\\_ME.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/Operational_guide_ME.pdf)> (accessed 03 October 2012).

<sup>99</sup> Deva (n 39 above) 98.

<sup>100</sup> Deva (n 39 above) 99.

<sup>101</sup> As above.

<sup>102</sup> n 39 above, 97.

<sup>103</sup> Chirwa (n 72 above) 286.

<sup>104</sup> Chirwa (n 72 above) 287.

<sup>105</sup> J Pace ‘The Global Compact – fact or fiction?’ (2003) 7(1) *Mediterranean Journal for Human Rights* 135.

## 2.4 United Nations Draft Human Rights Norms for TNCs

### 2.4.1 Nature and scope

At the Sixtieth Session the UN Human Rights Commission, the Sub-Commission on the Promotion and Protection of Human Rights tabled the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (Draft Norms).<sup>106</sup> The instrument was the culmination of the Sub-Commission's work since 1998 to compile human rights obligations applicable to TNCs from existing sources of international law.<sup>107</sup> It followed the abandonment of an earlier attempt to adopt a code for TNCs in 1992 due to the lack of consensus on the nature, content and scope of the code.<sup>108</sup> However, the Draft Norms also met a hostile response as an effective business lobby mobilised government representatives against the adoption of the instrument.<sup>109</sup> Particularly, opposition was directed at the proposition that the adverse impacts of corporate activity require international regulation and the suggestion that TNCs might be held accountable for the actions of others associated with their business such as suppliers, consumers and governments.<sup>110</sup> As a result of this hostility, consideration of the Draft Norms was halted for further consultation and at the subsequent session, a recommendation for a special procedure mandate on the issue was accepted as a way to end the deadlock.<sup>111</sup>

The Draft Norms recognise the primary responsibility of states to enforce human rights but goes further to explain that where relying on state responsibility alone is inadequate, TNCs and other businesses within their 'sphere of influence' have the obligation to promote, secure the fulfilment and protect recognised human rights.<sup>112</sup> Articles 2 to 14 of the Draft Norms provide for the obligations of TNCs which include equality of opportunity and non-discrimination; the right to security of person and internationally recognised labour rights. Corporations are to avoid involvement in international crimes such as war crimes, torture and forced labour.<sup>113</sup> They are also to refrain from bribery,<sup>114</sup> observe fair business practices and product safety,<sup>115</sup> adopt sound environmental protection standards<sup>116</sup> and contribute to the realisation of economic, social and cultural rights.<sup>117</sup> The Draft Norms require companies to adopt, disseminate and implement internal operational rules in

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<sup>106</sup> E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003.

<sup>107</sup> de Jonge (n 33 above) 34.

<sup>108</sup> Jagers (n 47 above) 123.

<sup>109</sup> de Jonge (n 33 above) 34.

<sup>110</sup> de Jonge (n 33 above) 34.

<sup>111</sup> Human Rights and Transnational Corporations and Other Business Enterprises (20 April 2005) E/CN.4/RES/2005/69.

<sup>112</sup> Preamble para 3; art 1

<sup>113</sup> Art 3.

<sup>114</sup> Art 11.

<sup>115</sup> Art 13.

<sup>116</sup> Art 14.

<sup>117</sup> Art 12-14.

accordance with the Norms and also provide for both an internal and external verification mechanisms backed by a requirement of reparations for those negatively affected by the activities of companies.<sup>118</sup>

#### 2.4.2 Strengths

The Draft Norms represent a bold and innovative attempt to deduce specific human rights obligations applicable to non-state actors and thus fill the void created by the state-centred approach to the realisation of human rights.<sup>119</sup> According to de Jonge, the Draft Norms were innovative in at least three respects.<sup>120</sup> First, they extended beyond existing human rights both in terms of substantive rights and their scope of application.<sup>121</sup> Second, they created novel mechanisms for the enforcement of human rights obligations for non-state entities and finally, they incorporated the concept of sphere of influence which sought to establish the responsibility of corporations based on the extent of their influence.<sup>122</sup>

The obligations provided for in the Norms as applicable to TNCs is the most comprehensive of all corporate human rights instruments with a general obligation ‘to promote, secure the fulfilment of, ensure respect for, and protect human rights’<sup>123</sup> as well as particular obligations with paragraph 12 providing a wide range of specific rights. Paragraph 23 of the Norms also broadly defined international human rights law as used in the Norms to include all civil, cultural, economic and political and social rights.

The Norms also mark a departure in terms of the depth of obligations imposed. The conventional approach has been to frame human rights obligations for corporations in negative terms albeit its inadequacy in dealing with the several ways in which corporations can violate human rights.<sup>124</sup> The Norms however go beyond negative obligations to impose positive obligations such that TNCs are not only to refrain from contributing to, and benefitting from human rights violations but also to ‘use their influence’ to promote human rights.<sup>125</sup>

The UN Norms also rejected the voluntary approach adopted by previous mechanisms and sought to enforce its principles on TNCs.<sup>126</sup> TNCs are required to ‘adopt, disseminate and implement internal rules of operations in compliance with the Norms’ and to periodically report on measures taken to

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<sup>118</sup> Art 15-19.

<sup>119</sup> Deva (n 39 above) 101.

<sup>120</sup> n 33 above, 35.

<sup>121</sup> As above.

<sup>122</sup> As above, 37.

<sup>123</sup> Para 1.

<sup>124</sup> n 39 above, 101.

<sup>125</sup> Commentary on the Norms: Commentary (b) to para 1.

<sup>126</sup> M Moonshipouri et al ‘Multinational corporations and the ethics of global responsibility: problems and possibilities’ (2003) 25 *Human Rights Quarterly* 978-982.

implement the Norms.<sup>127</sup> It also provided for an enforcement mechanism which required states to set up the necessary framework to ensure compliance by TNCs in addition to an international mechanism for periodic monitoring and verification.<sup>128</sup> This is also a significant departure from previous approaches where the enforcement of corporate responsibility for human rights lay almost exclusively with states.<sup>129</sup> It also provided for restitution for those negatively affected by the activities of TNCs which violate the Draft Norms with national and international courts granted jurisdiction for the determination of damages.<sup>130</sup>

### 2.4.3 Limitations

In spite of its pioneering approach to holding corporations directly responsible for human rights violations, the Draft Norms had inherent challenges that would have beset its implementation as a binding treaty.<sup>131</sup> The Draft Norms extended beyond the traditional boundaries of human rights law in terms of the contents of the rights especially with its application of economic, social and cultural rights to non-state actors.<sup>132</sup> They provided rights associated with consumer protection, the environment and corruption which are usually considered to be covered by other more appropriate fields of law.<sup>133</sup> Second, while states were given a lot of discretion with respect to available resources and appropriate means in the realisation of socio-economic rights, no such margin was provided for TNCs.<sup>134</sup>

The Draft Norms also sought to enforce human rights obligations for a wide range of non-state actors.<sup>135</sup> Apart from TNCs, it also applied to ‘other enterprises’ doing business with TNCs whose impact is ‘not entirely local’.<sup>136</sup> The scope of entities which fell under the definition of other enterprises included any contractor, sub-contractor, supplier, licensee or distributor of a TNC, regardless of the legal form of the enterprises or the relationship involved.<sup>137</sup> Additionally, by requiring TNCs to include them in their contracts, the Draft Norms seek to create liability without clearly defining the limits of that liability.<sup>138</sup> The Draft Norms also require TNCs to avoid any activity which supports, solicits, or encourages states or non-state actors to abuse human rights but failed to stipulate what was required of TNCs toward this end.<sup>139</sup>

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<sup>127</sup> Para 15.

<sup>128</sup> Para 17.

<sup>129</sup> Deva (n 39 above) 102.

<sup>130</sup> Para 18.

<sup>131</sup> Deva (39 above) 103.

<sup>132</sup> de Jonge (n 33 above) 35-36.

<sup>133</sup> As above.

<sup>134</sup> As above.

<sup>135</sup> As above.

<sup>136</sup> Para 21.

<sup>137</sup> As above.

<sup>138</sup> de Jonge (n 33 above) 36.

<sup>139</sup> As above.



The Norms and the Commentary on the Norms make reference to at least 56 international instruments most of which were negotiated by states without TNCs in their consideration. This approach is problematic as some of the instruments referred to have not received the ratification of the majority of states and it is unreasonable to expect corporate executives to ascertain on their own, the human rights obligations all these instruments impose on their corporate activities.<sup>140</sup> Nolan charges that the Draft Norms contained an ‘overly inclusive’ list of human rights imposed on corporations as is illustrated by paragraph 12 of the Norms.<sup>141</sup> Another problematic aspect of the Draft Norms was the introduction of the concept of ‘sphere of influence’.<sup>142</sup> This concept considered as an ambiguous ‘slippery slope’<sup>143</sup> was the subject of controversy that contributed to the rejection of the Norms and has been criticised by the SRSB as an inappropriate and a counter-productive tool for allocating responsibility between states and companies.<sup>144</sup>

The Norms however are not yet binding and considering the criticisms they received from the SRSB, they may never become a binding instrument as intended but according to de Jonge, they have become part of a the normative statements contributing to the emergence of customary law in this field.<sup>145</sup>

## 2.5 OECD Guidelines for MNEs

### 2.5.1 Nature and scope

The OECD Guidelines on MNEs date back to 1976 and form part of the OECD Declaration on International Investment and Multinational Enterprises.<sup>146</sup> It serves as a statement of expectations of home governments of their corporations abroad with the aim of ensuring that TNCs act in accordance with government policies, support sustainable development and promote mutual confidence between enterprises and local communities.<sup>147</sup>

The current version of the Guidelines was introduced in 2000 and updated in May 2011 with the support of 42 countries including all the members of the OECD.<sup>148</sup> Apart from representatives of these countries, the update process also involved business leaders, trade unions, and civil society

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<sup>140</sup> Deva (n 39 above) 103.

<sup>141</sup> J Nolan ‘With power comes responsibility: human rights and corporate accountability’,(2005) 28 *University of New South Wales Law Journal* 593.

<sup>142</sup> de Jonge (n 33 above) 37-40.

<sup>143</sup> de Jonge (n 33 above) 35.

<sup>144</sup> Protect, Respect and Remedy: A Framework for Business and Human Rights A/HRC/8/5 (2008) 65-72.

<sup>145</sup> n 33 above, 41.

<sup>146</sup> OECD Doc DAF/IME (2000).

<sup>147</sup> OECD Guidelines for Multinational Enterprises (2011) <<http://dx.doi.org/10.1787/9789264115415-en>> (accessed 03 October 2012); preface para 1.

<sup>148</sup> ‘World leaders promote ambitious multilateral agenda for responsible business conduct’ *Investment News*, May 2011 <<http://www.oecd.org/daf/internationalinvestment/47557611.pdf>> (accessed 03 October 2012); see page 2 for a list of adhering states.

organisations<sup>149</sup> as well as regional consultations in Africa, Asia, and Latin America. The Guidelines were updated in 2011 with a view to making them the leading international instrument for the promotion of responsible business conduct.<sup>150</sup> The update followed concerns by OECD members that the Guidelines were destined to be left behind in a field that had seen rapid development in the past decade.<sup>151</sup> However the Guidelines retain their status as voluntary.<sup>152</sup> The Guidelines cover issues such as labour and environmental standards, corruption, consumer protection, technology transfer, competition and taxation.<sup>153</sup> They do not only encourage companies to observe the Guidelines but also to encourage their business associates such as contractors and suppliers to do the same.<sup>154</sup>

### 2.5.2 Strengths

Although initially absent in the 1976 edition, a specific recommendation on human rights was included in the 2000 revision of the Guidelines<sup>155</sup> and in the 2011 edition, an entire section is devoted to human rights.<sup>156</sup> The 2011 update also showed a resounding approval of the SRSG report with an adoption of its ‘respect, protect and remedy’ framework.<sup>157</sup>

The Guidelines require companies to respect the human rights of those affected by their activities, mitigate adverse effects and to provide appropriate remedies in cases of violation.<sup>158</sup> The 2011 edition also departs from the previous requirement of observing the human rights obligations of the host state and replaces it with internationally recognised human rights.<sup>159</sup> It recommends that MNEs undertake a ‘risk-based due diligence’ in order to avoid causing or contributing to human rights violations. Thus in the case of *Rights and Accountability in Development (RAID) v DAS Air*, the United Kingdom (UK) National Contact Point (NCP) found DAS Air to have failed to carry out due diligence with respect to its supply chains by flying to conflict zones in the Great Lakes Region although it asserted that it did not know the source of the minerals it was transporting.<sup>160</sup> Local engagement in the planning of projects with significant local impact is also advised.<sup>161</sup>

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<sup>149</sup> As above.

<sup>150</sup> Terms of Reference for an Update Of The OECD Guidelines for Multinational Enterprises 2  
<<http://www.oecd.org/corporate/guidelinesformultinationalenterprises/45124171.pdf>> (accessed 03 October 2012)

<sup>151</sup> P Hohnen *OECD MNE Guidelines: A responsible business choice* (2008-2009)  
<[http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD\\_MNE\\_Guidelines.html](http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD_MNE_Guidelines.html)> (accessed 03 October 2012).

<sup>152</sup> Sec I(1).

<sup>153</sup> Part I paras II-X.

<sup>154</sup> Part I para II.10.

<sup>155</sup> Jagers (n 47 above) 102-106.

<sup>156</sup> Chapter IV of part 1.

<sup>157</sup> Deva (n 39 above) 85.

<sup>158</sup> Part I paras IV.1-6.

<sup>159</sup> Part I para II.2.

<sup>160</sup> *RAID v DAS Air* Summary of NCP Decision (17 July 2008) <<http://oecdwatch.org/cases/Case-41>> (accessed 03 October 2012).

<sup>161</sup> Part I paras II.10-13.

The Guidelines also state that some matters covered in it may be internationally binding and therefore adhering states are obliged to implement them.<sup>162</sup> There is also a requirement of public disclosure of social, ethical and environmental codes of conduct, financial performance and other policies of the company<sup>163</sup> to enable stakeholders play their role as informal checks and balances on companies' behaviour.<sup>164</sup> The Guidelines also seek to avoid abuse of power by corporations by requiring them not to seek exemptions not provided for in the statutory or regulatory regime of the host state on matters such as taxation, financial incentives, environmental standards, health and safety.<sup>165</sup> This is particularly relevant in the context of Africa where some TNCs are capable of extracting exorbitant concessions out of weak and corrupt governments which in some cases may lead to human rights abuses.

The Guidelines also depart from their previous minimalist position which recommended standards of host states and advocates adherence of TNCs to the standards of the Guidelines as much as possible without violating the laws of the host state when there is a conflict between the two.<sup>166</sup> It also recommends the application of international labour standards including the prohibition of child labour and forced labour.<sup>167</sup>

The Guidelines also establish a complaints and dispute settlement mechanism with NCPs established by all adhering states to receive and settle disputes brought by anyone against a TNC.<sup>168</sup> The dispute resolution procedures of the NCPs were further elaborated in the 2011 update with clear suggestions on timelines and the handling of parallel proceedings through the cooperation of NCPs.<sup>169</sup> The NCPs offer their good offices for the settlement of disputes between parties and can issue recommendations on the implementation of the Guidelines including restitution and other remedial measures.<sup>170</sup> Cases which occur outside adhering countries may be brought before the home state NCP of that TNC. Thus the case *RAID v DAS Air*<sup>171</sup> was a case involving a UK TNC's operations in the Democratic Republic of Congo (DRC), Uganda and Rwanda.

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<sup>162</sup> Preface para 1; part I para I.1.

<sup>163</sup> Part I para III.1.

<sup>164</sup> Deva (n 39 above) 81.

<sup>165</sup> Part I para II.5.

<sup>166</sup> Part I para I.2.

<sup>167</sup> Part I para V.1

<sup>168</sup> Part II para I.

<sup>169</sup> As above; AL Santner 'Soft law mechanism for corporate responsibility: how the updated OECD Guidelines for Multinational Enterprises promote business for the future' (2011) 43 *George Washington International Law Review* 384.

<sup>170</sup> n 168 above.

<sup>171</sup> n 160 above.

### 2.5.3 Limitations

Although the Guidelines have some positive aspects especially with the 2000 revision and the 2011 update, it still suffers from a number of drawbacks as a mechanism for enforcing corporate compliance with human rights law. First, although human rights provisions have been introduced they remain a minor aspect of the Guidelines forming only a chapter and formulated as recommendations.<sup>172</sup> Further, although the Guidelines state that some aspects may be binding, it does not clearly specify those aspects as binding in the text of the Guidelines. Finally, the major weakness of the Guidelines is the lack of an effective enforcement mechanism to ensure compliance in the event that an amicable settlement fails.<sup>173</sup> The requirement of secrecy in the procedures of settlement also excludes public pressure that could encourage MNEs to act in accordance with the Guidelines.<sup>174</sup> Thus according to OECD watch the vast majority of cases brought under the Guidelines have not yielded any improvement in the situation that led to the complainant.<sup>175</sup> As an indication of the weakness of the Guidelines, Jagers refers to reports that the NCPs are largely ineffective and even MNEs which had any knowledge of the Guidelines gave little consideration to them in their operations.<sup>176</sup> It however remains to be seen if the 2011 update of the Guidelines will lead to any drastic improvement in the effectiveness of its implementation mechanisms.

### 2.6 Conclusion

The number as well as diversity of approaches adopted for the regulation of the conduct of TNCs indicates the importance of the issue in the struggle to promote, protect and fulfil human rights. It also demonstrates the dire need to find an appropriate mechanism for the unique nature of TNCs as non-state actors whose impact on human rights is presently undeniable. The history of corporate human rights regulation also suggests that while soft law mechanisms are likely to be met with greater acceptance their effectiveness is often questionable to the extent that there is an increasing trend towards strengthening their enforcement mechanisms. On the other hand, it is also clear that binding instruments are likely to encounter hostilities and are fraught with conceptual and operational difficulties. Any attempt to regulate corporate behaviour in Africa to comply with human rights must therefore give careful consideration to the strengths and limitations of past approaches in order to design a system that is workable and effective but also acceptable.

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<sup>172</sup> Deva (n 39 above) 82.

<sup>173</sup> Chirwa (n 72 above) 273; Deva (n 39 above) 88.

<sup>174</sup> Deva (n 39 above) 87-88.

<sup>175</sup> As above.

<sup>176</sup> Jagers (n 47 above) 108.

## Chapter 3: The Guiding Principles as a basis for an African instrument for corporate human rights responsibility

I would use of international law the words which Galileo used of the earth: 'But it does move.'<sup>177</sup>

### 3.1 Introduction

Following serious challenges to the advancement of the UN Draft Norms as an instrument for imposing human rights obligations on TNCs along the same baseline as states, the Human Rights Commission requested a special procedure mandate in an attempt to move beyond the stalemate.<sup>178</sup> The then Secretary-General, Kofi Annan appointed John Ruggie as the SRSG on business and human rights.<sup>179</sup> Having been appointed after a lack of consensus on the Draft Norms due to their far reaching nature, the Ruggie mandate was bound to establish minimum standards that were less controversial and more acceptable than the Draft Norms. The Ruggie framework was operationalized into the Guiding Principles on Business and Human Rights.

By setting minimum requirements based on more settled principles of international law, the Guiding Principles have managed to garner UN endorsement and therefore stand as the most authoritative international statement on business and Human Rights.<sup>180</sup> However, in endorsing the Guiding Principles, the UN Human Rights Council also envisaged the need for regional enhancements to suit regional specificities.<sup>181</sup> In this chapter, the key parameters of the Ruggie framework and the Guiding Principles are discussed. The argument is then advanced in support of using the Guiding Principles as a legitimate basis for a binding African instrument for regulating corporate conduct to comply with human rights law. This is particularly important as the Guiding principles in their current state constitute soft law for both states and TNCs. It is argued that the position of TNCs in international law and in economic relations in Africa as well as the peculiarities of the state in Africa call for an instrument capable of ensuring direct responsibility of TNCs for human rights as well as states' obligation to protect people from human rights abuses by TNCs.

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<sup>177</sup> Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529 at 554.

<sup>178</sup> Secretary-General appoints John Ruggie of United States special representative on issue of human rights, transnational corporations, other business enterprises <<http://www.un.org/News/Press/docs/2005/sga934.doc.htm>> (accessed 20 October 2012).

<sup>179</sup> As above.

<sup>180</sup> John Ruggie <<http://www.hks.harvard.edu/about/faculty-staff-directory/john-ruggie>> (accessed 20 October 2012).

<sup>181</sup> n 6 above.

## 3.2 The Guiding Principles

### 3.2.1 Background

Although issues of business and human rights received a fresh impetus in the 1990s with increased global economic activity and the spread of TNCs, efforts by the UN to impose human rights obligations on TNCs were largely fraught with deadlock and controversy. Earlier efforts to draft a code of conduct for TNCs in the 1970s and 1980s broke down and were eventually abandoned.<sup>182</sup> The only effort which had succeeded at the UN level was an entirely voluntary initiative with the Global Compact in 1999. In 2005, following the failure of the UN Draft Norms to garner support for approval, the Human Rights Commission established a mandate for a Special Representative of the Secretary-General. The mandate of the SRSR included:<sup>183</sup>

- To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.

John Ruggie who was appointed to fulfil this mandate had earlier played a key role in the establishment of the Global Compact.<sup>184</sup> Ruggie's work involved in-depth research; extensive consultations with businesses, governments, civil society, affected individuals and communities, lawyers, investors and other stakeholders as well as practical road-testing of proposals.<sup>185</sup> His progress was serialised in reports to the Human Rights Council from 2006 to 2011.<sup>186</sup> In 2008, the Council approved Ruggie's report in which he outlined the 'protect respect and remedy' framework and requested a transposition of the framework into a policy system with a three year extension of the mandate.<sup>187</sup> In June 2011, the Council approved the Guiding Principles on TNCs as the final culmination of six years of work by Ruggie as SRSR.<sup>188</sup> The Guiding Principles have gained popularity with the adoption of key elements by the OECD, the International Standards Organization, the International Finance Corporation and the European Union.<sup>189</sup>

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<sup>182</sup> D Murphy 'Taking multinational codes of conduct to the next level' (2005) 43 *Columbia Journal of Transnational Law* 403 - 405.

<sup>183</sup> Human rights and Transnational Corporations and Other Business Enterprises, E/CN.4/RES/2005/69.

<sup>184</sup> n 178 above.

<sup>185</sup> The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012) 1.

<sup>186</sup> Reports and other documents: Human Rights Council/Commission on Human Rights <<http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx>> (accessed 8 October 2012).

<sup>187</sup> UN Human Rights Council Report of the Human Rights Council on its Eighth Session 8/7 UN Doc A/HRC/8/52 (2008) <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc>> (accessed 8 October 2012).

<sup>188</sup> Guiding Principles (n 5 above).

<sup>189</sup> The Institute for Human Rights and Business (IHRB) *The UN Guiding Principles on Business and Human Rights* <<http://www.ihrb.org/project/eu-sector-guidance/un-guiding-principles.html>> (accessed 8 October 2012).

In summary, the Guiding Principles rest on three pillars:<sup>190</sup>

- States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights;
- The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The Guiding Principles apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.<sup>191</sup> Their objective is to enhance standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contribute to a socially sustainable globalisation.<sup>192</sup> They are however not to be read as imposing new international law obligations, or as limiting or undermining any existing human rights obligations of states.<sup>193</sup>

### 3.2.2 The state duty to protect human rights

The duty of states to protect human rights is underpinned by two foundational principles. First, states are required to protect people from human rights abuses within their jurisdiction by third parties, including business enterprises.<sup>194</sup> Toward this end states must take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.<sup>195</sup>

States are expected to consider the full range of permissible preventative and remedial measures although they maintain the discretion to choose which steps to take.<sup>196</sup> This duty is also clarified as a standard of conduct and therefore states are not per se responsible for human rights abuse by private actors.<sup>197</sup> However, where such an abuse is attributable to the state or where the state fails to take appropriate steps to prevent, investigate, punish and redress private actors' abuse, the state can be held responsible for that abuse.<sup>198</sup> The protection and promotion of the rule of law with measures for adequate accountability, legal certainty and procedural and legal transparency is also entailed in the duty of the state to 'protect'.<sup>199</sup> Second, as part of the duty of the state to 'protect', States are also expected to set clear expectations that all business enterprises domiciled in their territory respect

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<sup>190</sup> Guiding Principles (n 5 above) 6.

<sup>191</sup> As above.

<sup>192</sup> As above.

<sup>193</sup> As above.

<sup>194</sup> Principle 1.

<sup>195</sup> Principle 1.

<sup>196</sup> Commentary on principle 1.

<sup>197</sup> Commentary on principle 1.

<sup>198</sup> Commentary on principle 1.

<sup>199</sup> Commentary on principle 1.

human rights in all their operations.<sup>200</sup> This expectation includes parent company reporting requirements as well as extraterritorial legislation and enforcement.<sup>201</sup>

The second set of principles under state duties are the operational principles meant to elaborate on the regulatory measures to be taken by states in meeting the obligation to protect people from human rights abuses by TNCs and other business enterprises. The measures required of states include the enforcement of laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights and to periodically review such laws with the view to addressing inadequacies; ensuring that laws do not constrain but enable businesses to respect human rights; guiding business enterprises on how to respect human rights in all their operations; encouraging, and where appropriate requiring business enterprises to report on their human rights impact.<sup>202</sup>

Principle 4 requires states to take additional steps such as requiring human rights due diligence in cases of state owned enterprises or those that receive substantial state support and services such as credit, official investment insurance or guarantee agencies. States are also to ensure that their human rights obligations are provided for in contracts or legislation on the provision of services with an impact on human rights<sup>203</sup> and to use their unique position to promote respect for human rights in their commercial transactions with business enterprises.<sup>204</sup> Principle 7 devotes particular attention to conflict zones requiring home states and host states as well as neighbouring states to take measures to warn, prevent and punish complicity in the heightened human rights abuses that usually occur in conflict zones. States are also required to provide information, training and support for state-based institutions that shape business practices in order to ensure that they act compatibly with the state's human rights obligations<sup>205</sup> and to retain adequate domestic space to meet their human rights obligations in their bilateral investment treaties and contracts.<sup>206</sup> Finally, states as members of multilateral institutions that deal with business issues must encourage business respect for human rights and use the Guiding Principles as a basis to promote a shared understanding of business and human rights.<sup>207</sup>

### **3.2.3 The corporate responsibility to respect human rights**

As foundational principles, the responsibility of business to respect human rights requires business enterprises to avoid infringing on the rights of others and to address adverse human rights impacts of

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<sup>200</sup> Principle 2.

<sup>201</sup> Commentary on principle 2.

<sup>202</sup> Principle 3.

<sup>203</sup> Principle 5.

<sup>204</sup> Principle 6.

<sup>205</sup> Principle 8.

<sup>206</sup> Principle 9.

<sup>207</sup> Principle 10.



their activities.<sup>208</sup> At a minimum, the human rights provisions that business enterprises must respect are those provided in the International Bill of Human Rights (the UDHR, the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic Social and Cultural Rights (ICESCR) and the principles concerning fundamental rights detailed in the ILO's Declaration on Fundamental Principles and Rights at Work.<sup>209</sup>

Business enterprises are also required to refrain from causing or contributing to adverse human rights impacts and to address such impacts when they occur.<sup>210</sup> Additionally, they are expected to prevent or mitigate adverse human rights impacts that are linked to their operations, products or services by their business associates including cases where they have not contributed to those impacts.<sup>211</sup> Although the Guiding Principles are intended to apply to all business enterprises equally regardless of size, sector, operational context, ownership and structure, they are expected to put in place measures commensurate with their size and circumstances such as policy commitments to human rights, human rights due diligence and remediation of adverse human rights impacts.<sup>212</sup>

Principles 16 to 24 elaborate on measures that businesses must take as operational principles in line with the responsibility to respect human rights.<sup>213</sup> The policy statements on human rights required under principle 15 must be approved at the most senior level with expert input and must stipulate the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services.<sup>214</sup> It must be publicly available and communicated to all personnel, business partners and other relevant parties. It must also be operationalized into policies and procedures of the enterprise.<sup>215</sup>

The final principles on the corporate responsibility to respect human rights devotes relatively high attention to human rights due diligence thus reflecting its importance. Due diligence is required as a means to identify, prevent, mitigate and account for how business enterprises address their adverse human rights impacts by assessing actual and potential impacts, responding appropriately to them and communicating how those impacts are addressed.<sup>216</sup> It is required to take into consideration the size of the business as well as nature and context of operations and it must be a continuous process as risks and circumstances of the enterprise vary over time.<sup>217</sup> Due diligence must also involve meaningful

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<sup>208</sup> Principle 11.

<sup>209</sup> Principle 12.

<sup>210</sup> Principle 13(a).

<sup>211</sup> Principle 13(b).

<sup>212</sup> Principle 14.

<sup>213</sup> Principle 15.

<sup>214</sup> Principle 16 (a)(b)(c).

<sup>215</sup> Principle 16(d)(e).

<sup>216</sup> Principle 17.

<sup>217</sup> Principle 17.

consultation with affected groups with particular attention to vulnerable groups as well as inputs from human rights experts.<sup>218</sup> The findings of assessments must also be properly integrated into operations of the company with appropriate allocations in budgets, responsible officials as well as measures for exercising oversight.<sup>219</sup> Companies are also required to use qualitative and quantitative indicators as well as feedback from internal and external sources to verify the effectiveness of measures to address adverse human rights impacts.<sup>220</sup> Business enterprises involved in high risk activities are also expected to formally report publicly on measures to address adverse human rights impacts.<sup>221</sup> Such reports are required to be in a form and frequency that reflects the impacts involved and is accessible to the intended audience without compromising on commercial confidentiality.<sup>222</sup>

With respect to remediation, business enterprises are required to provide for or cooperate in the remediation of adverse impacts through legitimate processes.<sup>223</sup> The Guiding Principles clarify that in some situations corporate level grievance mechanisms may be adequate whereas in more severe cases such as criminal allegations, judicial mechanisms may be necessary.<sup>224</sup>

Noting that the context of corporate activities may present challenges to the corporate responsibility to respect human rights, the Guiding Principles provide directions and clarifications requiring business enterprises to comply with all applicable laws and respect internationally recognised human rights, wherever they operate and to find ways of honouring international human rights law in cases of conflicting requirements.<sup>225</sup> Business enterprises are also required to treat the risk of causing or contributing to gross human rights abuses as an issue of legal compliance.<sup>226</sup> Finally, in cases where it is impossible to address a number of actual and potential adverse impacts simultaneously, in the absence of legal guidelines, business enterprises are expected to prioritise the most severe impacts or those impacts where a delay may lead to an irredeemable situation.<sup>227</sup>

### 3.2.4 Access to remedy

The foundational principle underpinning the access to remedy pillar of the Guiding Principles is that as part of their duty to protect people from business-related human rights abuse, states must take ‘appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means,

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<sup>218</sup> Principle 18.

<sup>219</sup> Principle 19(a).

<sup>220</sup> Principle 20.

<sup>221</sup> Principle 21.

<sup>222</sup> Principle 21.

<sup>223</sup> Principle 22.

<sup>224</sup> Commentary on principle 22.

<sup>225</sup> Principle 23 (a)(b).

<sup>226</sup> Principle 23(c).

<sup>227</sup> Principle 24.

that when such abuses occur within their jurisdiction those affected have access to effective remedy.<sup>228</sup>

The operational principles meant to provide access to remedy recommend the utilisation of a wide range of mechanisms including both state based and non-state based mechanisms. States are required to take appropriate steps including the removal of legal, practical and other impediments to ensure the effectiveness of judicial mechanisms for addressing business-related human rights abuses.<sup>229</sup> In addition to judicial mechanisms, states are also required to provide appropriate non-judicial grievance mechanisms such as national human rights institutions (NHRIs), as part of a comprehensive system for the remedy of business-related human rights abuse.<sup>230</sup> States are also to improve access to non-state based grievance mechanisms such as those provided by the enterprise, industry associations and other stakeholder groups.<sup>231</sup> Along with these, states are also required to facilitate access to regional and international bodies capable of addressing business related human rights abuses.<sup>232</sup> Business enterprises are also expected to play an active role in providing early and direct redress for human rights abuses related to their business by establishing or participating in operational-level grievance mechanisms.<sup>233</sup> The final operational principle sets criteria for the effectiveness of non-judicial grievance mechanisms by requiring them to be legitimate, accessible, predictable, equitable, transparent, rights compatible and a source of continuous learning.<sup>234</sup> Operational-level mechanisms are also required to be designed based on consultation with stakeholders as target beneficiaries and to rely on dialogue as a means of addressing grievances.<sup>235</sup>

### **3.3 The case for a regional instrument based on the Guiding Principles**

#### **3.3.1 The Guiding Principles as a viable basis for a regional mechanism**

Although the Ruggie framework has received criticisms for setting low standards for TNCs and neglecting positive obligations of businesses,<sup>236</sup> it represents a viable framework that can be used as a basis to develop an African regime that is workable and acceptable to both states and TNCs. This is because Guiding principles represent the most viable basis for such an evolution due to its international legitimacy as the most authoritative statement of the principles on business and human

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<sup>228</sup> Principle 25.

<sup>229</sup> Principle 26.

<sup>230</sup> Principle 27.

<sup>231</sup> Principle 28 and 30.

<sup>232</sup> Commentary on principle 28.

<sup>233</sup> Principle 29.

<sup>234</sup> Principle 31.

<sup>235</sup> Principle 31.

<sup>236</sup> D Bilchitz *Business and human rights: the responsibilities of corporations for the protection of human rights* (2008) 16-17.

rights. Additionally, the Guiding Principles actually call for regional implementation mechanisms and further, they possess the flexibility to accommodate regional peculiarities.

First, the Ruggie framework represents the most authoritative statement on the application of human rights principles to business enterprises.<sup>237</sup> Although the Ruggie mandate was not the only effort to bring TNCs under the framework of international human rights law, it is the only effort to have succeeded in garnering the support of states at the UN level. The Ruggie mandate was established to settle the controversies surrounding the applicability of international human rights law to business enterprises. The preceding controversy therefore set the stage for the approach of ‘principled pragmatism’<sup>238</sup> adopted by Ruggie at the onset of his mandate. Ruggie therefore set out to and did achieve a minimum threshold of principles that the international community as a whole would find acceptable as a coherent aggregate of existing international law standards on business and human rights. The minimalists output of the Guiding Principles has succeeded in breaking decades of deadlock on the application of human rights law to business enterprises.

Ruggie’s final report which details the Guiding Principles received unanimous endorsement from the UN Human Rights Council and therefore secures international acceptability of its principles. Subsequent to the approval by the UN, several enthusiastic endorsements have also bestowed further legitimacy on the Guiding Principles and its framework and core elements have been subsequently applied to other instruments in this area of law. In 2011, the OECD updated its Guidelines for MNEs and for the first time comprehensively dealt with business-related human rights abuses, relying heavily on the Guiding Principles.<sup>239</sup> The European Commission also endorsed the Guiding Principles as an important reference for the European Union’s renewed policy on corporate social responsibility.<sup>240</sup> The Global Compact also commended the Guiding Principles for providing operational clarity in the Compact’s own foundational principles.<sup>241</sup> Therefore in spite of well-founded criticisms of the Guiding Principles, they are the most authoritative statement on business and human rights and any international effort will benefit greatly in terms of its legitimacy and acceptability if it is based on the core elements and framework of the Guiding Principles. Indeed as Robinson asserts, they represent an emerging consensus for the advancement of the agenda of business and human rights.<sup>242</sup>

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<sup>237</sup> n 185 above, 2.

<sup>238</sup> <<http://www.ohchr.org/EN/NewsEvents/Pages/PrincipledpragmatismBusinessHR.aspx>>

<sup>239</sup> Part I chapter IV.

<sup>240</sup> ‘Business and human rights: new United Nations guidelines’ *European Commission News* 17 June 2011. <[http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item\\_id=5220](http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220)> (accessed 8 October 2012).

<sup>241</sup> UN Global Compact *The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (June 17, 2011)

<[http://www.unglobalcompact.org/Issues/human\\_rights/The\\_UN\\_SRSRSG\\_and\\_the\\_UN\\_Global\\_Compact.html](http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSRSG_and_the_UN_Global_Compact.html)> (accessed 8 October 2012).

<sup>242</sup> n 43 above, 25.

Second, the Guiding Principles envisage and actually call for regional mechanisms as part of efforts to implement the principles and provide access to remedies for business-related human rights abuses.<sup>243</sup> They require states to take measures to ensure the availability of remedies when business-related human rights abuses occur.<sup>244</sup> In achieving access to remedies, they provide that state-based mechanisms and operational level mechanisms can be enhanced by regional human rights mechanisms.<sup>245</sup> Again, in elaborating on non-state based mechanisms that states are expected to facilitate access to, regional and international bodies are stated as one category of non-state based grievance mechanisms.<sup>246</sup> These provisions demonstrate that the Guiding Principles contemplate that in order to implement its principles and provide adequate remedies for their infringement; states are under a duty to create and or facilitate access to regional mechanisms to complement domestic mechanisms for addressing business-related human rights abuses. Indeed in its resolution approving the final report of the SRSG, the Human Rights Council also established a Working Group whose mandate among others included

[t]o continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas.<sup>247</sup>

The Working Group is also expected to further operationalize the Guiding Principles in close cooperation and collaboration with regional human rights mechanisms.<sup>248</sup> The Resolution in its preamble also expresses concern about the challenge posed by weak national legislation and implementation mechanisms and states that ‘further efforts to bridge governance gaps at the national, regional and international levels are necessary’.<sup>249</sup> The Guiding Principles are therefore intended by to serve as a basis for enhancing regional mechanisms for accountability with respect to business-related human rights abuses. They therefore provide a legitimate basis for developing regional mechanisms of accountability to complement corporate and national-level mechanisms for human rights accountability on the part of TNCs and other business enterprises.

Finally, although the Guiding Principles adopt a minimalist approach in terms of normative provisions, they do not shut the door to the existence or development of other human rights standards that may be applicable to business enterprises. In its normative stipulations for example, the Guiding Principles state that

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<sup>243</sup> Commentary on principle 25; Commentary on principle 28.

<sup>244</sup> Principle 25.

<sup>245</sup> Commentary on principle 25.

<sup>246</sup> Commentary on principle 28.

<sup>247</sup> n 6 above, para 6(e).

<sup>248</sup> n 6 above, para 6(g).

<sup>249</sup> n 6 above, preamble.

[t]he responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, *at a minimum*, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work (emphasis added).<sup>250</sup>

The Commentary then clarifies that business can have impacts on the entire spectrum of human rights and therefore depending on the context of the enterprise, certain rights must receive heightened attention.<sup>251</sup> Reference is therefore made to UN instruments dealing with rights of indigenous people, women, religious and linguistic minorities, children, persons with disabilities as well as migrant workers and their families and issues of humanitarian law. Therefore, even though the Guiding Principles refer to a limited number of instruments, those instruments are not presented as an exhaustive list of provisions to be respected by business enterprises. Conversely, the Commentary explains that the instruments specified only represent benchmarks used by social actors to assess business-related human rights impacts and business enterprises may be required to respect additional standards depending on the circumstances.<sup>252</sup> The Guiding principles therefore lend themselves to regional enhancements based on the peculiar circumstances of Africa. Considering the circumstances of TNCs and business in Africa: the focus on the extraction of natural resources; the significant populations of indigenous people; the deficit in gender equality and the persistence of conflicts and weak governance zones in Africa, the Guiding Principles present a basis for enhancements in a regional instrument to fit the peculiarities of business-related human rights impact in the region.

### **3.3.2 The case for establishing a regional implementation mechanism for Africa**

The question as to whether TNCs should be subject to human rights obligations has been the subject of considerable debate since developing countries initiated the drive for the New International Economic Order in the 1970s.<sup>253</sup> Presently, there remains no doubt that corporations do have obligations to respect human rights.<sup>254</sup> While the Guiding Principles have established that indeed business enterprises must respect human rights law, they do not constitute a binding legal instrument and do not establish any mechanism for international implementation. Implementation in the framework of the Guiding Principles remains largely a part of the duty of the state to protect people from human rights abuses. Matters of legal liability and enforcement are also not defined under the corporate responsibility to respect human rights but are rather left as largely defined by national law provisions. While the nation-state remains the primary actor in international relations and primary means of law enforcement, this approach is the most pragmatic to take. However in the context of Africa, the rise of TNCs which puts

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<sup>250</sup> Principle 12.

<sup>251</sup> Commentary on principle 12.

<sup>252</sup> Commentary on principle 12.

<sup>253</sup> J Ruggie ‘Business and human rights: an evolving international agenda’ (2007) 101 *American Journal International Law* 819.

<sup>254</sup> JD Bishop ‘The limits of corporate human rights obligations’ *Business Ethics Quarterly* (2012) 121.

them in a unique position to both violate and promote human as well as the limitations of depending on state responsibility due to the weakness of many states, makes it imperative that supranational mechanisms are established to complement domestic legal systems.

### *The position of TNCs in Africa*

TNCs and other Business enterprises occupy an important position as social organs and cannot be kept outside the framework of law and the social expectation of all persons; natural or legal to be law abiding. Globalisation has further boosted the rise in influence of non-state actors and their dominance in several aspects of life previously controlled by government. Indeed studies estimate that more than 64% (112) of the world's top 175 economic entities are corporations and all these 112 corporations rank higher in terms of economic might than all but three African countries.<sup>255</sup> As Strange cautions, it is necessary to conceptualise power beyond political power to include economic power as well.<sup>256</sup> While traditionally, human rights have been regarded as guarantees against the pervasive power of the state, today the situation differs with more non-state actors wielding enormous power and influence.<sup>257</sup> The state has also been rolled back in terms of its monopolistic role in the delivery of vital services thus leaving to the private sector, functions that were considered to be public functions.<sup>258</sup> This has given TNCs and other business enterprises a position in society where they can both to promote as well as violate human rights.<sup>259</sup> This trend is set to continue or at least is unlikely to be reversed. It is therefore imperative to bring non-state actors such as TNCs under the framework of international human rights law if the protection and realisation of human rights is to be advanced.

The essence of international human rights law is to protect human rights and to ensure that all social actors respect the rights of others.<sup>260</sup> The focus of human rights protection therefore is the interest of the human being as the right bearer and that interest cannot be compromised based on the personality of the violator. While other non-state actors cannot bear the same baseline of obligations as the state, the violation of human rights by third parties cannot be tolerated because of the inability or unwillingness of the state to prevent such third party violations. The power and influence of corporations puts them at a higher level and makes it impossible for vulnerable people and groups to hold them accountable. Indeed, even many governments in Africa will find it difficult to summon the political will and the ability to adequately regulate the activities of TNCs to comply with international

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<sup>255</sup> S White 'The Top 175 economic entities, 2010 measured by GDP and total revenue' <<http://dstevenwhite.com/2011/08/14/the-top-175-global-economic-entities-2010/>> (accessed 8 October 2012); only South Africa, Egypt and Nigeria made it to the list.

<sup>256</sup> S Strange *The retreat of the state* (1996) 16-43.

<sup>257</sup> A Reinisch 'The changing international legal framework for dealing with non-state actors' in P Alston (ed) *Non-state actors and human rights* (2005) 37-38.

<sup>258</sup> Chirwa (n 1 above) 407.

<sup>259</sup> Deva (n 39 above) 148-149.

<sup>260</sup> As above.

human rights standards due to various reasons such as the dependence on their investment, diplomatic consequences and the lack of expertise as well as corruption of public officials. In addition to the economic power of TNCs, many also receive diplomatic support from their home governments to protect their interests abroad. Many governments in the region may therefore be unwilling to pursue human rights claims against such TNCs for fear of diplomatic consequences. The competition for foreign investment among states may also lead to states signing bilateral investment treaties that do not adequately cater for the rights of people who may suffer from the adverse impacts of the activities of TNCs.<sup>261</sup> Further, corruption and incompetence among public officials may also block access to effective remedies for those who suffer abuses from the activities of powerful TNCs.

Currently, international and especially regional mechanisms have become important tools for complementing the regulatory role of the state. Regional mechanisms may also not be subject to the vulnerabilities that make states unwilling and unable to deal with violations of rights by TNCs as they are more independent of political and economic considerations. A regional mechanism can therefore provide a useful forum of last resort to people whose rights are violated by TNCs in situations where their governments may be unwilling or unable to hold them accountable.

#### ***The limitations on state responsibility in the African context***

In the absence of clear international law provisions for holding TNCs directly accountable for human rights abuses, people have resorted to holding the state responsible for acts of private actors such as TNCs due to the failure of the state to prevent those acts. In the modern world of powerful TNCs, the weakness of many African states suggests that depending on state responsibility alone may be inadequate for addressing business-related human rights abuses. Indeed, more effective results can be achieved by holding TNCs also directly accountable for their own acts which violate human rights.

Using the doctrine of state responsibility to hold states responsible for the acts of corporations is established in the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission). State responsibility for internationally wrongful acts of private actors can be invoked when those acts are attributable to the state. The *Ogoni* case represents a landmark application of state responsibility for acts of private actors.<sup>262</sup> The complaint alleged the violation of several rights under the African Charter in relation to the Nigerian governments' collaboration with Royal Dutch Shell Company in oil production in the Niger Delta. In addition to environmental degradation as a result of oil production by the consortium, government forces caused destruction of homes and livelihoods. In holding Nigeria to have violated the African Charter, the Commission stated with reference to cases

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<sup>261</sup> 'International multinational enterprises and human rights' A report by Amnesty International and Pax Christi (2000)17-18.

<sup>262</sup> *Ogoni* case (n 20 above).



from the Inter-American Court of Human Rights<sup>263</sup> as well as the European Court of Human Rights<sup>264</sup> that

when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens.<sup>265</sup>

Although the principle of state responsibility as applied in the *Ogoni* case currently provides a useful means of holding states accountable, its impact in providing access to remedies in the African context is limited by a number of factors.

First, victims of human rights abuses by corporations may be reluctant to proceed against the state as opposed to a business enterprise. Currently, the majority of governments in Africa are still classified as either authoritarian or hybrid regimes.<sup>266</sup> Many citizens therefore may consider it too risky to proceed against the state in an international forum and indeed may suffer consequences for doing so. Even after decisions are given in their favour, recommended compensation may be more difficult to squeeze out of an authoritarian regime. To provide greater access to remedies as envisaged under the Guiding Principles therefore, it will be necessary to provide the opportunity to proceed against the corporate entity directly responsible for the particular human rights abuse.

Second, the regulatory capacities of many countries in Africa may be too weak to adequately monitor, investigate and enforce compliance with international human rights standards especially when powerful TNCs are involved. TNCs as global actors are more difficult to regulate as their planning and operations may span a number of countries and thus pose logistical and diplomatic challenges to effective regulation of their activities. Holding states responsible for the failure to regulate such entities is based on the assumption that all states are in a position to actually regulate the activities of TNCs. In fact however, in many parts of Africa, effective government control may be absent and therefore punishing such governments and recommending their intervention may in some cases be an exercise in futility. Holding TNCs directly accountable for their actions will ensure that recommendations are addressed directly to the particular entity that is responsible for the abuse.

Third, compliance with recommendations to remedy human rights abuses may also be more likely to be honoured if they are addressed to TNCs than to states. State compliance with recommendations of international human rights bodies is extremely low in Africa. In a survey of 44 decisions of the African Commission in which states were found to have violated the African Charter, there was full

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<sup>263</sup> *Velásquez Rodríguez v Honduras* IACHR Ser C 4 (29 July 1988).

<sup>264</sup> *X and Y v Netherlands* ECHR (16 March 1985) Ser A 91.

<sup>265</sup> *Ogoni* case (n 20 above) para 57.

<sup>266</sup> The Economist Intelligence Unit (EIU) Democracy Index of 2011 classifies these three states as authoritarian regimes. Index available at <<http://www.eiu.com>> (accessed 8 October 2012).

state compliance in only 14% of the cases with partial compliance in 20% and absolute non-compliance in 66% of the cases.<sup>267</sup> While international mechanisms which issue non-binding recommendations may have little or no leverage over states to compel them to honour their recommendations, TNCs and other business enterprises may be more subject to market forces when such recommendations are issued against them. They may therefore be more likely to comply with such recommendations especially where their complicity is clear and demonstrable, in order to keep the goodwill that is needed to maintain investor confidence and market shares. Additionally, governments may be in a position to pressurise TNCs operating in their jurisdiction to honour such recommendations whereas in the case of recommendations against governments, no such superintending force may exist. Providing a regional mechanism for holding TNCs accountable may therefore improve access to remedies for victims of violations.

State responsibility has a role to play in ensuring the protection and realisation of human rights and efforts should be made to improve the regulatory capacity of the state as it remains the strongest enforcement entity and the dominant actor in international relations. However, depending solely on state responsibility may prove inadequate in providing access to remedies for business related human rights abuses as required by the Guiding Principles, hence the need for a regional mechanisms to hold corporations directly accountable for violations of international human rights law.

### **3.4 Conclusion**

The focus of this chapter has been an evaluation of the Guiding Principles as a basis for a prospective African instrument for corporate human rights responsibility and also the advancement of arguments for the establishment of such a mechanism. The Guiding Principles provide a viable, legitimate and most authoritative basis for the creation of an African mechanism for business-related human rights abuse. They actually envisage such a mechanism and its framework is flexible enough to admit regional specificities. The need for a regional instrument is also necessitated by the rising power of TNCs in a region where states continue to face challenges with capacity and therefore the doctrine of state responsibility is inadequate for preventing and punishing corporate human rights violations.

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<sup>267</sup> Unpublished: L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LL.D thesis, University of Pretoria, 2005 314.

## Chapter 4: Challenges of designing and implementing an instrument for corporate responsibility for human rights Africa

A boisterous horse requires a boisterous bridle.<sup>268</sup>

### 4.1 Introduction

As discussed in chapter three, although the Guiding Principles provide a legitimate and viable basis for a prospective regional mechanism for addressing business related human rights violations, it does not by itself establish any such mechanism, nor does it offer any detailed guidance on how to do so. It defers that responsibility to states acting individually and collectively.<sup>269</sup> A regional instrument for business and human rights can however achieve little beyond the previous regulatory efforts if it does not go beyond the Guiding Principles to provide an appropriate implementation mechanism that fits the peculiarities of Africa.

This chapter discusses some of the challenges that must be surmounted in designing and implementing an African instrument for business-related human rights abuses and proposes ways of addressing those challenges. The chapter considers theoretical challenges in international law, the determination of normative content of a prospective instrument, as well as challenges with designing and implementing an effective enforcement mechanism.

### 4.2 Challenges in international law

A major challenge encountered in efforts to hold TNCs directly accountable for human rights violations in international forums arises from traditional notions of international law which posit that TNCs are not subjects of international law and therefore cannot bear obligations under international law.<sup>270</sup> Traditionally, entities in the international system have been considered either as subjects or objects of international law.<sup>271</sup> This position has implications for the design of any international instrument which seeks to hold TNCs directly responsible for human rights violations in an international forum. This is because the object theory as posited by Hielborn in 1986 holds that non-state actors such as TNCs are only objects of international law because they can only access its benefits through the states of their nationality and cannot be restrained directly by international law except through their states, nor could they even invoke or violate international law.<sup>272</sup> This distinction has however not always been the case in international law and even today, its foundations are shaky as

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<sup>268</sup> Hausa (West African) proverb, in Hausa: *Linza: mi da wu:ta ma:ganin mahaukacin do:ki*.  
<<http://www.afriprov.org/index.php/african-proverb-of-the-month/30-2004proverbs/208-dec2004.html>>  
(accessed 10 October 2012).

<sup>269</sup> n 232 above.

<sup>270</sup> Reinisch (n 257 above) 70.

<sup>271</sup> H Lauterpacht, 'International law' *Collected Papers Cambridge vol I* (1970) 151-77.

<sup>272</sup> G Manner 'The object theory of international law' (1952) 46 *American Law Journal* 443-444.

both theory and practice have moved away considerably from this simplistic position.<sup>273</sup> The object theory only became dominant on the back of 19th century positivism as before that period, non-state entities such as the English East India Company and the Dutch United East India Company clearly operated as active international actors: waging war, occupying land and concluding treaties just like states.<sup>274</sup> Legal positivists in the nineteenth century however, pushed the view that only states could be subjects of international law with all other actors as objects.<sup>275</sup> In the twentieth century, several developments proved that the subject/object dichotomy and its statist approach were not sustainable in theory and in practice and the need to accommodate more actors in international affairs became clear. International law was therefore forced to acknowledge that other entities could also have rights and obligations under international law. Therefore in the *Jurisdiction of the Courts of Danzig* case the Permanent Court of International Justice (PCIJ) held that practical needs override theoretical considerations in regard to international legal personality and therefore states can grant international rights and duties to certain non-state entities if they consider it necessary.<sup>276</sup> In the *Reparations* case,<sup>277</sup> the statist view of international law that regarded states as the only subjects of international law was again rejected as the International Court of Justice (ICJ) was of the view that the UN although not a state was equally a subject of international law as it was ‘capable of possessing rights and duties’. The Court explained that

[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights and their nature depends upon the needs of the community.<sup>278</sup>

The emergence of international human rights law has also led to international treaties that place direct obligations on non-state actors. The African Charter,<sup>279</sup> the UDHR,<sup>280</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>281</sup> and the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>282</sup> as well as other human treaties directly address non-state actors, imposing direct obligations on them.<sup>283</sup>

Starting in 1970 with ECOSOC Resolution 1503, UN treaty bodies adopted complaint mechanisms which allow individuals and groups to submit complaints in their own capacity often against their own states. Regional human rights mechanisms also provide such substantive and procedural rights directly

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<sup>273</sup> Jagers (n 47 above) 20.

<sup>274</sup> As above.

<sup>275</sup> Jagers (n 47 above).

<sup>276</sup> I Brownlie *Principles of international law* (1998) 60-61.

<sup>277</sup> *Reparations for Injuries Suffered in the Service of the United Nations* (11 April 1949) (1949) ICJ Reports.

<sup>278</sup> As above, 179.

<sup>279</sup> Arts 27-30.

<sup>280</sup> Preamble; art 30.

<sup>281</sup> Art 5(1).

<sup>282</sup> Art 5(1).

<sup>283</sup> A Clapham *Human rights obligations of non-state actors* (2006).

to non-state actors including corporations in the case of the European Court of Human Rights.<sup>284</sup> Indeed if human rights are considered inalienable, their protection will require obligations on more than states and the UDHR for example imposes obligations directly on ‘every individual and every organ of society’.<sup>285</sup>

Currently, several other international instruments grant corporations the right to institute actions to protect their rights in international forums without the support of their state of nationality. The United Nations Convention on the Law of the Sea sets up the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea which has jurisdiction over cases instituted by corporations.<sup>286</sup> The International Centre for the Settlement of Investment Disputes (ICSID) also grants corporations the right to be parties to disputes in their own right.<sup>287</sup> The United Nations Compensation Commission (UNCC) set up after the 1991 Gulf War likewise granted corporations the right to bring claims against Iraq<sup>288</sup> and the Iran-United States Claims Tribunal also granted standing to corporations under certain conditions.<sup>289</sup>

It is therefore clear that the statist object theory is not sustainable under current international law theory and practice. States and international organisations have found the need to endow non-state actors including corporations with international legal personality by granting them rights to be parties to international proceedings. This progress is particularly relevant and essential to the meaningful enforcement of international human rights law. Cassese, in a review of the UN level monitoring mechanisms, concludes that the procedures which allow communications by non-state actors have been relatively successful while procedures for inter-state complaints are yet to yield any major result.<sup>290</sup> Considering the huge challenges involved in the protection and promotion of human rights in Africa and the proven inadequacy of state efforts, there is the need to bring non-state actors under the jurisdiction of international law as there are no sustainable theoretical or practical challenges in international law.

In the case of *Prosecutor v Tadic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) reflected the central role of human rights in these developments in international law with the statement that

[t]he impetuous propagation in the international community of human rights doctrines... has brought about significant changes in international law notably in the approach to problems besetting the world community...thus a state-sovereignty-oriented approach has been

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<sup>284</sup> M Emberland *The Human rights of corporations: exploring the structure of the ECHR protection* (2006) 3.

<sup>285</sup> Preamble.

<sup>286</sup> Art 187, Part XI, section 5.

<sup>287</sup> Art 25.

<sup>288</sup> Provisional Rules for Claims Procedure (1992) art 5(3).

<sup>289</sup> Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by The Government Of The United States Of America and The Government of the Islamic Republic of Iran (1981), art VII(1)(b).

<sup>290</sup> A Cassese *International law* (2005) 387.

gradually supplanted by a human being-oriented-approach. Gradually the maxim of Roman law *hominus causa omne jus constitum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.<sup>291</sup>

A regional instrument that allows complaints to be brought against TNCs cannot therefore be impeached on the basis of the object theory of international law. To the contrary, it will rather be in tune with the progressive development of international law and meet the necessities of optimal protection of human rights in Africa.

### 4.3 Challenges with normative content

Another major controversy in efforts to hold TNCs accountable under international human rights law is the determination of norms applicable to corporations. This is because apart from certain provisions which have acquired a *jus cogens* character such as the right to life and the prohibition of forced labour and torture, international human rights law remains largely a contested field.<sup>292</sup> Additionally, the provisions of international human rights treaties are often addressed to states without much contemplation of obligations for non-state actors. While efforts which have espoused a limited set of principles such as the Global Compact have been criticised for having little impact on the behaviour of TNCs, others such as the Draft Norms which encompassed a wide range of obligations have also been rejected as setting the same threshold for TNCs as exists for states.

Various suggestions have been made by scholars about the tentative list of norms for which TNCs should be held accountable.<sup>293</sup> While the choice of norms presents a challenge to the design and implementation of a regional instrument for corporate human rights responsibility, the Guiding Principles offer a pragmatic and legitimate basis for dealing with this challenge. First, the Guiding Principles suggest that under international law, the responsibility of corporations is to respect internationally recognised human rights.<sup>294</sup> The ‘responsibility to respect’ requires corporations to avoid infringing on the rights of others and to address adverse human rights impacts of their activities.<sup>295</sup> The Guiding Principles elaborate on internationally recognised human rights which corporations are required to respect as a minimum comprising: the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>296</sup> The Guiding Principles also give room for contextual modifications of applicable rights and establishes that corporate activity is capable of infringing on the entire spectrum of human rights.<sup>297</sup>

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<sup>291</sup> *Prosecutor v Tadic (Jurisdictional phase)* (1996) ICTY 35 International Legal Matters (ILM) 97.

<sup>292</sup> M Jungk ‘A practical guide addressing human rights concerns for companies operating abroad’ in M Addo (ed) (n 37 above) 176.

<sup>293</sup> Jagers (n 47 above) 51-73.

<sup>294</sup> Principle 11.

<sup>295</sup> Principle 11.

<sup>296</sup> Principle 12.

<sup>297</sup> n 252 above.

Previous regulatory effort as discussed in chapter two demonstrate that it may prove a challenging task for any instrument that seeks to impose responsibilities on TNCs to attempt to provide an exhaustive list of human rights norms that TNCs must respect. The minimalist approach of the Guiding Principles may very well serve as a pragmatic starting point for binding norms.

The African Charter may serve as an additional human rights instrument that corporations may be required to respect. Indeed, a prospective instrument for corporate human rights responsibility may be designed as an additional protocol to the African Charter thus giving it further legitimacy as based on the Charter as well. The unique feature of the African Charter as one that provides for all three generations of human rights makes this a workable and desirable proposition. Decided cases of the African Commission such as the *Ogoni* case<sup>298</sup> and the *Endorois* case<sup>299</sup> demonstrate the importance of peoples' rights in Africa and the African Charter is unique in its protection of peoples' rights.

The Guiding Principles also give room for contextual considerations in determining which rights are most relevant to particular business activities.<sup>300</sup> Thus the supervisory body of the proposed instrument may in consultation with TNCs, governments and relevant civil society organisations produce Guidelines as the African Commission has done with some provisions in the African Charter or General Comments as is the procedure of UN treaty bodies to elaborate on the contents of rights in the specified the relevant instruments. The interpretation of the provisions of the specified instruments may take into consideration the particular circumstances of the Africa with regard to TNC activities and human rights abuses. Such a conservative approach is unlikely to encounter much resistance and yet provides a basis for progressive interpretation and implementation of applicable norms.

#### **4.4 Challenges of enforcement mechanisms: an integrated approach**

Another perennial problem that has plagued efforts to hold TNCs accountable for human rights violations at the international level as discussed in chapter two has been the lack of effective enforcement mechanisms. Voluntary codes have thus been utilised relying on corporations' good conscience and self-interest. The shortcomings of past efforts and the particular situation of many African countries demonstrate the need for a strong implementation mechanism with greater access for victims of corporate human rights violations and greater powers for enforcement.

Unlike the majority of treaties whose enforcement may be limited to a definite number of states parties, a regional instrument that seeks to enforce human rights obligations of TNCs will have an unlimited number of entities to monitor. This may require various levels of mechanisms and various

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<sup>298</sup> *Ogoni case* (n 20 above).

<sup>299</sup> *Centre for Minority Rights Development (CEMIRIDE) v Kenya* Communication 276/2003.

<sup>300</sup> n 252 above.

kinds of sanctions operating in an integrated manner to ensure maximum impact of the regional regime on the behaviour of corporations. This integrated approach recommended by Deva<sup>301</sup> recognises the variety of motives that corporations may have in respecting human rights and therefore proposes the application of various kinds of sanctions to discourage corporations from human rights violations. The integrated approach also recognises the strengths and weaknesses various implementation mechanisms and therefore suggests the utilisation of various implementation mechanisms at the corporate level, the national level and the international or regional level.

#### 4.4.1 Corporate level mechanisms

The basic starting point for the implementation of corporate human rights responsibility should be the requirement for TNCs operating in Africa to adopt self-regulating codes of conduct.<sup>302</sup> However, the supervisory body of the proposed instrument may issue guidelines on specific industry demands as universal standards have often been rejected by TNCs in favour of sector specific standards.<sup>303</sup> The adoption of these codes must involve consultations with stakeholders and people likely to be affected by the activities of the TNC in question. These codes must at the minimum meet the requirements of the responsibility to respect human rights under the Guiding Principles and must be informed by existing corporate regulatory initiatives at the national and international level.<sup>304</sup> This will include the requirement of due diligence as well as the establishment of corporate level grievance mechanisms.<sup>305</sup> TNCs must however be encouraged to go beyond these basic requirements and design codes that fit the specificities and context of their activities.

After the adoption of such codes by the TNC, it will be required to publish the code on its website and circulate it among stakeholders as well as the NHRI. This will enable effective monitoring by company staff, NHRIs, stakeholders and civil society organisations for the corporation to live up to its own voluntarily undertaken human rights commitments. Such codes may also have a bearing on how judges or other dispute resolution authorities resolve human rights cases involving the corporation. Shareholders could also use the corporate code as a basis to pass resolutions and demand accountability from management of the company.<sup>306</sup>

These corporate level mechanisms even when they are entirely non-binding may serve a useful purpose in mobilising moral support for human rights and influencing decision-making within the

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<sup>301</sup> n 39 above.

<sup>302</sup> Ratner (n 49 above) 531.

<sup>303</sup> United States Council on International Business (USCIB), Position paper on codes of conduct (1998) <<http://www.uscib.org/index.asp?documentID=1358>> (accessed 8 October 2012).

<sup>304</sup> Deva (n 39 above) 205.

<sup>305</sup> Principle 15; Commentary on principle 21.

<sup>306</sup> Deva (n 39 above) 207.



corporation.<sup>307</sup> It also forms a strong basis for the corporation to promote its brand by undertaking laudable human rights responsibilities and abiding by those undertakings as socially responsible enterprises. Considering that currently, ethical considerations can significantly affect the market performance of a brand,<sup>308</sup> this could prove to be an incentive to promote human rights within the operations of corporations. It also opens an effective doorway for the application of informal sanctions such as naming and shaming campaigns and even boycotts which could also negatively affect the market performance of a brand and deter corporate violations of human rights. The challenges of voluntary codes as was discussed in chapter two mainly stem from poor implementation and the tendency for corporations to use them merely as tools of public relations.<sup>309</sup> These challenges will be dealt with by the involvement of stakeholders and civil society organisations to keep corporations accountable for human rights standards they have committed themselves to.<sup>310</sup> Additionally, the challenge of implementation will also be dealt with by the adoption of national and regional level mechanisms to complement corporate level mechanisms.

#### **4.4.2 National level mechanisms**

To complement corporate level mechanisms, a regional instrument providing for corporate responsibility for human rights must also provide for strong national implementation mechanisms as part of the obligations of states under the treaty. National legislation will be required to help to deal with the challenges of enforcement that corporate initiatives and international law mechanisms usually face.<sup>311</sup> The state retains the highest degree of responsibility with respect to human rights and must continue to do so. Although the effectiveness of many governments in Africa is major challenge, it will be inaccurate to suggest that the state has nothing to offer in terms of implementation of human rights obligations of TNCs. Indeed, legislation at the national level is an indispensable tool for ensuring compliance with international human rights law.<sup>312</sup> Many countries in Africa have made genuine progress with democratic reforms and maintain satisfactory control over their territory and those that are not may be expected to steadily progress in that direction.<sup>313</sup> The state must therefore continue to maintain its responsibility to protect the human rights of people within its territory.

The Guiding Principles offer guidance on the responsibilities that states must bear in order to protect human rights and provide access to remedy in their jurisdiction. Such responsibilities must be included in any regional instrument and remain enforceable against the state at the regional level. States must be

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<sup>307</sup> Ratner (n 49 above) 532.

<sup>308</sup> See generally R Harrison et al (eds) *The ethical consumer* (2005).

<sup>309</sup> As above.

<sup>310</sup> Deva (n 39 above) 207.

<sup>311</sup> MN Shaw *International law* (2003) 1-11.

<sup>312</sup> Deva (n 39 above) 208.

<sup>313</sup> See generally E Gyimah-Boadi (ed) *Democratic reform in Africa: the quality of progress* (2004).

required to take appropriate steps to prevent, investigate, punish and redress abuses through effective policies, legislation, regulation and adjudication.<sup>314</sup> The state could apply sanctions ranging from publications of lists of companies with poor standards to criminal penalties depending on the severity of the violation involved.<sup>315</sup>

Also, to deal with the challenge of effective implementation of voluntary codes at the corporate level, legislation at the national level will be binding on TNCs and enforceable by municipal courts. In addition to judicial mechanisms, the state would also be required to provide non-judicial mechanisms for seeking redress such as NHRIs. This as Deva explains, can effectively complement judicial mechanisms if NHRIs for example are granted an expanded jurisdiction for awareness raising in the field of business and human rights; the conduct of independent impact assessments for controversial projects; alternative dispute resolution as well as the provision of legal advice to both corporations and victims.<sup>316</sup> The Danish Institute for Human Rights' development of a human rights compliance toolkit for corporations endorsed by the UN Office of the High Commissioner for Human Rights (OHCHR) serves as a good example of the role that NHRIs can play in promoting business compliance with human rights law.<sup>317</sup> In all African countries, corporate legislation which has implications for human rights such as labour, industrial planning, consumer protection and environmental standards may already exist. Thus, there may only be the need to infuse a right based approach and upgrade them to comply with the requirements of the Guiding Principles.

Another area where state obligations may be imposed by a regional instrument will be as required by the Guiding Principles, the enactment of corporate law that 'do not constrain but enable business respect for human rights'.<sup>318</sup> This will free management of companies from the traditional duty of solely considering the economic interest of shareholders in their decisions and allow human rights considerations in corporate decision-making. In this area, the corporate laws of countries such as South Africa and India provide useful examples. The South African Company Act of 2008 provides explicitly that one of the purposes of companies is to achieve social benefits thus allowing such considerations in corporate decision-making.<sup>319</sup> The Indian Companies Bill of 2011 also proposes that companies above a certain size must constitute corporate social responsibility committees and stakeholders relationship committees as measures to enhance accountability.<sup>320</sup> There may also be the need for legislation to prevent the use of the principles of separate legal personality and limited

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<sup>314</sup> Principle 1.

<sup>315</sup> Ratner (n 49 above) 534.

<sup>316</sup> n 39 above, 209.

<sup>317</sup> 'Embedding human rights into business practice' <<http://www.ohchr.org/Documents/Publications/Embeddingen.pdf>> (accessed 20 October 2012).

<sup>318</sup> Principle 3(b).

<sup>319</sup> Sec 7(d).

<sup>320</sup> Sec 135; sec 178(5) & (6); schedule VII para 5(iii)(b).

liability to avoid liability for business-related human rights abuses.<sup>321</sup> Although already provided for in the constitutions of some African countries such as Cape Verde,<sup>322</sup> Ghana,<sup>323</sup> Malawi<sup>324</sup> and South Africa,<sup>325</sup> the effective enforcement of the *drittwirkung* (horizontal application) doctrine which allows legal action against private persons based on violations of public law provisions such as the constitutional bill of rights, may be required of states as part of the duty to provide access to remedy.

Effective implementation of these national level regulations may have a great impact on the behaviour of TNCs and adopting regional standards will make it more difficult for TNCs to negotiate exemptions which violate human rights standards in weaker countries. However, weakness of governance and other factors such as corruption may still be exploited by TNCs and lead to the denial of remedies to victims of business-related human rights abuses, hence the need for an accessible regional mechanism, to complement national and corporate level efforts.

#### 4.4.3 Regional level mechanisms

Regional mechanisms for monitoring human rights have proven themselves to be effective tools for the promotion and protection of human rights. As Viljoen explains, their advantage over global systems is due to the higher level of convergence and coherence among states at regional levels which facilitates norm-specification as compared to the imperative of compromise for universal acceptance at the global level.<sup>326</sup> In terms of implementation as well, he argues that the immediacy of inter-locking interests also promotes a faster response and improved implementation.<sup>327</sup> In the early years of the African Human Rights System, many scholars doubted the prospects of the regional system as an effective mechanism for the protection of human rights in Africa.<sup>328</sup> Currently however, the usefulness of the system is without doubt as it has generated useful jurisprudence and settled numerous disputes by progressively interpreting the African Charter for the advancement of human rights in Africa.<sup>329</sup>

An effective regional system for monitoring and implementing corporate responsibility for human rights will require a supervisory body with both a promotional and a protective mandate. As the African Commission already has such a mandate,<sup>330</sup> it could be designated as the supervisory body and

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<sup>321</sup> Deva (n 39 above) 212.

<sup>322</sup> Art 18.

<sup>323</sup> Art 12(1).

<sup>324</sup> Sec 15(1).

<sup>325</sup> Secs 8 and 39.

<sup>326</sup> n 20 above.

<sup>327</sup> As above.

<sup>328</sup> M Mutua *The African Human rights System: a critical evaluation* (2002) Human Development Report Office (HDRO), United Nations Development Programme (UNDP) in its series Human Development Occasional Papers (1992-2007) HDOSPA-2000-15 <<http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf>> (accessed 8 October 2012).

<sup>329</sup> See generally M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2011).

<sup>330</sup> African Charter, art 45.

endowed with the needed legal and material support. Commissioners may be chosen with requisite expertise to form a panel on business-related human rights abuses.

As part of its protective mandate, the Commission will have jurisdiction to receive complaints brought against states and TNCs for business-related human rights abuses. In such cases, the Commission must also maintain its relaxed rules on *locus standi* which allows public interest litigation.<sup>331</sup> The Commission may issue recommendations directed at TNCs and may impose sanctions ranging from compensation of victims of human rights abuse to withdrawal of operating licenses by host states. Recommendations may also be directed at the host state to ensure compliance of the TNC with the recommendations of the Commission. In deciding cases, the Commission will be required to refer cases which in its opinion involve egregious violations of human rights amounting to customary international law crimes to the African Court. The proposed African Court of Justice and Human Rights has already been granted jurisdiction for corporate crimes under its criminal chamber and therefore will fit into such a referral system without the need for further legal provisions.<sup>332</sup>

Considering the limits of law especially in an area such as business and human rights, the Commission must also have a very important promotional mandate. This will include producing model legislation and corporate codes to provide assistance with the operationalization of corporate human rights responsibility across various business sectors on the region. Such models will serve as a means of introducing more context specific interpretations of the obligations of both states and TNCs. The African Commission will also use its powers to undertake protection missions<sup>333</sup> to monitor corporate respect for human rights in African countries.

#### 4.5 Conclusion

There currently exists no such elaborate mechanism for the enforcement of corporate human rights obligations. This may be an indication of the serious challenges involved in putting such a mechanism in place. In this chapter some of the major challenges that have prevented the establishment of international mechanisms for the enforcement of corporate human rights responsibility have been raised and suggestions aimed at overcoming those challenges have been offered.

Theories in international law that have been used to block international efforts to hold corporations accountable have been shown to be obsolete. Challenges in choosing norms that are applicable can also be settled with reference to the requirements of the responsibility to respect human rights as well as the concepts of *jus cogens* and *drittwirkung*. Finally, based on the reality that no single regulatory

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<sup>331</sup> *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 65.

<sup>332</sup> Art 46(c) of the Draft Protocol On Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (15 May 2012) Exp/Min/IV/Rev 7.

<sup>333</sup> Rules of Procedure of The African Commission on Human and Peoples' Rights (2010), chapter II.

mechanism is adequate, a more integrated system that relies on three levels of enforcement as well as a wide range of sanctions is proposed. It is therefore concluded that there exists no insurmountable challenges to the establishment of a regional mechanism for holding corporations accountable for human rights violations in Africa.

## Chapter 5: Conclusion and recommendations

### 5.1 Conclusion

The defining character of globalisation in the twenty-first century is undisputable and TNCs have been central to that phenomenon. As an inescapable and irreversible phenomenon, globalisation's challenges and opportunities must be continuously studied to inform the design and implementation of appropriate laws and policies that increase the benefits of globalisation for people globally and limit its adverse impacts especially on the vulnerable groups. This study set out to explore the prospects and challenges of a regional instrument for corporate human rights responsibility in Africa and concludes that there are persuasive reasons for such an instrument and there are no insurmountable challenges to design and implementation of such an instrument.

Existing international regulatory initiatives for corporate human responsibility were examined with a focus on their strengths and limitations in order to draw important lessons for any prospective instrument in Africa. The Guiding Principles and the Ruggie framework were also discussed and arguments were advanced in support of the Guiding Principles as a viable and legitimate basis for a regional instrument. The prospects of such an instrument was also discussed to the effect that compelling reasons exist for the establishment of a regional mechanism for corporate human rights responsibility. These reasons include the current power of TNCs in Africa to both promote and violate human rights and the limitations of the current regional human rights system based on state responsibility.

Finally, the study examined some challenges that have to be resolved in the design and implementation of a regional instrument imposing human rights responsibilities on TNCs and states. These challenges mainly relate to traditional theories and practices of international law, the choice of applicable norms for a prospective instrument as well as the challenges of implementation and enforcement. The study concluded that an effective instrument that resolves these challenges can be created as traditional theories and practices of international law which impede the imposition of international obligations on non-state actors such as TNCs are increasingly becoming obsolete. Additionally, the Guiding Principles and the African Charter provide a sound basis with respect to the choice of human rights norms for a prospective instrument. Finally, it was concluded that challenges of implementation and enforcement can be overcome with an integrated approach with mechanisms of enforcement at corporate, national and regional levels applying a wide range of sanctions depending on the severity of violations involved.

## **6.1 Recommendations**

Efforts at the UN level to impose direct responsibility for human rights violations on TNCs have encountered fatal difficulties in the past. There is therefore the need for African governments, the African Commission and civil society organisations to focus on the adaptation of the African Human Rights System to hold corporations directly accountable for rights violations in Africa. Toward this end, governments must equip NHRIs with a promotional and protective mandate within their jurisdictions and remove legal and practical impediments to accessing remedies for human rights violations by corporations as required by the Guiding Principles. Governments in Africa must also collaborate within the framework of the African Union for the creation of a regional regime for corporate human rights responsibility.

Civil society organisations must also devote more attention to the activities of TNCs in Africa and promote the agenda of respect for human rights in corporate activities while mobilising support for the establishment of national and regional mechanisms for corporate human rights responsibility. The prospects of such an instrument will be brighter if it receives more civil society impetus at sessions of the African Commission and increased lobbying at the African Union as well as civil society initiatives to draft such an instrument.

The African Commission can also increase interest in the agenda of business and human rights by constructively engaging with the UN Working Group and issuing a resolution on the African situation with respect to TNCs and human rights violations in Africa.

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## BIBLIOGRAPHY

### A. Books

- Addo, M (ed) (1999) *Human rights standards and the responsibility of transnational corporations* The Hague: Kluwer Law International.
- Alston, P (2005) *Non-state actors and human rights* New York: Oxford University Press.
- Brownlie, I (1998) *Principles of public international law* Oxford: Clarendon Press.
- Cassese, A (2005) *International law* Oxford: Oxford University Press.
- Clapham, A (2006) *Human rights obligations of non-state actors* Oxford: Oxford University Press.
- Deva, S (2012) *Regulating corporate human rights violations: humanizing business* New York: Routledge.
- de Jonge, A (2011) *Transnational corporations and international law: accountability in the global business environment* Northampton: Edward Elgar.
- Emberland, M (2006) *The Human rights of corporations: exploring the structure of the ECHR protection* Oxford: Oxford University Press.
- Gyimah-Boadi, E (ed) (2004) *Democratic reform in Africa: the quality of progress* London: Lynne Rienner Publishers.
- Harrison, R, Shaw, D & Newholm, T (eds) (2005) *The ethical consumer* London: Sage Publications
- Hepple, BA *Labor laws and global trade* (2005) Oxford: Hart Publishing.
- Huntington, SP (2002) *The third wave: democratization in the late twentieth century* Norman, OK: University of Oklahoma Press.
- Jagers, N (2002) *Corporate human rights obligations: in search for accountability* New York: Intersentia.
- Kinley, D (2009) *Civilising globalisation: human rights and the global economy* Cambridge: Cambridge University Press.
- Leach, P (2011) *Taking a case to the European Court of Human Rights* Oxford: Oxford University Press.
- Noortmann, M & Ryngaert, C ‘Non-state actors: international law’s problematic case’ in Noortmann, M & Ryngaert, C (eds) (2010) *Non-state actor dynamics in international law: from law-takers to law-makers* Aldershot: Ashgate.
- Shaw, MN *International law* (2003) Cambridge: Cambridge University Press.
- Ssenyonjo, M (ed) (2011) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* Leiden: Martinus Nijhoff Publishers.
- Strange, S *The retreat of the state* (1996) New York: Cambridge University Press.
- Tully, S (2007) *Corporations and international lawmaking* Leiden: Martinus Nijhoff.



Viljoen, F (2012) *International human rights law in Africa* Oxford: Oxford University Press.

## **B. Chapters in books**

Adong, S 'International health and Africa: who is leading who in Africa' in Bakut, B and Dutt, S (eds) (2001) *Africa at the millennium: an agenda for mature development* New York: Palgrave Macmillan.

Brysk, A 'Transnational Threats and Opportunities' in Brysk, A (ed) (2002) *Globalization and human rights* Los Angeles: University of California Press.

Chirwa, DM 'State responsibility for human rights' Baderin, MA and Ssenyonjo, M (eds) (2010) *International human rights law: six decades after the UDHR and beyond* Farnham: Ashgate.

Doyle, MW & Gardner, AM 'Human rights and international order' in Coicaud, J, Doyle MW and Gardner, A-M (eds) (2003) *The globalization of human rights* Tokyo: United Nations University Press.

Hanid, U & Johner, O 'The United Nations Global Compact Communication on Progress policy: origins, trends and challenges' in Rasche, A and Kell, G (eds) (2010) *The United Nations Global Compact: achievements trends and challenges* Cambridge: Cambridge University Press.

Jungk, M 'A Practical guide addressing human rights concerns for companies operating abroad' in M. Addo (ed) (1999) *Human Rights Standards and the Responsibility of Transnational Corporations* The Hague: Kluwer Law International.

Mazrui, A 'African security: the erosion of the state and the decline of race as a basis for human relations in Africa' in Thomas, C and Wilkin, P (eds) (1999) *Globalization, human Security, and the African experience* Boulder: Lynne Rienner Publications.

Reinisch, A 'The changing international legal framework for dealing with non-state actors' in Alston, P (ed.) *Non-State Actors and Human Rights* (2005) New York: Oxford University Press.

Robinson, M 'Business and human rights' in McCorquodale, R (ed) (2010) *The Rule of law in international and comparative context* London: British Institute of International and Comparative Law.

Rudolph, PH 'The Tripartite Declaration on Principles for Multinational Enterprises' Mullerat, R and Brennan, D (eds) (2005) *Corporate social responsibility: the corporate governance of the 21st century* Alphen aan den Rijn: Kluwer Law International.

## **C. Journal articles**

Aguirre, D 'Corporate social responsibility and human rights law in Africa' (2005) 5 *African Human Rights Law Journal* 239.

Amao, OO 'The African regional human rights system and multinational corporations: strengthening host state responsibility for the control of multinational corporations' 12 *International Journal of Human Rights* (2008) 761.

- Baker, MB 'Private codes of conduct: should the fox guard the henhouse?' (1993) 24 *University of Miami Inter-American Law Review* 399.
- Bishop, JD 'The limits of corporate human rights obligations' (2012) 22 *Business Ethics Quarterly* 119.
- Campbell, T 'A human rights approach to developing voluntary codes of conduct for multinational corporations' (2006) 16 *Business Ethics Quarterly* 225.
- Cernic, LJ 'United Nations and corporate responsibility for human rights' (2011) 8 *Miskolc Journal of International Law* 23.
- Cernic, LJ 'Corporate responsibility for human rights: analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2009) 6 *Miskolc Journal of International Law* 24.
- Coxson, CR 'The 1998 ILO Declaration on Fundamental Principles and Rights at Work: promoting labor reforms through the ILO as an Alternative to imposing coercive trade sanctions' (1999) 17 *Dick Journal of International law* 469.
- Deva, S 'Global Compact: a critique of UN's public-private partnership for promoting corporate citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107.
- Duruigbo, E 'Corporate accountability and liability for international human rights abuses: recent changes and recurring challenges' (2008) 6 *Northwestern University Journal of International Human Rights* 222
- Gattini, A 'The UN Compensation Commission: old rules, new procedures' (2002) 13 *European Journal of International Law* 161.
- Hansen, P & Aranda, V 'An emerging international framework for transnational corporations' (1990/1991) 14 *Fordham International Law Journal* 881.
- Jessup PC 'The subjects of a modern law of nations' (1947) 45 *Michigan Law Review* 383.
- Kinley, D & Chambers, R (2006) 'The UN Human Rights Norms for Corporations: the private implications of public international law' 6 *Human Rights Law Review* 448.
- Kinley, D Nolan, J & Zerial N 'The politics of corporate social responsibility: reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30.
- Manner, G 'The object theory of international law' (1952) 46 *American Law Journal* 428.
- Moonshipouri, M, Welsh, C & Kennedy, E 'Multinational corporations and the ethics of global responsibility: problems ad possibilities' (2003) 25 *Human Rights Quarterly* 965.
- Murphy, D 'Taking multinational codes of conduct to the next level' (2005) 43 *Columbia Journal of Transnational Law* 389.

Nolan, A ‘Addressing economic and social rights violations by non-state actors through the role of the state: a comparison of regional approaches to the “obligation to protect”’ (2009) 9 *Human Rights Law Review* 225.

Nolan, J ‘With Power Comes Responsibility: Human Rights and Corporate Accountability’ (2005) 28 *University of New South Wales Law Journal* 581.

Oloka-Onyango, J ‘Reinforcing marginalized rights in an age of globalization: international mechanisms, non-state actors, and the struggle for peoples' rights in Africa’ (2002-2003) 18 *American University International Law Review* 851.

Oloka-Onyango, J ‘Who's watching “big brother”? Globalization and the protection of cultural rights in present day Africa’ 27 *Human Rights Quarterly* 1245.

Pace, J ‘The Global Compact – fact or fiction?’ (2003) 7 *Mediterranean Journal for Human Rights* 127.

Ratner, SR ‘Corporations and human rights: a theory of legal responsibility’ (2001) 111 *Yale Law Journal* 443.

Santner, AL ‘Soft law mechanisms for corporate responsibility: how the updated OECD Guidelines for Multinational Enterprises promote business for the future’ (2011) 43 *George Washington International Law Review* 375.

#### **D. Unpublished theses and dissertations**

Chirwa, DM ‘Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: a survey of emerging laws’ *unpublished LLD thesis, University of Western Cape, 2005.*

Fokwa, TJ-B ‘In search for direct corporate responsibility for human rights violations in Africa: which way forward?’ *unpublished LLM thesis, University of Pretoria, 2004.*

Louw, L ‘An analysis of state compliance with the recommendations of the African Commission on Human and Peoples’ Rights’ *unpublished LLD thesis, University of Pretoria, 2005.*

Lunga, Z ‘Yielding to marketocracy? Assessing the Ruggie framework on business and human rights’ *unpublished LLM thesis, University of Pretoria, 2009.*

#### **E. Reports and papers**

Bilchitz, D (2008) ‘Business and human rights: the responsibilities of corporations for the protection of human rights’ *South African Institute of Advanced Constitutional, Public, human rights and Constitutional Law (SAIFAC).*

‘From principles to practice: The European Union operationalizing the United Nations Guiding Principles on Business and Human Rights Expert’ Report of conference hosted by the Danish EU Presidency in Copenhagen 7-8 May 2012.

‘International multinational enterprises and human rights’ A Report by Amnesty International and Pax Christi, Utrecht: Pax Christi (2000).

Jenkins, J (2001) ‘Corporate codes of conduct: self-regulation in a global economy’ *Geneva: Technology, Business and Society Programme Paper No 2*.

Lauterpacht, H (1970) ‘International Law’ *Collected Papers Cambridge Volume I*.

Mutua, M (2000) ‘The African Human rights System: a critical evaluation’ Human Development Report Office (HDRO), United Nations Development Programme (UNDP) in its series Human Development Occasional Papers (1992-2007) HDOCPA-2000-15.

## **F. Treaties and legal documents**

A guide to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, International Labour Office Geneva, Geneva (2002).

African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/3 rev 5 21 ILM 58 (1982).

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (April 2006).

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by The Government Of The United States Of America and The Government of the Islamic Republic of Iran (January 1981).

Draft Protocol on Amendments to the Protocol on the Statute of the African Court Of Justice and Human Rights Exp/Min/IV/Rev 7 (May 2012).

Embedding human rights into business practice, Global Compact and Office of the High Commissioner for Human Rights (2004).

Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/17/31 (March 2011).

Human Rights and Transnational Corporations and Other Business Enterprises, A/HRC/17/4 (July 2011).

Human Rights and Transnational Corporations and Other Business Enterprises, E/CN.4/RES/2005/69 (April 2005).

International Covenant on Civil and Political Rights, GA res 2200A (XXI), UN Doc A/6316 (1966).

International Covenant on Economic, Social and Cultural Rights, GA res 2200A (XXI), UN Doc A/6316 (1966).

Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2 (August 2003).

OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts 7, OECD Doc. DAFFE/IME (November 2000).

OECD Guidelines for Multinational Enterprises, OECD Publishing (2011).

Protect, Respect and Remedy: A Framework for Business and Human Rights (plus 2 addenda) A/HRC/8/5 (April 2008).

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/17/31 (March 2011).

The corporate responsibility to respect human rights: An Interpretive Guide, UN Office of the High Commissioner for Human Rights, New York and Geneva: HR/PUB/12/02 (2012).

Towards Global Partnerships, UN Global Compact A/C.2/66/L.43/Rev.1 (December 2011).

Towards global partnerships, General Assembly Resolution 60/215 (March 2006).

Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, International Labour Office Geneva (2006).

United Nations Convention on Law of the Sea (1982).

## **G. Case law**

### **African Commission:**

*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

*Centre for Minority Rights Development (CEMIRIDE) v Kenya* Communication 276/2003.

### **European Court of Human Rights**

*X and Y v Netherlands* ECHR (16 March 1985) Ser A 91.

### **Inter-American Court:**

*Velásquez Rodríguez v Honduras* IACHR (29 July 1988) Ser C 4.

### **International Court of Justice**

*Reparations for Injuries Suffered in the Service of the United Nations* (11 April 1949) (1949) ICJ Reports.

### **International Criminal Tribunal for the former Yugoslavia:**

*Prosecutor v Tadic (Jurisdictional phase)* ICTY 35(1996) ICTY 35 International Legal Matters (ILM) (1996).

### **OECD UK National Contact Point:**

*Global Witness vs. Afrimex* Summary of NCP Decision (28 August 2008).

*Rights and Accountability in Development (RAID) v DAS Air*, Summary of NCP Decision (17 July 2008).

## **England:**

*Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529.

## **USA:**

*In re South African Apartheid Litigation* (2004)346 F Supp 2d SDNY.

*Esther Kiobel, Individually and on Behalf of Her Late Husband, Dr. Barinem Kiobel, et al v Royal Dutch Petroleum Co. et al.* (2010) 621 F 3d 111 2d Cir.

*Wiwa v Royal Dutch Petroleum Co.* (2000) 226 F 3d 88 2d Cir.

## **H. Constitutions**

The 1990 Constitution of Cape Verde.

The 1992 Constitution of Ghana.

The 1994 Constitution of Malawi.

The 1996 Constitution of South Africa.

## **I. Legislation**

South African Company Act of 2008.

Indian Company Bill of 2011.

Commission on Human Rights and Administrative Justice Act of 1993, Act 456.

## **J. Internet sources**

Amnesty International and Greenpeace Netherlands *The toxic truth: Côte d'Ivoire toxic waste report* <<http://www.amnesty.ch/de/laender/afrika/elfenbeinkueste/dok/2012/trafigura-muss-fuer-den-giftmuellskandal-gerichtlich-zur-verantwortung-gezogen-werden/bericht-a-toxic-truth.-september-2012.-auf-englisch>> (accessed 03 October 2012).

'Business and human rights: new United Nations guidelines' *European Commission News* (2011) <[http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item\\_id=5220](http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220)> (accessed 8 October 2012).

Declaration on Principles concerning Multinational Enterprises and Social Policy Document: Official Bulletin (Geneva, ILO) 1986 vol LXIX Series A No 3 196-197 <[http://training.itcilo.it/ils/foa/library/tridecl/procedure\\_en.htm#Endnote1](http://training.itcilo.it/ils/foa/library/tridecl/procedure_en.htm#Endnote1)>

*Esther Kiobel, Individually and on Behalf of Her Late Husband, Dr. Barinem Kiobel, et al v Royal Dutch Petroleum Co et al* No. 10–1491 <[http://www.supremecourt.gov/oral\\_arguments/hearinglists/HearingList-October2012.pdf](http://www.supremecourt.gov/oral_arguments/hearinglists/HearingList-October2012.pdf)> (accessed 03 October 2012).

Harvard Kennedy School *John Ruggie*

<<http://www.hks.harvard.edu/about/faculty-staff-directory/john-ruggie>> (accessed 03 October 2012).

Mears, B *Big cases await Supreme Court's 2012-13 term*

<[http://edition.cnn.com/interactive/2012/10/politics/scotus.cases/?hpt=po\\_c2](http://edition.cnn.com/interactive/2012/10/politics/scotus.cases/?hpt=po_c2)>

(accessed 03 October 2012).

Hausa (West African) proverb

<<http://www.afriprov.org/index.php/african-proverb-of-the-month/302004proverbs/208dec2004.html>>

(accessed 10 October 2012).

Hohnen, P *OECD MNE Guidelines: a responsible business choice* OECD Observer (2008-2009)

<[http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD\\_MNE\\_Guidelines.html](http://www.oecdobserver.org/news/fullstory.php/aid/2772/OECD_MNE_Guidelines.html)>

(accessed 03 October 2012).

OECD Guidelines for Multinational Enterprises OECD Publishing (2011)

<<http://dx.doi.org/10.1787/9789264115415-en>> (accessed 03 October 2012).

Procedure for the Examination of Disputes concerning the Application of the ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy Document: Official Bulletin (Geneva, ILO) 1986 vol LXIX Series A No 3 196-197

<[http://training.itcilo.it/ils/foa/library/tridecl/procedure\\_en.htm#Endnote1](http://training.itcilo.it/ils/foa/library/tridecl/procedure_en.htm#Endnote1)>

(accessed 03 October 2012).

*RAID vs. Das Air* OECD WATCH

<<http://oecdwatch.org/cases/Case-41>> (accessed 03 October 2012).

Terms of Reference for an Update of the OECD Guidelines for Multinational Enterprises 2

<<http://www.oecd.org/corporate/guidelinesformultinationalesterprises/45124171.pdf>>

(accessed 03 October 2012).

The Economist Intelligence Unit (EIU) Democracy Index of 2011 classifies these three states as authoritarian regimes. <<http://www.eiu.com>> (accessed 8 October 2012).

The Institute for Human Rights and Business (IHRB) *The UN Guiding Principles on Business and Human Rights*

<<http://www.ihrb.org/project/eu-sector-guidance/un-guiding-principles.html>>

(accessed 8 October 2012).

UN Global Compact *Corporate Sustainability in the World Economy* (2011)

<[http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf)>

(accessed 03 October 2012).

UN Global Compact *How to participate: business organisations*

<[http://www.unglobalcompact.org/HowToParticipate/How\\_to\\_Apply\\_Business.html](http://www.unglobalcompact.org/HowToParticipate/How_to_Apply_Business.html)>

(accessed 03 October 2012).

UN Global Compact *Corporate Sustainability in the World Economy* (2011)

<[http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf)>

(accessed 03 October 2012).

UN Global Compact *Progress and Disclosure*

<[http://www.unglobalcompact.org/COP/differentiation\\_programme.html](http://www.unglobalcompact.org/COP/differentiation_programme.html)>

(accessed 03 October 2012).

UN Global Compact *Corporate Sustainability in the World Economy* (2011)

<[http://www.unglobalcompact.org/docs/news\\_events/8.1/GC\\_brochure\\_FINAL.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf)>

(accessed 03 October 2012).

UN Global Compact

<[http://www.unglobalcompact.org/issues/human\\_rights/tools\\_and\\_guidance\\_materials.html](http://www.unglobalcompact.org/issues/human_rights/tools_and_guidance_materials.html)>

(accessed 03 October 2012).

UN Global Compact Operational Guides For Medium-Scale Enterprises (2007)

<[http://www.unglobalcompact.org/docs/news\\_events/8.1/Operational\\_guide\\_ME.pdf](http://www.unglobalcompact.org/docs/news_events/8.1/Operational_guide_ME.pdf)>

(accessed 03 October 2012).

United States Council on International Business (USCIB) Position paper on codes of conduct (1998)

<<http://www.uscib.org/index.asp?documentID=1358>> (accessed 8 October 2012).

(accessed 8 October 2012).

UN Global Compact *The Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*

<[http://www.unglobalcompact.org/Issues/human\\_rights/The\\_UN\\_SRSG\\_and\\_the\\_UN\\_Global\\_Compact.html](http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html)> (accessed 8 October 2012).

White S The Top 175 economic entities, 2010 measured by GDP and total revenue

<<http://dstevenwhite.com/2011/08/14/the-top-175-global-economic-entities-2010/>>

‘World leaders promote ambitious multilateral agenda for responsible business conduct’ *Investment News* May 2011, Issue 15 1

<<https://www1.oecd.org/innopac.up.ac.za/daf/internationalinvestment/47557611.pdf>>

(accessed 03 October 2012).