

TRANSNATIONAL CORPORATIONS, ACCOUNTABILITY, AND  
INTERNATIONAL HUMAN RIGHTS MECHANISMS

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Mechanisms

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## **DEDICATION**

This is dedicated to my parents for their unwavering love and support throughout the years, and endless encouragement to pursue whatever my heart desired with pride, enthusiasm, and integrity.

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## LIST OF ABBREVIATIONS AND ACRONYMS

ASADHO	African Association for the Defense of Human Rights
ATCA	Alien Tort Claims Act
ATS	Alien Tort Statute
COP	Communication on Progress
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
ECOSOC	Economic and Social Council
FARDC	Forces Armées de la République Démocratique du Congo
FIDH	International Federation for Human Rights
GDP	Gross Domestic Product
ICC	International Criminal Court
ICCPR	International Convention of Civil and Political Rights
ICESCR	International Convention of Economic, Social, and Cultural Rights
IGO	International Governmental Organization
ILO	International Labor Organization
IMF	International Monetary Fund
MONUC	United Nations Organization Mission in the Democratic Republic of Congo



MOSOP	Movement for the Survival of Ogoni People
NGO	Nongovernmental Organization
OECD	Organization of Economic Cooperation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
RAID	Rights and Accountability in Development
SRSR	Special Representative to the Secretary General
TNC	Transnational Corporation
TVPA	Torture Victim Protection Act
UN	United Nations
UNEP	United Nations Environmental Program
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNDHR	United Nations Declaration of Human Rights

## **ABSTRACT**

### **TRANSNATIONAL CORPORATIONS, ACCOUNTABILITY, AND INTERNATIONAL HUMAN RIGHTS MECHANISMS**

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George Mason University and University of Malta, 2013

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This thesis explores the development and efficacy of international human rights mechanisms in respect to holding transnational corporations culpable for human rights violations committed as a direct result of their operations. When it comes to holding transnational corporations (TNCs) accountable for violating human rights, there appears to be a gap between rhetoric and reality in international law. What are the international regulatory mechanisms that have been implemented to ensure transnational corporations abide by universal human rights as outlined in the UDHR, and how effectively have they been enforced?

One of the problems with addressing grievances against TNCs is that as non-state actors they are not legally culpable under existing international treaties. To this day any preemptive actions taken by TNCs are done so on a voluntary basis. Intergovernmental organizations are increasingly setting standards to regulate corporate conduct in the area

of human rights. Though not legally binding, soft law is “generally understood to encompass nonbinding norms that govern behavior.” Critics claim that such principles are too general and ineffective, whereas proponents assert that soft laws often lead to the establishment of norms and rules, or “hard” laws, set forth by these non-binding codes.

Arguably one of the largest corporate human rights offenders is the oil, gas and mining industry, also known as the extractive sector. Through the in-depth analysis of two case studies in the Democratic Republic of Congo and Nigeria, this paper will determine how existing normative human rights standards and legal mechanisms have been applied, what the results were in each case and how they differed. I will comparatively analyze what has been done to hold TNCs accountable for human rights abuses in the past, what is currently being done—and how. Furthermore, these cases will help identify deficiencies in the system, and suggest future alternatives.

## CHAPTER 1

### INTRODUCTION

There appears to be a gap between rhetoric and reality in international law as it pertains to holding transnational corporations (TNCs) accountable for human rights violations. One of the problems with addressing grievances against TNCs is that international legal scholars have remained conflicted as to whether TNCs are legally bound by international law to respect human rights. The state-centered Westphalia ideology on which our international system still operates no longer works in today's globalized world as it becomes increasingly difficult to distinguish between "legitimate" state actors and non-state actors such as TNCs that operate across sovereign state borders. Subsequently the question of who should be held responsible for human rights violations when transnational enterprises are involved remains unclear, despite the principles outlined in the United Nations Declaration of Human Rights (UNDHR).

There is often the misconception that human rights law holds states responsible solely for the well being of their own citizens when in fact most human rights treaties ratified by the majority of states are fairly open and apply not only to a state's citizens but to all persons within its dominion.<sup>1</sup> Therefore any actor within—and including—a state's

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<sup>1</sup> Todd Howland, "Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights," in *International Human Rights Law : Six Decades after the UDHR and Beyond*, ed.

sovereign borders should be held responsible for human rights violations. Individuals, specifically under international criminal law, have duties as well, as has been recognized by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the International Tribunals regarding Rwanda (ICTR) and the former Yugoslavia (ICTY). A 2001 ICC statute recognized that any persons who commit crimes within its jurisdiction should be “individually responsible and liable for punishment.”<sup>2</sup> The legal rules that bind individuals and states will be discussed in further detail in the section on the International legal system.

As they stand today, current international treaties do not hold TNCs legally culpable for human rights violations, with the onus remaining on the state. Any preemptive actions corporations do take are done so on a voluntary basis as they consider appropriate to their internal corporate codes of conduct, though intergovernmental organizations are increasingly setting standards to regulate corporate conduct in the area of human rights. Several have attempted to implement principles and guidelines that address the emerging power of TNCs in the international community and their responsibilities for acceptable standards of practice—some with more success than others. In 1976 the Organization for Economic Cooperation and Development (OECD) established the Guidelines for Multinational Enterprises, and shortly thereafter the International Labor Organization (ILO) adopted the Declaration of Principles Concerning Multinational Enterprises.

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Mashood Baderin and Manisuli Ssenyonjo (Farnham Surrey, Great Britain: Ashgate Publishing Group, 2010), 378.

<sup>2</sup> Michele Olivier, “Exploring Approaches to Accommodating Non-State Actors Within Traditional International Law,” *Human Rights & International Legal Discourse* 4 (2010): 29.

The United Nations (UN) first attempted to draft international regulations for corporate responsibility in 1974 with the founding of the Commission on Transnational Corporations. Though several codes of conduct were drafted through the years, the Commission was eventually abandoned in 1992.<sup>3</sup> Five years later the UN Sub-Commission for the Promotion and Protection of Human Rights created the Working Group on the Working Methods and Activities of Transnational Corporations, consisting of five independent legal experts.<sup>4</sup> In August 2003 the working group presented the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" to the Sub-Commission, which unanimously accepted them. However, the Norms did not pass the next level of enquiry, and in April 2004 the UN High Commission on Human Rights rejected them. Despite this setback the Norms are still considered a landmark success by many because they were the first "nonvoluntary initiative accepted at the international level."<sup>5</sup>

The UN's reaction following the failure to adopt the Norms was to appoint a special representative on the issue of business and human rights, whose mandate was to identify and clarify international ideals and policies as they pertained to commerce and human rights and submit recommendations to the Commission.<sup>6</sup> In 2005, then Secretary-General Kofi Annan appointed Law Professor John Ruggie as Special Representative to the Secretary-General (SRSG), who would eventually introduce the 2011 Guiding

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<sup>3</sup> Giovanni Mantilla, "Emerging International Human Rights Norms for Transnational Corporations," *Global Governance* 15 (2009): 282.

<sup>4</sup> David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *The American Journal of International Law* 97, no. 4 (October 1, 2003): 903–904, doi:10.2307/3133689.

<sup>5</sup> *Ibid.*, 903.

<sup>6</sup> Mantilla, "Emerging International Human Rights Norms for Transnational Corporations," 289.

Principles on Business and Human Rights. Founded on a three-pillar framework of ‘Protect, Respect, and Remedy,’ the principles are aimed at simplifying the baseline expectations of businesses in regards to human rights.

Though not legally binding, these soft laws are “generally understood to encompass nonbinding norms that govern behavior” and can take a number of forms to include resolutions, statements of intent, or codes of conduct, to name a few.<sup>7</sup> Critics claim that such principles are too general and ineffective since they are not legally enforceable, whereas proponents assert that soft laws often lead to the establishment of norms and rules set forth by these non-binding codes and “help shape identities, increasing compliance,” through what some call a “logic of appropriateness,” thus leading to moral legitimacy, norms and group identity. Another such effort is the Global Compact, a set of ten principles proposed by Kofi Annan in 1999 that businesses can voluntarily support and adopt. Established in 2000, it is today’s largest voluntary corporate initiative in the world, with over 10,000 members.<sup>8</sup>

Despite the multiple attempts that have been made by various international organizations over the past forty years to improve human rights as they are affected by TNCs, the struggle to hold such non-state actors accountable continues. Certainly the need to remedy the existing international status quo has been recognized and today corporate accountability stands as one of the primary concerns to be addressed by human rights experts, legal scholars and the NGO community. One of the largest obstacles

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<sup>7</sup> “Organizational Irrationality and Corporate Human Rights Violations,” *Harvard Law Review* 122 (2009 2008): 1941.

<sup>8</sup> “Foundation for the Global Compact,” accessed June 27, 2013, <http://globalcompactfoundation.org/about-ungc.php>.

remains that there is no uniformity amongst states; that is to say, there have not been any standards adopted by states that can uniformly regulate human rights violations by TNCs, thereby leaving an absence of legislation that would both adjudicate TNC human rights abuses and provide a platform for victims to take legal action against TNCs for such abuses.<sup>9</sup>

### **Purpose of the Study**

The purpose of this study is to analyze the emergence of international human rights norms for transnational corporations, whilst investigating what progress is being made towards advancing these human rights norms from “soft” laws to legally binding hard laws. The study will determine how international normative standards and legal mechanisms have been applied through the in-depth analysis of two case studies that implicate the extractive industry’s involvement in human rights violations: the first case occurred in Nigeria in 1994, the second a decade later in 2004 in Democratic Republic of Congo. The time lapse between each case will allow me to comparatively analyze what changes, if any, were made during that time to hold TNCs accountable for human rights abuses. The cases are similar in that they involved extractive transnational companies operating in poor African countries with histories of protracted conflicts and corrupt governments. However the context of each case is specific, and the relationships that existed between the corporation, its home government, and the host state will help

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<sup>9</sup> Oxford Pro Bono Publico (OPBP) Research Team, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, Submission for U.N. Secretary-General’s Special Representative on Business & Human Rights (University of Oxford, England: Oxford Pro Bono Publico Programme, November 3, 2008), i, <http://www.law.ox.ac.uk/opbp>.



identify deficiencies in the system and suggest alternatives for future cases that will arise.

I will apply a comparative approach as a means of analyzing and explaining socio-political and legal developments and to draw conclusions about the causal relationships between the two case studies. Qualitative methods will rely primarily on a comprehensive literature review that will allow me the flexibility needed to conduct the type of exploratory research necessary to understand the relationship between transnational corporations, the state, and international law, and the dynamics that decide customary norms, accountability mechanisms and the adjudication process. Through the process of data collection and inductive analysis I will use a mix of theoretical perspectives to guide the process of categorizing the material, and compare it with existing literature to develop a generalization based on the various themes that emerge.

*Case Study: Nigeria*

In May 1994 Ken Saro-Wiwa was arrested following a political rally where four people were killed. He was held incommunicado for nine months before being charged with murder. On November 10, 1995, only eight days after his sentencing, the Nigerian government executed Ken Saro-Wiwa and eight of his colleagues after finding them guilty of their involvement in the death of two village elders. It was later proven that none of the “Ogoni nine,” as the defendants became known, were in the area at the time of the murders. Instead it was concluded by the international community that the Nigerian government committed “judicial murder,” silencing these men as a direct result of their involvement in protests against Shell’s environmental practices in the Niger Delta.

### *Case Study: Democratic Republic of Congo*

Anvil is a mining corporation—whose head office is in Australia and whose parent company is Canadian—with operations in DRC. In 2004 it was accused of supplying military forces with logistical support that ultimately killed approximately 100 people. On January 24, 2012, the Canadian Court of Appeal overturned an earlier ruling by the Superior Court and stated there were insufficient connections to Québec because Anvil Mining’s Montreal office was not involved in decisions leading to its alleged role in the massacre (it was the Australia office), further stating that the victims could have sought justice in the DRC or Australia, where Anvil Mining had its head office. The claimants asked the Supreme Court to review but on November 1, 2012, the Court refused to grant the claimants leave to appeal the case.

### **Definition of Terms**

It is important to clarify the working definitions of some of the primary concepts of this study, which include: transnational corporations, the extractive industry; the difference between legal terminology such as treaties and norms, and the commonly used “soft” law versus “hard” law; and the distinction between state and non-state actors in the international political system, the latter of which will be discussed in further detail in chapter two. Though some of these terms may appear transparent, their importance is significant and the subtlest differences must be explicit in order to appreciate specific concepts moving forward.

## **Transnational Corporations and the Extractive Industry**

According to the United Nations Conference on Trade and Development, transnational corporations (TNCs) are “incorporated or unincorporated companies that comprise parent enterprises and their foreign affiliates ... a parent enterprise is defined as one that controls assets of other entities in countries outside of their own home country.”<sup>10</sup> Rutgers Law Professor Beth Stephens similarly defines TNCs as firms that own (partly or wholly), control, and manage income-generating assets in more than one country. Agreeing on one working definition is one of the primary problems facing the international community today when trying to introduce universal guidelines for multinationals. Without such definition responsibility cannot be allocated. For the purposes of this paper TNCs may be defined according to the above-mentioned working definition used by the UN.<sup>11</sup> TNCs are often referred to as MNEs (multinational enterprises) or MNCs (multinational corporations), and they may be used interchangeably throughout this paper.

Following the end of the Cold War; the Reagan-Thatcher neoliberal era of deregulation and privatization; and the rise of information technology, MNCs rose to levels of unprecedented power, wielding tremendous influence in the countries where they operate. With this level of isolated power comes the greater risk of harm to those living under that authority. Stephens ascertains that the “enormous power of multinational corporations enables them to inflict greater harms, while their economic

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<sup>10</sup> “Unctad.org | Transnational Corporations (TNC),” accessed June 21, 2013, [http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx).

<sup>11</sup> A more thorough definition is available at the website, which provides more detail regarding equity capital, assets, etc.

and political clout renders them difficult to regulate.”<sup>12</sup> This is especially prevalent in poor, developing countries that are highly dependent on the revenues that foreign enterprises promise them in exchange for access to their natural resources.

At the forefront of the debate surrounding regulatory challenges of MNCs and enforcement mechanisms is the extractive sector, which refers to the oil, gas, and mining industries, and supports my selection of the Nigeria and DRC case studies. Mining operations require considerable infrastructure and financing which explains why poor developing countries are dependent on foreign enterprises to proceed with resource extraction. Extractive operations are a critical revenue source for many of these countries, “giving local authorities a vested interest in protecting those operations ... [and] situations of conflict can in fact be exacerbated by the presence of lucrative extractive industries, as competing factions strive to control rents from the operation to fund their own struggles.”<sup>13</sup> It should come as no surprise then that these combined factors often lead to human rights abuses, whether by corrupt governments or the extractive companies themselves.

It is a great paradox of our time that resource-rich countries such as Nigeria and the DRC are often plagued by the resource curse, a term used to describe the “failure of resource-rich countries to efficiently harness the wealth realized from their natural resources so that the benefits are enjoyed by all.”<sup>14</sup> Instead such countries find themselves

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<sup>12</sup> B. Stephens, “Amorality of Profit: Transnational Corporations and Human Rights, The,” *Berkeley J. Int’l L.* 20, no. 1 (2002): 47.

<sup>13</sup> Adam McBeth, “Crushed by an Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector,” *Yale Human Rights & Development Law Journal* 11 (2008): 128.

<sup>14</sup> Ruby Onwudiwe, “Globalization, Extractive FDI and the Effects of Multinational Corporations on Conflict Situations in Developing Countries” (Ph.D., George Mason University, 2011), viii,

embroiled in gross human rights violations—often as the direct result of global demands for scarce resources and the subsequent actions taken by extractive corporations to meet those demands. The traditional international legal system still holds states solely responsible for their citizens, with few limitations placed on the TNCs that operate within their territorial borders. The current system need to be reexamined in order to adjust to the new demands met by economic globalization, including holding non-state actors accountable for their increasing roles within sovereign states.

### **Legally binding treaties versus Norms**

Article 38(1) of the Statute of the International Court of Justice is today the generally recognized and accepted statement that delineates the primary sources of international law, which include treaties and conventions, and customary law. International law dictates that a state can only be held responsible if it has either ratified a treaty or convention, or it is in violation of customary international law. Treaties and Conventions are considered “hard” laws, meaning they are legal binding contracts between two or more states. Treaties are bound by five fundamental rules: they must be in *writing*; treaties *signed* by the state signify intent to be obliged to all rules of the treaty in the future; once a state has *ratified* a treaty it is legally bound to abide by all its rules; if states do not agree with certain aspects of a treaty they can express *reservations*, thus exempting it from responsibility to that particular rule;<sup>15</sup> and lastly, perhaps the most important rule specifies that no treaty can go against or contradict *jus cogens*, which is

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<http://search.proquest.com.mutex.gmu.edu/pqdtft/docview/890163038/abstract/13F19F51C5E4FE97D42/1?accountid=14541>.

<sup>15</sup> It should be noted that today most treaties and conventions are not eager to allow reservations, and some do not allow any at all. There is often a period of time allowed for states to join a treaty, called *ascension*.

the most fundamental principle of international law that essentially protects against such human rights violations as torture and slavery. Any treaty that violates such “super norms,” as they are often referred to, is illegal and therefore unacceptable.<sup>16</sup>

Customary law as indicated by Article 38 is the other primary source—also considered to be the original source—of international law. When a sufficient number of states within the international community begin regularly following a practice, it eventually becomes a standard and, following two additional legal requirements, will become legally binding. The first requirement dictates that a practice needs to be accepted as law (*opinion juris*), in other words, states must have a sense of legal obligation; secondly, to be accepted as a general practice requires three tests: *uniformity* (the practice followed by the different states, i.e. maritime law, is broadly the same. Without uniformity it cannot become customary law), *consistency* (states follow the same practice regularly), and *specially affected states* (as an example a maritime law that will affect a Mediterranean nation such as Malta, more so than Switzerland).<sup>17</sup>

One of the most difficult theoretical questions that remain today is the extent to which non-state actors can participate in the formation of treaties and customary law, which are reliant on the consent of states. The Vienna Convention on the Law of Treaties specifically underscores the importance of treaties between states, defining a treaty as “an international agreement concluded between States in written form and governed by

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<sup>16</sup> Omar Grech, “International Law” (University Lecture presented at the Human Rights and Conflict, University of Malta, April 9, 2013).

<sup>17</sup> *Ibid.*

international law.”<sup>18</sup> Treaties that are concerned with issues specifically surrounding a state’s authority, as a result of state sovereignty, will be open only to state participation. Yet the Convention also recognizes and allows for the possibility of treaties between non-state parties as well. To paraphrase Olivier, treaties can create international organizations that assume legal personality and act as non-state subjects of international law.<sup>19</sup> It is in fact not a new development that states have not only used treaties to establish legal norms, but also to “authorize extra-national actors to interpret and apply treaties in specific cases involving specific parties,” the International Court of Justice is one such example.<sup>20</sup>

Treaties and customary law remain the two primary sources of the international legal system, but the increasing importance of non-state actors’ roles in the creation, implementation, and regulation of such agreements illustrates the need for a clearer definition of their responsibilities. Though they cannot act independently from states, non-state actors are increasingly powerful in law-making, particularly in what is commonly referred to today as soft law. Whereas “hard” law refers to treaties and customs, legally binding under the international legal system; “soft” law encompasses forms of international law that are not yet legally binding but are often the first step towards achieving the state consent necessary to reach the adoption of treaty or customary law.

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<sup>18</sup> “Vienna Convention on the Law of Treaties” (United Nations, May 23, 1969), [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>19</sup> Olivier, “Exploring Approaches to Accommodating Non-State Actors Within Traditional International Law,” 21.

<sup>20</sup> Duncan B. Hollis, “Why State Consent Still Matters-- Non-State Actors, Treaties, and the Changing Sources of International Law,” *Berkeley Journal of International Law* 23, no. 1 (March 2005): 166.

Because instruments of soft law are not legally binding, they are open to the participation of non-state actors, to include UN resolutions, which often reflect general principles of laws as expressed in existing or emerging treaties. The increasing importance of non-state actors in creating soft law also solicits the question of their role in existing “hard” laws—that is their responsibility towards upholding existing laws and being accountable for any violations. This is a particular point of contention in regards to human rights. The Universal Declaration of Human Rights, in its Preamble, refers to the responsibility of member states, as well as “people” of the United Nations. Does this imply individuals within a state or solely groups? This interpretation remains unclear, and today the onus to observe and protect human rights remains with the state. The following chapter will address these concerns by examining the three primary international human rights instruments known collectively as the International Bill of Rights, emerging human rights norms, and the international legal system.



## **CHAPTER TWO**

### **THE INTERNATIONAL SYSTEM**

Up to the present time, no international legal mechanisms have been implemented to hold transnational corporations accountable for human rights violations. However since the 1970s several international bodies have instituted various codes of conduct and operational principles with the intent of providing TNCs with a solid framework for ethical business practices that ensures the protection of human rights. The hope is that over time the international community—NGOs, governmental bodies, and TNCs—will be able to agree upon a universal set of standards and operational principles that can be legally accepted and enforced in order to hold TNCs equally responsible for upholding human rights as states are, and accountable for any violations of those rights.

#### **The International Bill of Rights**

The atrocities committed during the Second World War provoked the international community to reflect on what formal measures should be taken to ensure the legal protection of human rights and avoid such atrocities from ever recurring. Two major developments occurred following the end of the war: the first being the Nuremberg Trials, wherein the principle emerged that dictated individuals—not only states—have obligations and responsibilities under international law and could be found guilty of crimes under such laws. This was groundbreaking because up until then individuals were

not responsible under international human rights law. The second largest development to result out of the war was the United Nations Charter, which of itself did not define human rights but in its Preamble encouraged the “respect for human rights and for fundamental freedoms.”<sup>21</sup> The 1945 UN Charter provides the legally binding basis for the development of human rights law, which led to the founding of the UDHR in 1948, considered today as the legal baseline for international human rights.

In 1946, shortly after the formal adoption of the UN Charter, the Economic and Social Council (ECOSOC), acting on its powers under the Charter, established a Commission on Human Rights, mandated to develop a framework for an international bill of rights and a declaration that would define the term “human rights.” The Committee, chaired by Eleanor Roosevelt, drafted the UDHR for nearly two years—beginning in January 1947, and on December 10, 1948 it was unanimously adopted as a resolution of the UN General Assembly. The UDHR was the first instrument that contained a list of internationally recognized human rights covering both civil and political rights as well as economic, social and cultural rights. But its greatest significance was that it provided “an authoritative content, adopted by the General Assembly, to the interpretation of the UN Charter in respect of its human rights provisions.”<sup>22</sup>

The Declaration was passed as a resolution and thus not legally binding, therefore shortly following its adoption the assembly deemed it important to continue the process

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<sup>21</sup> Grech, “International Law.”

<sup>22</sup> Mashood Baderin and Manisuli Ssenyonjo, “Development of International Human Rights Law Before and After the UDHR,” in *International Human Rights Law : Six Decades after the UDHR and Beyond*, ed. Mashood A. Baderin and M. Ssenyonjo (Farnham Surrey, Great Britain: Ashgate Publishing Group, 2010), 9.

of developing a document that would render the rights listed in the Declaration legally binding on all states. Initiated by the Human Rights Commission, the development of the International Covenant on Human Rights took place between 1949-1950, but due to the polarized ideologies between the East and West during the Cold War it was rendered difficult to continue. The concept of the indivisibility of human rights was continuously challenged. Whereas the USSR pushed for Economic, Social, and Cultural Rights, the United States strongly advocated for Civil and Political Rights, and it quickly became evident that the only feasible solution was to have two separate covenants.<sup>23</sup> The International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) were adopted in 1966, but the process of ratification took another decade and the covenants did not come into force until 1976. Together with the UDHR they formed what is today known as the International Bill of Rights.

One of the criticisms of the conventions is that their reporting mechanisms are quite weak, thus failing to “ensure the implementation of the rights contained in various conventions,” such as the rights of individuals to bring claims against the state before an international tribunal.<sup>24</sup> However, others point out the importance of the Covenants in that, since their adoption, a multitude of international, regional and national laws have emerged that deal specifically with children’s rights, women’s’ rights, and racial discrimination, to name a few. Furthermore, numerous tribunals have been established to

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<sup>23</sup> Omar Grech, “Human Rights and Development,” in *80:20: Development in an Unequal World*, ed. Colm Regan and Bertrand Borg (Bray, Co. Wicklow: 80:20 Educating and Acting for a Better World, 2011), 74.

<sup>24</sup> *Ibid.*

protect human rights internationally and regionally, such as: the European Court of Human Rights, African Court on Human and People's Rights, Inter-American Court on Human Rights, and the International Criminal Court.

Another point worth noting is that during the period following the formation of the UDHR, and before the ratification of the Covenants, states began referring to the UDHR more and more often. Despite the fact that it was not legally binding, it was the only universal document on human rights and over time it evolved into international customary law. The UDHR “has evolved to the extent that some of its provisions now either constitute customary international law and general principles of law or represent elementary considerations of humanity.”<sup>25</sup> In this regard, its significance has been repeatedly confirmed through the ICC's invocation, its reference by regional and domestic courts as an aid to understanding other human rights treaties, and as a template to other nation's constitutional provisions that seek to protect human rights.<sup>26</sup> In this respect, the UDHR has, since its adoption in 1948, acquired a universal value system—a common standard of achievement for all peoples and all nations.

Despite the evolution of the UDHR as international customary law, the question of its universality remains at the core of the human rights debate. The two sets of rights under the Covenants continue to progress differently for various reasons including the divergent views of states, particularly in the case of ESC rights which have been much slower to progress than civil and political rights. Furthermore, since the adoption of the

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<sup>25</sup> Ian Brownlie, *Principles of Public International Law* (New York: Oxford University Press, 2008), 559.

<sup>26</sup> Baderin and Ssenyonjo, “Development of International Human Rights Law Before and After the UDHR,” 9.

International Bill of Rights, new concepts of human rights have arisen that, as Baderin explains, “were not specifically understood in 1948 and were not provided for in the UDHR [and] have been evolving normatively over time.”<sup>27</sup> The following section will explore some of these normative developments in international human rights law that have emerged, and more specifically those human rights mechanisms that have developed as a direct response to the increasing power of TNCs.

### **Emerging human rights norms**

For the purpose of this paper, I will be examining the five mechanisms that have been most fundamental to the expansion of human rights protection in the international business community. Introducing them in chronological order, they include: the OECD’s *Guidelines for Multinational Enterprises*, the ILO’s *Tripartite Declaration*, the ECOSOC’s *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights*, the UN *Global Compact*, and the most recent 2011 UN *Guiding Principles on Business and Human Rights*. Due to their more recent nature and importance to emerging international human rights norms, I will be spending more time and depth on the Norms and the 2011 Guiding Principles.

With the increased liberalization of the market economy, the OECD first realized the need for regulatory guidelines for TNCs in the 1970s, and in 1976 adopted the *Guidelines for Multinational Enterprises* (the Guidelines hereafter) as an Annex to the

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<sup>27</sup> Ibid., 15.

Declaration on International Investment and Multinational Enterprises.<sup>28</sup> The Guidelines provide standards by which TNCs should conduct their business ethically and responsibly. Revised numerous times over the years to adapt to the changing nature of the global economy, the guidelines cover several socio-economic issues, to include: increased disclosure of an enterprise's financial performance, ownership, and governance; human rights; employment and industrial relations; environment; consumer interests; science and technology; competition; and taxation.<sup>29</sup> In its efforts to remain current with other institutional standards, the OECD's commentary on human rights reiterates that the Guidelines are in full agreement with the United Nations "Protect, Respect and Remedy" Framework, as well as the UDHR and the ILO's labor standards.

The OECD Guidelines are recommendations for corporate social responsibility (CSR) and, as such, companies are not legally required to observe them, though strongly encouraged by their governments to comply.<sup>30</sup> They differ from other codes of conduct in that, since 2012, they have been adopted by 44 governments, who in turn are responsible for recognizing the guidelines and addressing them to multinationals domiciled in their territory. Though these codes are often referred to as "soft law" because of the inability to enforce their provisions, they should not be dismissed or underestimated, as they "have a

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<sup>28</sup> A policy commitment by governments that provides an "open and transparent environment for international investment and to encourage the positive contribution multinational enterprises can make to economic and social progress."

<sup>29</sup> "OECD Guidelines," accessed July 1, 2013, <http://www.oecdguidelines.nl/>.

<sup>30</sup> Philip Swanson, Mai Oldgard, and Leiv Lunde, "Who Gets the Money? Reporting Resource Revenues," in *Natural Resources and Violent Conflict: Options and Actions*, ed. Ian Bannon and Paul Collier (Washington, D.C.: World Bank, 2003), 66.

unique and very important value as external *benchmarks* for business-generated codes.”<sup>31</sup> Suggestive of the ever-increasing human rights advocacy was the new OECD text, introduced in June 2000, which made clear reference to the UDHR and revamped its implementation procedures to enable NGOs and other complainants to bring grievances regarding corporate misconduct to the attention of TNC home governments—including those outside of OECD territories.<sup>32</sup> Furthermore, if companies refuse to cooperate, there is always the option of what has been referred to as the “naming and shaming” sanction. This can serve as a significant deterrent to corporations, particularly those operating in OECD member states that have government contact points for reporting purposes.<sup>33</sup>

Less than one year after the introduction of the OECD Guidelines, the International Labor Organization instituted the 1977 *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (hereafter to be referred to as the Tripartite Declaration). Whereas the Guidelines are directed towards a broad area of socio-economic issues that could be adversely affected by TNC operations, the ILO conceived the Tripartite Declaration specifically out of a growing concern for the protection of employees’ human rights in the TNC workplace, and for “regulating their

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<sup>31</sup> Fabrizio Marrella, “The Law of International Trade,” in *Economic Globalisation and Human Rights*, ed. Wolfgang Benedek, K. De Feyter, and Fabrizio Marrella (Cambridge, UK; New York: Cambridge University Press, 2007), 293.

<sup>32</sup> Patricia Feeney, “Business and Human Rights: The Struggle for Accountability in the UN and the Future Direction of the Advocacy Agenda,” *International Journal on Human Rights* 11 (2009): 164.

<sup>33</sup> Swanson, Oldgard, and Lunde, “Who Gets the Money? Reporting Resource Revenues,” 66.

conduct and defining the terms of their relations with host countries, mostly in developing countries.”<sup>34</sup>

As a specialized agency of the UN, with 185 member countries, the ILO Declaration’s importance is telling by the unanimous agreement of all members to adopt its principles. As the name suggests, the Tripartite Declaration is unique in that it was approved jointly by governments, employers, and workers, and in accordance to the ILO’s structure of representation by governments and representatives of the labor force and business community. Offering basic guidance in training, working conditions, and industrial relations, the Tripartite Declaration refers to many of the ILO Conventions, though its primary usage has ultimately fallen upon the clarification of specific national labor policies, and less so on human rights issues. A report by the International Federation for Human Rights (FIDH), explains that though an interpretation procedure is in place to clarify the content of the Declaration in cases of dispute between parties, it has become virtually obsolete, partly due to the fact that many potential applications overlap with other complaints mechanisms and cannot be used simultaneously. Consequently critics argue that it has proved to be of little avail for victims of human rights violations.<sup>35</sup>

A 2012 ILO Report partially supports the opinion that the Declaration is limited in its capabilities towards protecting human rights, attributing it to the fact that, “like the OECD Guidelines for Multinational Enterprises, originally adopted in 1976, [it] belong[s]

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<sup>34</sup> International Labour Organization, “Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) - 4th Edition” (ILO, January 1, 2006), 92-2-119010-2[ISBN], [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm).

<sup>35</sup> Veronique Van Der Plancke and et. al., *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Resource Mechanisms*, Guide (International Federation for Human Rights (FIDH), July 2010), 76.



to a different generation than the current wave of CSR initiatives.”<sup>36</sup> The Declaration was, however, influential in shifting the weight of responsibility of non-binding guidelines—from the international community voicing its expectations of TNC behavior, to the enterprises themselves voluntarily assuming their responsibilities. Furthermore, the Declaration cemented the ILO’s involvement and consultative status with future UN endeavors towards protecting human rights in the workplace, particularly the 2011 Guiding Principles, in which Special Representative John Ruggie strongly depended on the ILO’s knowledge in the area of labor rights.<sup>37</sup>

A common feature amongst many institutional guidelines and principles is their language; both the Guidelines and the Tripartite Declaration denote themselves as being the first authoritative documents and multilaterally agreed upon codes of conduct, respectively. Yet they simultaneously make clear that they are voluntary in nature (with the exception of the ILO addendum 1 to the Declaration, which specifies that revisions ratified by member States are compulsory). Regardless of their voluntary nature, as two of the earliest “soft” mechanisms to address human rights in the corporate workplace, the OECD Guidelines and ILO Declaration have served as standards for future human rights frameworks.

Critics point out that neither the Guidelines nor the Declaration are directly applicable to most human rights concerns today, whilst proponents reiterate that they have often been adopted for internal corporate codes of conduct, which, when adopted by

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<sup>36</sup> International Labour Office, International Labour Conference, *Fundamental Principles and Rights at Work from Commitment to Action* (Geneva, Switzerland: International Labour Office, 2012), 107, [http://www.ilo.org/public/libdoc/ilo/2012/112B09\\_52\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2012/112B09_52_engl.pdf).

<sup>37</sup> *Ibid.*, 35.

TNCs, can be quite effective in that they are then communicated to all other contracting parties.<sup>38</sup> Regardless of whether companies are compliant to codes of conduct for ethical reasons or simply for the sake of maintaining their business reputation, the end results can be positive. Furthermore, voluntary codes of conduct can increase the possibility of creating legally enforceable rights. And if, in fact “sufficiently widespread in a specific sector of the economy and if endorsed by trade associations, [they] could form a factual or legal benchmark for the assessment of the wrong committed by the TNC.”<sup>39</sup> Drawing from the principles set forth by the Declaration and the Guidelines as well as other codes of conduct, then UN Secretary-General Kofi Annan introduced ten principles he called the *Global Compact* at the 1999 World Economic Forum’s annual meeting at Davos.

In 2000 Global Compact was officially launched, with a new set of voluntary principles designed to align business operations in the area of human rights, labor, environment, and anti-corruption.<sup>40</sup> The ten principles, borrowing from existing human rights documents such as the UDHR and the Tripartite Declaration, were designed with the intent that companies would incorporate them into their own internal operational codes. Today there are more than 10, 000 members worldwide, who are required to report on their initiatives annually. Global Compact is “based on the idea that good practices should be regarded by being publicized, and ... shared in order to promote a mutual

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<sup>38</sup> Adalberto Perulli, “Globalisation and Social Rights,” in *Economic Globalisation and Human Rights*, ed. Wolfgang Benedek, K. De Feyter, and Fabrizio Marrella (Cambridge, UK; New York: Cambridge University Press, 2007), 124–125. Internal codes are “adopted by multinational enterprises and communicated to all other contracting and sub-contracting parties.”

<sup>39</sup> Oxford Pro Bono Publico (OPBP) Research Team, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, 94.

<sup>40</sup> Feeney, “Business and Human Rights,” 164. Anti-corruption was not added to the agenda until 2004.

learning among businesses.”<sup>41</sup>

Global Compact’s annual reporting requirements for TNCs gives it an increased public dimension, thus also increasing the risk for harmful publicity if companies do not abide by the ten principles. This tactic is indicative of the earlier mentioned sanction of naming and shaming, which can be as detrimental to a company’s portfolio as any “official” penalty. Furthermore if companies do not abide by their membership requirements they can be removed from the initiative; companies that do not submit their annual Communication on Progress (COP) report for two years are listed as “inactive” status. To regain active status they simply need to submit the required report, however if they continue to fail communications, they are expelled. The most recent UN Global Compact report revealed that as of July 4, 2013, 4164 members had been expelled.<sup>42</sup> This high number suggests the seriousness of the initiative’s goals, and the UN’s awareness that some companies may be joining for the “free ride,” and with no intention of following the rules.

Critics of the Global Compact maintain that, just as with its predecessors, it is voluntary and as such, sanctions for noncompliance, such as bad publicity, tend to be softer. Proponents counter that these sanctions are enough for most corporations to uphold the principles, thus enjoying a fairly high level of legitimacy.<sup>43</sup> Nevertheless, increased attention to the problem of TNCs and human rights by transnational advocacy groups, governmental agencies, and legal scholars, led to a new initiative in 1997 by the

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<sup>41</sup> “FIDH - International Federation For Human Rights,” 6, accessed February 26, 2012, <http://www.fidh.org/-english->.

<sup>42</sup> “Expelled Participants,” accessed July 4, 2013, [http://unglobalcompact.org/COP/analyzing\\_progress/expelled\\_participants.html?page=1&per\\_page=100](http://unglobalcompact.org/COP/analyzing_progress/expelled_participants.html?page=1&per_page=100).

<sup>43</sup> Mantilla, “Emerging International Human Rights Norms for Transnational Corporations,” 285.

UN Sub-Commission on the Promotion and Protection of Human Rights.

The Norms were the first attempt by the UN to shift away from voluntary codes as regulatory mechanisms for corporate activity to non-voluntary standards that would hold corporations directly responsible for the respect of human rights. The UDHR calls on the responsibility of “every individual and every organ of society”<sup>44</sup> to respect and promote human rights, and the Norms translated this language to include corporations, thus binding them to respect a long list of rights.<sup>45</sup> This ambitious endeavor to literally translate certain aspects of the International Bill of Rights would prove contentious later. In 1998 the UN Sub-Commission on the Protection and Promotion of Human Rights established the Working Group on the Working Methods and Activities of Transnational Corporations. Composed of five legal experts, the working group was mandated with several tasks centered on the working methods and activities of TNCs, which included: identifying and examining the human rights issues affected by TNCs, examining whether TNC financial agreements were compatible with human rights standards, recommending business methods to improve human rights, and considering the extent of a state’s obligation to regulate TNCs.<sup>46</sup>

Originally slated for only a three-year period, the enormity of the working group’s task soon became evident, and in 2001 the mandate was extended for another three years. In March 2001, at the direction of the Office of the UN High Commissioner for Human Rights, a seminar was organized, which invited various NGO representatives working in

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<sup>44</sup> “The Universal Declaration of Human Rights,” accessed August 25, 2013, <http://www.un.org/en/documents/udhr/>.

<sup>45</sup> Mantilla, “Emerging International Human Rights Norms for Transnational Corporations,” 286.

<sup>46</sup> Weissbrodt and Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” 904.

the field of corporate responsibility, human rights, and development, and provided them a forum to express their concerns and offer suggestions.<sup>47</sup> Following much the same directives as the original mandate, but equipped with additional commentaries received at the seminar, the group proceeded with its second draft of Norms.

Following several more revisions, the working group presented a third draft for further suggestions at a seminar organized by NGOs in March 2003. The group, having taken the suggestions from prior seminars and meetings, reached a consensus on the final revision to the Commentary on the Norms, and presented it to the Sub-Commission, which then approved them in August 2003 and forwarded them to the High Commission for consideration. Civil society for the most part strongly endorsed the Norms, feeling they were a huge step forward for the advancement of human rights, and the development of legally binding mechanisms. The business community however, as well as many government agencies, was up in arms and it was not long before special interest groups and counter-lobbying campaigns began in full force.

The debate intensified, with proponents maintaining that a normative framework on business and human rights such as the Norms was a necessary global instrument, and opponents arguing that they failed to distinguish between the obligations of a state and a corporation.<sup>48</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR) was asked to consult in the deliberations, and ultimately encouraged the Commission to more closely review the Norms. Yet despite the support from NGOs and the OHCHR, the Commission decided against the Norms in 2005—a “swift neglect

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<sup>47</sup> Ibid., 904–905.

<sup>48</sup> Feeney, “Business and Human Rights,” 165.

...which effectually consigned them to the same fate as the Draft Code for Conduct for TNCs” from the 1970s.<sup>49</sup>

Wake Forest Law Professor, John Knox explains, that although neither the Sub-Commission nor the Commission on Human Rights had the authority to make the Norms legally binding, had the Commission adopted them, “the Norms could have become the basis for a later binding instrument or influenced the development of customary international law.”<sup>50</sup> Despite their eventual fate, the Norms served a purpose, not only shaping the human rights debate and the obligations of corporations, but also by initiating the next phase of UN mandates in framework building. Shortly after the Commission’s rejection of the Norms it requested the Secretary-General to appoint a special representative consigned to further explore the issues surrounding states roles in effectively regulating corporations.

In July 2005, then UN Secretary-General Kofi Annan appointed John Ruggie as his Special Representative on the issue of human rights and transnational corporations (SRSG). Ruggie, a Harvard law professor, already had a working relationship with Annan from several years earlier when he served as Secretary General for Strategic Planning in the structuring of the Global Compact.<sup>51</sup> From the beginning of his appointment, Ruggie, whose primary mandate was to identify and clarify the obligations of corporations in international law, made his position on the Norms clear. Claiming they were too stringent and contradictory in their legal interpretations, he dissented from both

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<sup>49</sup> Ibid., 166.

<sup>50</sup> John Knox, “The Human Rights Council Endorses ‘Guiding Principles’ for Corporations,” *The American Society of International Law* 15, no. 21, Insights (August 1, 2011): 1.

<sup>51</sup> Ibid.

opposing views—human rights advocacy groups and the business community—and instead took a middle position. While acknowledging the need for corporations to “become direct bearers of international human rights obligations,” in specific circumstances where governments were not fulfilling their duties, he simultaneously countered this assertion, questioning whether such obligations already existed, as the Norms seemed to reflect.<sup>52</sup>

In his Interim Report to the Commission on Human Rights in February 2006, the SRSG explained his primary disagreement with the Norms’ contradictory remarks, asserting both claims could not be correct:

If the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones.<sup>53</sup>

This criticism of the Norms drew instant backlash from human rights activists and scholars who claimed Ruggie was misguided in his mandate, which was to build upon what the Norms had initiated—not to discredit them completely. Nevertheless he maintained his position and moved forward with establishing a new set of principles and guidelines.

In 2008, John Ruggie submitted the Framework for Business and Human Rights

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<sup>52</sup> E. Duruigbo, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges,” *Nw. UJ Int’l Hum. Rts.* 6 (2007): 243.

<sup>53</sup> *Ibid.* 243–244.

to the Human Rights Council,<sup>54</sup> which consisted of three principles: the state's duty to protect against human rights abuses by corporations; corporate responsibility to respect human rights; and the need for effective remedies for corporate human rights abuses. The "Protect, Respect, and Remedy" Framework, Ruggie noted, did not require any "changes to existing law, but only better understanding of it," which he hoped would allow for an easier consensus from all sides.<sup>55</sup> The Human Rights Council then extended the SRSR's mandate for another three years to allow him more time to develop the Framework in more detail.

In June 2011, the Human Rights Council unanimously endorsed the thirty-one Guiding Principles on Business and Human Rights, making the UN's expectations clear in the area of corporations and human rights. The first ten principles of the framework speak to the state's duty to protect; whereas the largest number of principles address the most contested point of the debate—the corporate responsibility to protect, with fourteen principles; lastly the remedy section of the framework contains the remaining seven principles, outlining more effective remedies for corporate human rights abuses.<sup>56</sup> Contrary to the Norms, most governments and businesses were much more receptive to the Guiding Principles; and the NGO community, quite vocal in its early criticisms that the principles were too vague, hesitantly accepted them as a new starting point to build

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<sup>54</sup> Discredited by its poor membership and performance, the UN Human Rights Commission was replaced with the Human Rights Council in March 2006. More information can be found at [unwatch.org](http://www.unwatch.org/).  
<http://www.unwatch.org/>.

<sup>55</sup> Knox, "The Human Rights Council Endorses 'Guiding Principles' for Corporations," 2.

<sup>56</sup> John Ruggie, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide" (United Nations: New York and Geneva, 2012), <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>. A detailed explanation and commentary of each principle can be found here.



upon. Regardless, John Ruggie affirmed that there is still a long road ahead for the international community, but that the Council's endorsement of Protect, Respect, and Remedy "mark the end of the beginning: by establishing a common global platform for action."<sup>57</sup>

### **The International legal system: The state versus the non-state**

Ruggie's statement that the Guiding Principles require only a better understanding of existing law, thus bypassing the need for any changes, suggests a degree of simplicity that is seldom the case with international law. Even when states have ratified treaties, contradictions often arise due to divergent interpretations of the law. Aside from laws protecting human beings from the most egregious human rights violations, other legal principles are vague and, in the case of corporate accountability, essentially non-existent. The Norms failed to distinguish clearly between the obligations of the state and the corporation, and the Guiding Principles, though more explicit in delineating each party's duties, are still not legally binding. Thus what continues to happen is a shifting of blame between the private sector and the state. How does the international legal system distinguish the private sector from the state and what does it say about who is ultimately accountable to protect human beings from corporate human rights violations?

Perhaps the key attribute distinguishing between the state and non-state actor is that of sovereignty and all the rights *and* duties that the term implies. It has in fact been one of the primary arguments used by corporations to avoid persecution in cases of human rights violations within host states. Sovereignty, as Michèle Olivier explains it,

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<sup>57</sup> Knox, "The Human Rights Council Endorses 'Guiding Principles' for Corporations," 3.

has, since the nineteenth century, developed as the “defining requirement for international legal personality ... states were regarded as the only subject of international law by virtue of possessing sovereignty, whilst individuals and non-independent states were considered as subjects of international law.”<sup>58</sup> Yet the symbiotic nature of globalization has rendered the state intermediary approach inadequate in protecting individuals under international law.

Regardless of what position people hold regarding Ruggie’s opinion of the Norms, certain points he made are difficult to argue, particularly the fact that several duties that the Norms assigned to corporations encompassed topics that had never even been accepted by states.<sup>59</sup> This would be delicate, if not dangerous, territory to embark on. After all, although non-state actors are increasingly important in their international roles, they cannot supersede the states’ duties as well; to do so would simply be shifting the weight of the problem without solving anything. Increasingly non-state actors such as NGOs have held important roles in influencing international bodies in the development of international laws, and TNCs should be allowed the same voice. But with that privilege comes added responsibility, and therefore new laws must be established that designate TNCs the same duty to protect as states. This view does not lie well with many governments because oftentimes states align themselves with the interests of the corporations operating within their territory, therefore as long as they have the sole legal authority they can “allow” certain activities to continue, often to the benefit of the

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<sup>58</sup> Olivier, “Exploring Approaches to Accommodating Non-State Actors Within Traditional International Law,” 18.

<sup>59</sup> Mantilla, “Emerging International Human Rights Norms for Transnational Corporations,” 290.

business—not the individual.

Non-state actors are, by their very definition, restricted in their legal capabilities. There are, however, existing mechanisms in the international legal system that have increasingly allowed non-state actors such as corporations and NGOs in particular to lend an important voice to the development of new laws. One of the primary ways in which they have been able to participate in such developments is through the implementation of soft law, which Olivier defines as an expression of international law that is not legally binding, but serves as the building blocks in the shaping of binding law—a “stepping stone in mobilising the international consent necessary for the adoption of a treaty.”<sup>60</sup> Soft laws encompass such instruments as UN resolutions and guidelines and do not encompass the same strict requirements as formal hard laws, thus they are heavily influenced by the voices of non-state actors through their participation in international conferences.

The United Nations is the largest and most powerful example of a non-state actor in the international system, and its charter makes clear that it is the duty of all state members to ensure the safety and security of all persons within their sovereign custody. As has been evidenced by numerous cases historically and currently, the state does not always follow through in such obligations and gross human rights violations continue to occur, whether at the hands of the state or in its complicity towards the violations of non-state actors operating within its territorial borders. This is where the question of international legal personality enters the current discourse, which Olivier explains as the

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<sup>60</sup> Olivier, “Exploring Approaches to Accommodating Non-State Actors Within Traditional International Law,” 24.

“possession of international rights and duties and the capacity to seek redress for alleged violation and to be held accountable for non-fulfillment of duties.”<sup>61</sup> It would follow that parties with possession of such duties also have a role in the formation of new laws.

As mentioned earlier, non-state actors are limited in their capabilities, but this does not exempt them from all responsibility. In fact it is argued that the very definition of international legal personality does not have to be so stringent and can possess multiple subsets of definitions to fit the needs of all actors. International legal personality need not be an absolute concept; rather different entities “can enjoy international personality for their particular purposes.”<sup>62</sup> Furthermore, Olivier cites Dixon and McCorquodale, who make an important observation regarding the relationship between states and non-state actors operating within their sovereign borders and their interrelated duties: “The legal personality of all non-state actors can ultimately be traced back to a state—their personality has been conferred, accepted or recognized by states.”<sup>63</sup> Therefore, regardless of what position experts take defining legal personality, and whether or not it encompasses non-state actors, the state has the ultimate responsibility to oversee that its non-state actors abide by all international human rights laws.

The position of non-state actors in the international legal system remains unclear. Many questions remain as to how the international community should go about delineating responsibilities between the state and non-state in an increasingly interdependent and globalized world. As it stands today there are no laws that clearly

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<sup>61</sup> Ibid., 26.

<sup>62</sup> Ibid., 27.

<sup>63</sup> Ibid.

oblige non-state actors the responsibility to protect. The burden of the responsibility remains with the state under traditional international law. Yet the international mindset continues to shift towards a more holistic approach.

Whereas the traditional system dictates that states are responsible for the public interest, it does not take into account the role of intergovernmental organizations (IGO) or corporations within a sovereign state. De Feyter notes that while IGOs are solely accountable to their member states, and corporations to their shareholders, this leaves both entities “bereft of mechanisms placing them under direct control of the population of a specific territory,” thus not directly subject to any democratic control or responsibility over a population.<sup>64</sup> This is an immediate concern that needs to be addressed in order to adjust to the current circumstances of economic globalization. The states duties need to be reexamined in relation to those of non-state actors, and sufficient legal mechanisms must be implemented expediently in order to protect human rights against the actions of third parties such as TNCs. The following section will examine more closely the role of the state in relation to that of non-state actors, specifically TNCs in the extractive industry.

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<sup>64</sup> Koen De Feyter, “Introduction,” in *Economic Globalisation and Human Rights*, ed. Wolfgang Benedek, K. DeFeyter, and Fabrizio Marrella (Cambridge, UK; New York: Cambridge University Press, 2007), 11.

## CHAPTER THREE

### LITERATURE REVIEW

#### **The Extractive Sector and the State**

To fully understand the setting in which the oil and mining sector has developed within the scope of human rights and corporate practices one needs to first consider two key aspects that emerge from the current literature on the subject: the restructuring of the current international political economy of the extractive industry over the past 40 years, and the national governments of oil-producing and other resource-rich states. For it is the structural dynamics of these two entities that provide “the indispensable frame within which the politics, conflicts, and human rights violations surrounding oil can be best understood.”<sup>65</sup> The close alliances that have formed over the years between the global oil industry and the state have resulted in the inevitable association between oil security and other types of conflict and human rights violations. The extent to which oil companies operate in undemocratic, military, and corrupt oil-producing states has directly linked them with violence and conflict.

TNC operations are often conducted in settings in which human rights violations and the extractive industry are inextricably interconnected, but as Watts indicates, there is

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<sup>65</sup> Michael J Watts, “Righteous Oil? Human Rights, the Oil Complex, and Corporate Social Responsibility,” *Annual Review of Environment and Resources* 30 (2005): 377.

a volatile mix of other forces: geostrategic interests in oil mean that military and other forces are part of the local oil complex; the struggle over oil wealth—who controls it and how it will be dispersed—involves an influx of local political forces (e.g., ethnic militias, paramilitary forces, separatist movements); and, multilateral development agencies such as the IMF and other financial institutions as agents in the expansion of the energy sectors in oil-producing states.<sup>66</sup> In this context, Watts calls the oil complex a “corporate enclave economy” of sorts, characteristic of modernization yet specific to the extractive industry and its strategic importance in this moment in history.

In the early 1990s a body of research by primarily economists and political scientists began charting the relationship between resource-rich countries and economic growth, democracy, and conflict. Sachs and Warner hypothesized a strong association between resource dependency, corruption, and economic performance,<sup>67</sup> and Homer-Dixon sees oil as a declining resource—albeit a strategic one—that will only generate further interstate conflicts,<sup>68</sup> following on this theory, Collier and the World Bank have developed a line of argumentation that uses resource dependency as a central means of understanding rebellion and conflict, especially in Africa. What they have found is that countries with low, and unequally distributed per capita income “have remained dependent on primary commodities ... [and] face dangerously high risks of prolonged

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<sup>66</sup> Ibid., 380.

<sup>67</sup> Jeffrey D. Sachs and Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, Working Paper (National Bureau of Economic Research, December 1995), <http://www.nber.org/papers/w5398>.

<sup>68</sup> Thomas F Homer-Dixon and John I Clarke, “Book Reviews-Environment, Scarcity, and Violence,” *Population and Development Review* 25, no. 3 (1999): 598.

conflict,” particularly when accompanied by the likelihood of predatory behavior on the part of the state or rebel groups.<sup>69</sup>

The petro-state, as Watts refers to oil-rich states, is “itself part of a larger class of political phenomena, in which extractive economies and unearned income dominate state revenues.”<sup>70</sup> Distinguished by a sort of fiscal monopoly and an economic globalization, the politics and management of oil revenues become the heart of the state itself, with oil revenues often accounting for a disproportionate amount of a state’s GDP. Extractive revenues can account for as much as 80 percent of government and export revenues, as in the case of Nigeria. This disparity produces a state scenario with the enormously wealthy on the one hand, and growing inequality and poverty on the other—hence the “paradox of plenty.”

Oil-dependent states are, in spite of their vast resource wealth, some of the most socially unjust and undemocratic of all political economies and every year their lack of oversight and revenue reporting ranks them among the lowest in Transparency International's annual World Corruption Index. “As the proportion of GDP accounted for by oil increases, economic underdevelopment, state corruption, and political violence grow in equal measure.”<sup>71</sup> Rent-seeking behavior multiplies as transparency diminishes, thus compounding problems of accountability, corruption and fraud<sup>72</sup> and leading to the core of rights violations perpetrated by states and companies. It is for this reason that petro-states have come to be seen as suffering from a "resource curse."

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<sup>69</sup> Ian Bannon and Paul Collier, *Natural Resources and Violent Conflict: Options and Actions* (Washington, D.C.: World Bank, 2003).

<sup>70</sup> Michael J Watts, “Righteous Oil?,” 384.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., 386.



Ross offers three explanations for the casual mechanisms of the curse of resource-rich states: there is what he calls the “rentier effect,” where low taxes and high political patronage lessen the push for democracy; the “repression effect,” that suggests direct state control over revenues in order to bankroll military expenditures; and the “modernization effect,” which maintains that the higher-paying and sought after service sector jobs brought about by the extractive industry fail to bring about the social changes that would push for democracy.<sup>73</sup> These three possible suggestions support Watts’ earlier mentioned claim that the oil industry is predominantly an enclave, with limited employment possibilities.

The association between extractive resources and conflicts, human rights violations, and the failure of economic development is clear and certainly important. It is particularly evident when resource-rich states act on “preemptive repression,” that is, repress any protests or insurgencies with violence because they threaten the government’s key resource.<sup>74</sup> But the almost complete invisibility of both the oil and mining companies is especially striking. When the international community focuses solely on the duties of the state, a breakdown of human rights protections emerges; a failure resulting from the “systemic separation between international economic development, human rights enforcement, and the regulation of private players,” which leaves TNCs essentially irresponsible for the adverse effects caused by their activities.<sup>75</sup>

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<sup>73</sup> Michael L. Ross, “Does Oil Hinder Democracy?,” *World Politics* 53, no. 3 (April 1, 2001): 327–328, doi:10.2307/25054153.

<sup>74</sup> Michael J Watts, “Righteous Oil?,” 383.

<sup>75</sup> I. Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” *Buff. Hum. Rts. L. Rev.* 14 (2008): 131.

Halpern posits that, “TNCs have become the primary beneficiaries of trade liberalization but have succeeded in evading strict regulation by virtue of their multinational nature and increased power.” Furthermore, international economic development policies have placed an unequal amount of emphasis on the position of lending and trade institutions such as the World Bank, the International Monetary Fund, and the World Trade Organization, at the expense of the welfare of the state.<sup>76</sup> This reconfiguration of power at the hands of international institutions has created a co-dependent relationship between developing nations and TNCs, with resource-rich states relying heavily on the TNCs to uphold their corrupt regimes and thus contributing to the vicious cycle of the resource curse.

Economic globalization has allowed an alarming number of TNCs to accumulate massive amounts of wealth and power, often times in excess of the host states in which they operate. To put this in perspective, a recent UNESCO report (Source: Steger, M. (2008) *Globalisation: A Very Short Introduction*, 2nd edition, Oxford University Press, Oxford, p. 51.) stated that in 2000—based on a comparison of corporate sales and country GDPs—of the 100 largest economies in the world, 51 were corporations, and only 49 were countries. Furthermore, of the top ten highest grossing corporations, five were from the oil and energy sector.<sup>77</sup> By 2005, nine out of ten were either from the energy or automobile industry, according to a 2007 report put out by the Global Development And Environment Institute. This same publication also reported that, as of

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<sup>76</sup> Ibid., 133–134.

<sup>77</sup> “Corporate Power Facts and Stats,” accessed August 7, 2013, [http://www.unesco.org/education/tlsf/mods/theme\\_c/popups/mod18t04s01.html](http://www.unesco.org/education/tlsf/mods/theme_c/popups/mod18t04s01.html).

2005, the 500 largest firms worldwide had combined income revenues of over 19 trillion dollars, with one-third of these sales coming from the top 50 companies.<sup>78</sup> When positioned in this broader context it is difficult to deny the “power imbalance between the TNC and developing states, both literally and in the sense of effecting political will.”<sup>79</sup> Though the TNC cannot be said to be a passive player or a non-entity in the process,<sup>80</sup> the role of the TNC’s home state, as primary benefactor of trade and commercial policies—cannot be ignored either; this will be explored in closer detail in the section following corporate complicity.

The human rights community first began bringing attention to the increased evidence of corruption and the lack of transparency associated with the dealings between resource-rich states and TNCs in the 1990s, which consequently became a growing concern for international relations and global regulatory agencies. What needs to be stressed here isn’t that equal and perhaps even greater violations of human rights and dignity have not occurred at the hands of the State, but rather that there needs to be more emphasis on the duties and accountability of non-state global players as well as the traditionally powerful state. The international legal system needs to be restructured in a manner that allows it to regulate all actors—state and non-state—that may influence human rights, directly or vis-a-vis their relations with those that do.

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<sup>78</sup> Brian Roach, *Corporate Power in a Global Economy*, Educational Module (Medford, MA: Tufts University Global Development and Environment Institute, 2005), 6, [http://www.economicsnetwork.ac.uk/sites/default/files/Brian%20Roach/Corporate\\_Power\\_in\\_a\\_Global\\_Economy.pdf](http://www.economicsnetwork.ac.uk/sites/default/files/Brian%20Roach/Corporate_Power_in_a_Global_Economy.pdf).

<sup>79</sup> Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” 145.

<sup>80</sup> *Ibid.*

## Corporate Complicity

In many cases the countries that “host” MNCs are ruled by repressive regimes that lack civil and labor laws to protect their citizens, often resulting in human rights violations. Subsequently the MNCs, interested primarily in the “bottom line,” become complacent or active participants in these human rights violations. MNCs that choose to operate within state borders of oppressive regimes with a documented history of human rights abuses should be responsible for upholding international human rights norms and accountable to any violations of existing international treaties and customary laws, which occur as a direct or indirect result of their operations in that country.

Increasingly, a large number of human rights violations that occur in resource-rich countries at the hands of the government can be traced back to a degree of corporate involvement. As Kobrin points out, “the vast majority of corporate rights violations involve complicity, aiding or abetting violations by another actor, most often the host government.”<sup>81</sup> More often than not, that is, the corporation is directly or indirectly involved in the rights violation through its affiliation with a third party such as the state actor. As an example, in the 2004 DRC case, the mining company Anvil supplied company trucks to the militia government, which then used these vehicles to rampage a village and kill multiple civilians. It has been argued that without Anvil’s logistical assistance, the massacre would not have occurred. This is an example of corporate complicity that will be discussed in deeper detail in the case study chapter.

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<sup>81</sup> Stephen J. Kobrin, “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights,” *Business Ethics Quarterly* 19, no. 3 (July 2009): 351.

Florian Wettstein has written extensively on the concept of corporate complicity and its relationship to human rights violations, and specifies four categories that can be broadly distinguished: direct complicity, indirect, beneficial and silent. Of the four, Wettstein denotes silent complicity as of particular importance if we are to understand the new role TNCs play in the global economy and their subsequent responsibilities in respecting human rights in their transnational operations. Furthermore the concept of corporate complicity holds enough importance that it was mandated as one of the primary tasks for John Ruggie to address in his first tenure as United Nations SRSG, and as such is included as one of the key concepts in the Guiding Principles on Business and Human Rights. First however, I will provide a brief explanation of the primary categories of corporate complicity.

Direct complicity as the term implies involves situations where corporations have had a “direct and casual contribution to human rights violations.”<sup>82</sup> Examples of such contributions would include cases where a company knowingly contributes its property, vehicles, or equipment to parties with full knowledge that these resources will be fundamental to specific human rights violations. Indirect complicity can be explained as a situation where though a corporation is not directly supporting a specific human rights violation, its contributions—whether financially or logistically—to a party are indirectly allowing it to commit various human rights violations. This could be something as simple

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<sup>82</sup> Florian Wettstein, “The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy,” *Journal of Business Ethics* 96, no. 1 (February 14, 2010): 36, doi:10.1007/s10551-010-0447-8.

as a corporation paying taxes to an oppressive government, which is then used to fund brutal security forces.<sup>83</sup>

Beneficial complicity is often used interchangeably with indirect complicity, as situations where companies knowingly benefit from human rights violations inflicted by third parties that they have relations with. The concept of silent complicity is slightly more complicated to distinguish in regards to corporate accountability in human rights violations, as this is where the lines between legal and moral responsibility become blurred. Silent complicity denotes situations in which a company can be considered culpable of negatively affecting human rights by knowingly keeping silent about violations that occurred at the hands of an oppressive government with which it has business relations. As is often implied in the international discourse on human rights, sometimes silence can be the greatest offender, and Wettstein concurs, stating that while silent complicity may seem at first to be the most innocent form of complicity, it turns out to be the “one with the most far-reaching implications both in terms of its evasiveness as well as of the responsibilities it gives rise to.”<sup>84</sup>

One of the primary concerns regarding silent complicity is the often legitimizing effect it can have on corrupt and repressive regimes; a company’s chosen silence suggests, at best, an omission of any wrongdoing, and at worst, a silent approval of sorts that these violations of human rights are somehow acceptable. The nature of silent complicity and the fact that a corporation cannot be directly linked to specific violations,

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<sup>83</sup> Ibid.

<sup>84</sup> Ibid., 37.

gives rise for more concern and the need for increased diligence on the part of the international human rights community.

Other forms of complicity can be explicated in clearer “black and white” terms, but silent complicity is more elusive in nature, particularly in legal settings. Thus, the question of moral liability comes into the discussion and its relation to a party’s positive duties. Whereas negative duties imply inaction, or the avoidance of inflicting any harm on others, positive duties imply action, therefore the responsibility to aid or protect victims. As is stated in Ruggie’s Guiding Principles, “most national legislations prohibit complicity in the commission of a crime ... Examples of non-legal complicity could be situations where a business enterprise is seen to benefit from abuses committed by others ...”<sup>85</sup> Given the fact that, to date, regardless of such legislation, no corporation has ever been found guilty for its complicit involvement in a court of law, holding one accountable for silent complicity is even more difficult, even noted as such in the UN’s Global Compact.

Despite the prevalent use of the term today, there remains a considerable amount of ambiguity as to what corporate complicity means in legal terms, and what the boundaries of this concept are. In response to the many questions that have arisen in the international legal community, in 2006 the International Commission of Jurists mandated a panel of eight legal experts to explore the concept more closely and attempt to answer under what circumstances companies could be held legally responsible of complicity in human rights abuses. Their findings were extensive and as such will not be explored in

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<sup>85</sup> Ruggie, “The Corporate Responsibility to Respect Human Rights: An Interpretive Guide,” 5.

great detail; though too late to apply to the Nigeria and DRC cases, their conclusions will surely be relevant to future case studies.

### **The State, the corporation, and the individual: Who is responsible?**

As this chapter's introduction indicated, most often the countries that host extractive corporations are developing, resource-rich countries with poor governance, fragile economies, and widespread corruption, therefore they are often unable to regulate TNC operations, or worse yet unwilling since they are the primary financial beneficiaries. Further exacerbating the problem is the fact that home countries too often are juridically unable or unwilling to intervene, thus leaving TNCs essentially unaccountable when in violation of human rights. How does the international community go about placing duties and obligations upon TNCs in the field of human rights? How do we both recognize the duties and impose responsibility on TNCs for human rights violations as they occur in a sovereign-based system? And what should be the extent of those duties and obligations conceptually?<sup>86</sup>

While it can be argued in international law that all states are under the obligation to respect and promote human rights within their territory, the reality is that in practice only the host or the home state have direct jurisdiction over a TNC's headquarters, since these non-state entities "operate globally through a network of affiliates each of which is incorporated locally and thus a 'corporate citizen' of its host country." Though in respect to human rights violations in the extractive sector, it is the host country that is typically

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<sup>86</sup> Halpern, "Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century," 132.



the perpetrator. As Kobrin breaks it down, each unit of a TNC is incorporated in a single national jurisdiction, and subject to the laws of different states. Therefore one could argue that the obligation of a TNC is to “obey the law of the jurisdiction in which it is incorporated and conversely, that it should not be subject to the law of any other jurisdiction.”<sup>87</sup> It would follow then that the legal human rights obligations of corporations would be limited to those imposed upon it by the state in which it operates.

The traditional Westphalia view dictates that states are the only entities that possess international legal personality and therefore the capacity to have duties and rights. Under customary international law, states have every right to allow foreign corporations within their territory to promote investment and trade.<sup>88</sup> Corporations, as non-state entities, are considered to be actors whose duties are enforceable only by those states who, as the sole legal bodies, impart those rights and obligations upon them; the corporate conduct is dependent then on local laws. Traditionalists who argue that only the state can be responsible for overseeing and regulating TNC activities certainly support this view of the international system as a purely inter-state system. Furthermore, the idea of territoriality limits a state's authority to “acts that take place within its borders or the activities of its nationals abroad,” leaving little incentive to intervene on behalf of human rights abroad, whether directly or through a company’s internal procedures.<sup>89</sup>

Despite the traditional international legal approach of regulating commercial

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<sup>87</sup> Kobrin, “Private Political Authority and Public Responsibility,” 352.

<sup>88</sup> Francesco Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations,” in *Economic Globalisation and Human Rights*, ed. Wolfgang Benedek, K. De Feyter, and Fabrizio Marrella (Cambridge, UK; New York: Cambridge University Press, 2007), 248.

<sup>89</sup> Kobrin, “Private Political Authority and Public Responsibility,” 352.

interactions between different states, Francioni notes that there are some serious flaws that make this approach incompatible with the realities of economic globalization. Perhaps the most serious flaw being that by depending on local laws to protect human rights obligations of TNCs, an “element of relativism” is introduced that is not compatible with the universal principles of human rights, since many states do not ascribe to certain basic rights—particularly in regards, but not limited, to race and gender.<sup>90</sup> This is especially a problem in the extractive sector where governments will enforce harsh labor conditions and even torture on local populations. Lastly, even if home states do abide by universally recognized human rights, they cannot solely guarantee that companies in their territory will do the same. This returns us to the question then, that if a home state is unwilling to intervene, and host state is unable, what options are left to ensure the protection against human rights violations at the hands of TNCs?

With the increased competition amongst states created by the processes of economic globalization, the higher the chances of human rights violations to occur as developing states vie for opportunities to support investment. Therefore they are often apt to turn a “blind eye” to corporations rather than ensure compliance with human rights obligations. We must therefore look to alternative solutions, including the responsibilities of the home state. How does the home state secure compliance with human rights standards of their TNC’s foreign activities? Francioni offers three strong arguments that support the responsibility of the home state in the context of securing human rights standards; the first involves the home state’s preferred position to regulate its TNCs

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<sup>90</sup> Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations,” 249.

through exercising territorial jurisdiction; secondly, following on the state's right to practice extra-territoriality also empowers it to employ those same rights to ensure human rights; lastly, a balance must be reached between the home and host states in respect to exercising their extra-territorial powers to promote human rights.

Despite the transnational nature of business operations, the growth of TNCs is still “responsive to the global strategy and direction localized in the state of origin,” thus placing the state in the preferred position to regulate through exercising territorial jurisdiction.<sup>91</sup> Though international human rights treaties do not require states to exercise extraterritorial jurisdiction in respect to TNC conduct, various governmental committees have begun to strongly encourage this practice by home states as a preventive measure. Stephens also argues that though home country enforcement may hold certain disadvantages, in many situations it may be the best alternative: “given the lack of an effective international regulatory system and the difficulties host countries face when trying to impose standards on the corporations acting within their territory, home country regulation may be the best short-term alternative.”<sup>92</sup>

It is only just that if states do choose to practice principles of extraterritoriality over their corporations' foreign activities to promote investment and export interests, then they should also employ those same powers to ensure universal objective of promoting human rights. It has been suggested that states are reluctant to regulate the operations of their TNCs abroad because such regulations places their TNCs at a competitive disadvantage, instead selectively opting to relinquish their powers, allowing a “vacuum

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<sup>91</sup> Ibid., 260.

<sup>92</sup> Stephens, “Amorality of Profit,” 83.

of sorts for multinational corporations to set their own rules.” The hypocrisy of states is evident in the inconsistent manner in which they apply statutes of extraterritoriality; whereas those that regulate anti-trust, securities and criminal law are consistently exercised, those “with near identical language in the areas of environmental or labor regulation have been denied extraterritorial application.”<sup>93</sup>

One last observation worth noting is that it is important that a balance be reached between the home and host states in respect to their extra-territorial powers to promote human rights. After all, the responsibility to respect and protect human rights, extending to outside territories, is a principle that is accepted in Article 2 of the ICCPR, as well as other regional human rights documents.<sup>94</sup> Although the scope of the responsibility may be territorial, existing human rights treaties extend that responsibility to outside of the territory as well—provided that the state has jurisdiction over the actor.

Economic globalization has produced a shift from a Westphalia, state-centric international system to a multi-state system, fragmenting the once solely powerful political authority, and blurring the distinction between the public and the private sphere. This has further led to an expanded conception of the rights and duties of non-state actors. International human rights law has evolved in the six decades since the Universal Declaration of Human Rights. “The subject-object distinction is not as clear cut as it once was,” thus the scope of international human rights law must expand to the point that both individuals and corporations have duties and rights. The fact that TNCs have certain

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<sup>93</sup> Ibid.

<sup>94</sup> Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations,” 261.

rights under international law signifies the evolution of their role from that of objects to subjects, which in turn would justify their increased obligations.<sup>95</sup> Should we include the obligations of individuals employed by the corporations as well? Are they liable under international law?

The idea of holding individuals responsible for violations of international criminal law is not new, but rather can be traced back to the Nuremberg Trials following World War II, when leading German industrialists were prosecuted for “aiding and abetting the Nazi extermination plan.”<sup>96</sup> The Nuremberg Charter enabled the International Military Tribunal at Nuremberg (IMT)—for the first time—to prosecute individuals for war crimes such as crimes against peace, and crimes against humanity. This was perhaps the greatest legacy of the IMT—the “recognition of *individual* responsibility under international law for the commission of international crimes.”<sup>97</sup> Shortly after the four major allies—the U.S., France, United Kingdom, and the Soviet Union— established the Nuremberg Charter, they agreed upon an amended version of the Charter, known as Control Council Law No. 10. This new law set the legal foundation for a series of military tribunals against war criminals that were not necessarily the “primary” defendants but those that—complicit or otherwise—abetted the crimes, to include the industrialists.<sup>98</sup>

Ultimately it was American prosecutors, with assistance from the British, who

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<sup>95</sup> Kobrin, “Private Political Authority and Public Responsibility,” 353.

<sup>96</sup> Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” 168.

<sup>97</sup> Doreen Lustig, “Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann’s Concept of Behemoth at the Industrialist Trials, The,” *NYU Journal of International Law & Politics* 43 (2010): 969.

<sup>98</sup> *Ibid.*, 971.

took the lead in prosecuting various actors from the industrial sector, one of which was the case of the *United States v. Alfred Krupp*, involving twelve officials from the company Friedrich Krupp AG, which processed metals into war materials, including guns, tanks, and ships, for the Nazi regime. The specific charges filed against Alfred Krupp, heir to the industrial conglomerate, were as follows: Crimes against Peace, for his participation in the planning of wars of aggression in violation of international treaties; Crimes against Humanity, to include the devastation, and exploitation of occupied countries; Crimes against Humanity, for his role in the murder, extermination, enslavement, deportation, imprisonment, and torture of civilians who came under German control; and for Conspiracy to commit crimes against peace.<sup>99</sup> On July 31, 1948 Alfred Krupp and nine other Krupp defendants were convicted of their wartime activities. The corporate heir was sentenced to twelve years imprisonment plus forfeiture of all his assets, his company, and his entire property.<sup>100</sup>

What is important to note about the Nuremberg trials, as Halpern explains, is that they “were not about the behavior of the corporation as a judicial person ... Rather, individual criminal accountability was imposed in limited cases of complicity.”<sup>101</sup> By trying these cases the Nuremberg Tribunals set a precedent for future international criminal tribunals to prosecute non-state actors such as the individual for certain war crimes, as seen with the International Criminal Tribunal of Yugoslavia (ICTY), and the International Criminal Tribunal of Rwanda (ICTR), as well as the establishment of the

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<sup>99</sup> “Alfried Krupp | World War II Database,” *World War II Database*, accessed August 20, 2013, [http://ww2db.com/person\\_bio.php?person\\_id=328](http://ww2db.com/person_bio.php?person_id=328).

<sup>100</sup> Ibid.

<sup>101</sup> Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” 168.

International Criminal Court (ICC).<sup>102</sup> What is perhaps most striking about the conclusions that emerged from the Nuremberg trials, and most pertinent to this paper, is the observation made by Halpern that the tribunals, “by imposing liability on corporate leadership in their individualized capacity for enterprise activity,” closed the breach that had existed between harmful business activity and private, non-state accountability.<sup>103</sup>

Halpern counters the above-noted remark, however, with the real-life observation that the extension of liability to the individual for grave violations of human rights in the contemporary context of TNC activity has thus far proven more useful theoretically than technically. Francioni concurs, noting that despite the legality of such precedents set forth at Nuremberg regarding individual liability as confirmed in the language of the Statute of the ICC, the “transferability of the theory of individual criminal responsibility to the contemporary context of MNCs is intrinsically limited.”<sup>104</sup> One of the obvious difficulties, he notes, is that the threshold of such crimes is too high, i.e., genocide, torture, slavery. However, the more complex legal hurdle involves the considerable discrepancy that still exists between the extensive international human rights norms and stringent international laws that hold individuals criminally liable—leaving little room to prosecute a TNC for human rights abuses perpetrated by a corporate officer.<sup>105</sup> The Nuremberg Trials set forth many important precedents, yet there is still a long road ahead. Until the international community is able to reconcile the individual’s

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<sup>102</sup> Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations,” 251.

<sup>103</sup> Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” 169.

<sup>104</sup> Francioni, “Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations,” 252.

<sup>105</sup> *Ibid.*, 253.

responsibility within the corporate structure the debate will continue.

### **The Individual as Holder of Human Rights**

There has been a lot of discussion pertaining to the responsibility of individuals involved in human rights violations in the corporate setting, and how they should be held legally accountable. However, a growing amount of literature is pointing to the responsibility of individual citizens to recognize their rights and what they are legally entitled to as holders of universal human rights. The more people that are educated at the local level within vulnerable populations, the higher the chance to prevent human rights violations by the TNCs that operate within their communities. It is after all at the local level that human rights abuses occur, and therefore where the “local line of defence needs to be developed ... first and foremost by those that are threatened.”<sup>106</sup> For it is by the individual’s education of, and subsequent access to such rights that a collective action will emerge to empower the local community and prevent further state and TNC violations.

Halpern asserts that what is currently missing from the international human rights framework is the concept of an individual’s “ability to bring claims against the private party in its own right.”<sup>107</sup> Salil Tripathi, of the NGO International Alert, supports this assessment as well. At a 2006 consultation session convened by the SRSG and the Office of the High-Commissioner on Human Rights in Johannesburg, South Africa, he discussed

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<sup>106</sup> Koen De Feyter, “Localising Human Rights,” in *Economic Globalisation and Human Rights*, ed. Wolfgang Benedek, K. DeFeyter, and Fabrizio Marrella (Cambridge, UK; New York: Cambridge University Press, 2007), 76.

<sup>107</sup> Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” 183.



the overabundance of “tools” that have been created to address human rights violations by TNCs (such as the Guiding Principles, Global Compact), but no frameworks to support these tools. To paraphrase Tripathi: we can give the person the tools but they are useless if we do not teach the person how to use them—we need to also give them the instruction booklet.<sup>108</sup>

For victims of human rights abuses, it is often too difficult to access information or the legal expertise to investigate potential causes of action. Furthermore, oftentimes they are not only missing the framework but the knowledge; they are unconscious of the fact that they have certain rights at all. More needs to be done to ensure that victims of corporate human rights abuse have effective avenues to obtain justice.<sup>109</sup> They need first and foremost to receive the education—in order to fully encompass the concept of human rights and what that means for them as individuals. But this need for increased awareness does not only extend to those more susceptible to human rights violations.

Borg, Grech, and Regan discuss the challenge human rights educators face in translating the theoretical comprehension of human rights in the classroom to a more personal understanding. Because to have knowledge of specific rights and conventions is not enough, and can lead to a “disconnect between learned and lived experience ... foster[ing] a situation in which human rights are, ironically, dehumanized.”<sup>110</sup> Awareness

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<sup>108</sup> Sali Tripathi, “International Alert,” in *Innovative Practices at the Company Level* (presented at the The Sub-Saharan Consultation Convened by the Special Representative on the UN Secretary-General on Business and Human Rights and the Office of the High Commissioner on Human Rights, Johannesburg, South Africa: International Alert: Understanding Conflict, Building Peace, 2006), 5.

<sup>109</sup> Oxford Pro Bono Publico (OPBP) Research Team, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, foreword.

<sup>110</sup> Bertrand Borg, Omar Grech, and Colm Regan, “The Self Comes to Know Itself by Retelling Itself: Beliefs, Identities, and Human Rights,” *Beliefs and Values: Understanding the Global Implications of*

and education of human rights are instrumental to the advancement of international human rights standards. Olivier De Schutter, UN Special Rapporteur on the right to food, embodies the importance of individuals seizing ownership of their rights in this statement: “Rights are like a natural language: unless they are practiced and constantly improved, they risk falling into oblivion ... only by invoking our rights shall future violations be prevented.”<sup>111</sup> If we can incorporate a better understanding of the belief systems and values that encapsulate human rights, then we increase the chance that the future directors and CEOs of powerful TNCs will uphold the norms that are expected in the international human rights community, as well as influence the incorporation of those norms into company codes of conduct.

TNCs continue to grow significantly in their economic power and influence in the international legal and political system, accordingly they are also privileged with the rights afforded under that system. “Increasingly functioning as participants in the direct creation, application and enforcement of transnational law,” TNCs must then also be granted the same obligations, and concede to uphold the duties accepted under international law.<sup>112</sup> To demonstrate the necessity of incorporating TNCs as well as individual corporate officers, into the international human rights framework, we need only look into any number of headlines that have appeared internationally over the past two decades. The 1995 executions of nine human rights activists in the Niger Delta and

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*Human Nature* 2, no. 2 (January 1, 2010): 177, <http://bav.ibavi.org/index.php/beliefs-and-values/article/view/153>.

<sup>111</sup> Van Der Plancke and et. al., *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Resource Mechanisms*, foreword.

<sup>112</sup> A.C. Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy,” *Review of International Studies* 27 (2001): 144.

the continued human rights violations suffered by its Ogoni people, and the massacre of nearly one-hundred villagers in the DRC in 2004, were both directly related to the transgressive actions of TNCs. The following chapters will more closely examine each case, what happened, what legal recourses were available to the victims, and what the ultimate outcomes were.

## CHAPTER FOUR

### THE CASE OF SHELL, NIGERIA, AND THE OGO NI NINE

#### The Niger Delta

As extractive TNCs have risen to power, so has their involvement in human rights abuses, though they persistently reject the notion of any participation or complicity in such events. TNCs as non-state actors have largely been able to hide behind the “bystander” defense; that is, claim they have no voice or liability over said abuses, arguing their complicity “does not rise to the level of culpability.”<sup>113</sup> Yet the development of a global economic system has led to the increased exploitation of what Gurr calls the “underutilized human and natural resources,” benefiting some but harming many more. Indigenous people have been the most adversely affected and in response many have mobilized efforts to overcome inequities that restrict their access to natural resource wealth on their land, for which they are culturally as well as materially dependent.<sup>114</sup> The Ogoni region and its people in the Niger Delta of Southern Nigeria has in particular been adversely affected by oil production that has been taking place there since the late 1950s.

Before discussing the case of the Ogoni Nine a brief introduction of Nigeria’s oil

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<sup>113</sup> Jean Martin Amerson, “What’s in a Name - Transnational Corporations as Bystanders Under International Law,” *St. John’s Law Review* 85 (2011): 9.

<sup>114</sup> Ted Robert Gurr, “Minorities, Nationalists, and Islamists: Managing Communal Conflict in the Twenty-first Century,” in *Leashing the Dogs of War: Conflict Management in a Divided World*, ed. Chester A Crocker, F Hampson, and Pamela R Aall (Washington, D.C.: United States Institute of Peace Press, 2007), 135.

history and resource curse is appropriate to put the case in context. Home to approximately 31 million people, the Niger Delta is one of the 10 most important wetland and coastal marine ecosystems in the world. It is also the location of massive oil deposits, which have been extracted for decades by the government of Nigeria and by transnational oil companies. Oil has generated an estimated \$600 billion since the 1960s, yet despite this the majority of the Niger Delta's population lives in poverty, suffering from a crumbling social infrastructure, poverty, and protracted conflict. Their poverty in contrast to the wealth generated by oil, has become one of the world's starkest and most disturbing examples of the "resource curse."<sup>115</sup>

According to a 2009 Amnesty International Report local Ogoni communities have no legal rights to oil and gas reserves in their territory under Nigerian law. The Federal Government allocates permits to oil companies to survey and prospect for oil then grants them full access to the land to extract the oil. The State Department notes that oil revenues, for which the people of the Niger Delta do not benefit at all, have largely fueled Nigeria's economic growth<sup>116</sup> and while the 1999 inauguration of a civilian president ended 16 consecutive years of rule under the Abacha military regime, "it [still] faces formidable challenges in consolidating democratic order."<sup>117</sup>

Resource-rich states have every capacity to either "accommodate or suppress ...

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<sup>115</sup> Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta - Report* (AI Publications: London: Amnesty International, June 30, 2009), 9, <http://www.amnestyusa.org/research/reports/nigeria-petroleum-pollution-and-poverty-in-the-niger-delta-report>.

<sup>116</sup> Ibid.

<sup>117</sup> Bureau of Public Affairs Department Of State. The Office of Website Management, "Nigeria," Press Release|Fact Sheet, *U.S. Department of State*, November 20, 2012, <http://www.state.gov/r/pa/ei/bgn/2836.htm>.

depending on the preferences of the state elites ... Rulers of weaker states face more stark, zero-sum choices when confronted by communal challenges” that threaten their financial security.<sup>118</sup> The Nigerian government, as a major financial beneficiary of oil exploration, continuously negated the aspirations of the Ogoni minority population in the Niger Delta and instead supported the oil production companies, whose activities destroyed the environment, and contributed to mass poverty, oppression, and other human rights violations. When the indigenous Ogoni people protested, the Nigerian military forces were there, ready to protect their interests as well as the oil companies’—namely Shell, who in turn provided logistics and funding to the military, for transportation and weapons.

### **The Ogoni struggle against Shell**

The Movement for the Survival of Ogoni People (MOSOP), founded in 1990 by internationally renowned writer and environmental activist Ken Saro-Wiwa, is a human rights group that advocates through non-violence to stop the repression and exploitation of the Ogoni people and their resources by the oil industry and Nigerian government. Demanding political autonomy for the Ogoni people, Nigeria’s military government largely dismissed MOSOP’s demands. However the Ogoni did not back down and in 1992, in a bold move, MOSOP issued a written statement to Shell and the state-owned Nigerian National Petroleum Corporation demanding a payment of \$6 billion for 40 years of oil exploitation, and threatening mass riots within 30 days if the demand wasn't met.

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<sup>118</sup> Gurr, “‘Minorities, Nationalists, and Islamists: Managing Communal Conflict in the Twenty-first Century’,” 145.

The Nigerian military responded by sending in troops and declaring that demands for self-determination and the disruption of oil production would be considered treason, and punishable by death. Defiant, MOSOP continued with mass rallies, with more than half the Ogoni population publicly supporting the cause by 1993.<sup>119</sup>

As MOSOP's movement grew so too did the Nigerian government's campaign against it, purposely stirring up tribal disagreements between the Ogonis and their neighbors through well-crafted public media campaigns that discredited the movement and falsely attributing various acts of violence to the group. Between July and August of 1993 armed conflict between the Ogonis and the neighboring Andonis left 1,000 Ogonis dead and thousands homeless.<sup>120</sup> This was only one of many so-called "ethnic conflicts" presumably incited by the Nigerian government that occurred between July 1993 and April 1994. These conflicts between communities also caused rising tensions internally between the Ogoni leaders, and by May 1994 conservative Gokana chiefs (Gokana is one of six kingdoms in Ogoniland) were asking its people to withdraw completely from MOSOP, which in turn led to more public rallies from the movement's supporters.

On May 21, 1994 a large mob raided a public rally organized by Ogoni leaders and hacked to death four conservative Gokana chiefs. At the same time armed soldiers in another location were holding Ken Saro-Wiwa, prohibiting him from attending this very same political rally where the murders occurred. Despite this, Saro-Wiwa was arrested the following day under suspicion for his involvement in the murders. In the following

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<sup>119</sup> Center for Constitutional Rights and Earth Rights International, "The Case Against Shell," accessed August 12, 2013, <http://ccrjustice.org/files/4.6.09%20Case%20Against%20Shell%20Factsheet.pdf>.

<sup>120</sup> Richard Boele, *Ogoni: Report of the UNPO Mission to Investigate the Situation of the Ogoni of Nigeria, February 17-26, 1995*, Mission report to the Hague (Nigeria: Unrepresented Nations and Peoples Organization, May 1, 1995), 21, <http://www.unpo.org/images/reports/ogoni1995report.pdf>.

days the Internal Security Task Force, a brutal military occupation force established under General Abacha's regime to control Ogoniland, went into full force operations in search of anyone involved in the murders. Deemed a "punitive attack on the Ogoni community," the police operation raided 18 villages in the first six days, led to the arrest of hundreds of young Ogoni men, and left scores of people dead in its wake.<sup>121</sup>

Eventually eight other MOSOP members were arrested in connection with the killings, and they along with Saro-Wiwa were held incommunicado for nine months before being formally charged with murder. During this time the prisoners were tortured and many of their family members and villagers—including Saro-Wiwa's brother and mother—beaten and illegally detained.<sup>122</sup> On November 10, 1995, only eight days after his sentencing, Ken Saro-Wiwa—writer, activist and humanitarian—was executed by the Nigerian State, along with the other eight Ogoni MOSOP supporters. The executions of the Ogoni Nine, as the defendants became known, alerted the world not only to the destructive environmental impact of the oil industry in the Niger Delta, but the lasting damage to the health, livelihoods, and human rights abuses to the Ogoni people.

It was later proven that none of the Ogoni Nine was in the area at the time of the murders. Instead it was concluded by the international community that the Nigerian government had committed a "judicial murder," silencing these men as a direct result of their involvement in protests against Shell's environmental practices in the Niger Delta. Furthermore, the "special tribunal" was filled with procedural flaws, including the failure

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<sup>121</sup> Ibid., 25.

<sup>122</sup> Aaron Xavier Fellmeth, "Wiwa V. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts," *Yale Human Rights & Development Law Journal* 5 (2002): 245.



of the court to provide any solid evidence against Saro-Wiwa, and “the denial of legal representation and medical attention to the defendants.”<sup>123</sup> As a result, Nigeria was also excluded from the Commonwealth of Nations<sup>124</sup> for three years until a new government replaced the repressive dictatorial regime responsible for Saro-Wiwa’s execution.<sup>125</sup>

As a major financial beneficiary of oil exploration, the Nigerian government had continuously negated the aspirations of the Ogoni minority population in the Niger Delta and instead supported the oil production companies, whose activities have only plagued the region with environmental degradation, mass poverty, oppression, and various other forms of human rights violations. Despite Shell’s deep involvement with the incident, it remained outside the scope of legal liability in the case and refused to speak out against the trial, maintaining an “observer” status. Throughout the ordeal, Shell claimed an apolitical position in the country, saying it would be wrong to intervene with the legal practices of a sovereign state.<sup>126</sup> As an undisputedly powerful presence in Nigeria and close ally of its government, how could Shell claim neutrality in the face of such blatant complicity of human rights abuses?

### **Shell: Complicit, or unwilling Participant?**

Royal Dutch Petroleum/Shell has been using Ogoni land in Nigeria since the 1950s and since that time worked closely with the country’s military regime to suppress

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<sup>123</sup> Ibid.

<sup>124</sup> “The Commonwealth - Commonwealth of Nations,” *Commonwealth of Nations*, accessed August 22, 2013, <http://www.commonwealthofnations.org/commonwealth/>. The Commonwealth is a voluntary association of 54 countries worldwide, whose commonality is they were all once British colonies; and since independence wish to work together to emphasize “on equality has helped the association to play leading roles in decolonisation, combating racism and advancing sustainable development in poor countries.”

<sup>125</sup> Amerson, “What’s in a Name - Transnational Corporations as Bystanders Under International Law,” 25.

<sup>126</sup> Wettstein, “The Duty to Protect,” 40.

any rallies that protested their activities in the region. Citing security concerns, Shell frequently requested assistance from the Nigerian police to protect their investments and operations.<sup>127</sup> And to warrant these security operations, the company would provide financial and logistical support to the police, who in turn used it to raid villages and terrorize Ogoni citizens. However, following the arrests of the Ogoni Nine, Shell remained silent towards the media.

Shell claimed neutrality yet representatives for the company closely followed Saro-Wiwa's hearing and detention, even holding meetings with President Abacha and other Nigerian government officials to discuss the progress of the trial.<sup>128</sup> The Nigerian government, which denied access to all outside media and allowed only interested parties to attend the trial, granted special privilege to Shell attorneys. And it was reported that Brian Anderson, the Director of Shell's Nigerian subsidiary, met with Saro-Wiwa's brother, offering to trade his freedom if he would promise to end protests against the company.<sup>129</sup> Given this "proposal" it seems duplicitous at best that Shell would defend its non-interference, yet its claims of maintaining a strictly observer status is typical of what Amerson calls the "language of the bystander." Shell did not deny the fact that certain fundamental actions occurred, but rather its involvement in any actions that would deem it culpable in any way towards environmental destruction in Ogoni or Saro-Wiwa's execution.<sup>130</sup>

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<sup>127</sup> "Wiwa et Al V. Royal Dutch Petroleum et Al | Center for Constitutional Rights," *Center for Constitutional Rights*, accessed April 8, 2012, <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum>.

<sup>128</sup> Center for Constitutional Rights and Earth Rights International, "The Case Against Shell."

<sup>129</sup> Ibid.

<sup>130</sup> Amerson, "What's in a Name - Transnational Corporations as Bystanders Under International Law," 4.

A 2008 submission prepared for SGSR John Ruggie by the University of Oxford, discusses the obstacles that victims of human rights abuses face in seeking justice and redress in their home states. The authors specifically cite the Shell-Nigeria case as one example of what happens when TNCs operating in developing states hold more power than that state's citizens: "In cases where state military forces provide security to TNC operations and both the state and the TNC are implicated in the abuse, it may be futile and even dangerous for victims to bring claims or to seek prosecution of the corporations."<sup>131</sup> TNCs are often protected by the state itself, and exempted from any accountability, therefore leaving local victims who suffer not only at the hands of the company but also their own government without an adequate forum to seek justice.

A 2012 briefing published by the British oil watchdog, Platform reconfirms the findings of the Oxford report. Based on internal financial data from Shell's security department that was leaked to Platform, the report reveals the extreme lengths to which Shell goes to provide security in the Niger Delta, spending at least \$1 billion on security alone between 2007 and 2009. Almost 40% of this, some \$383 million, was spent in Nigeria alone.<sup>132</sup> Furthermore the report details to exactly which parties Shell's money went, with one-third of its security budget being spent on what it calls "third parties," meaning people not directly employed by Shell but most often government forces that are contracted by the company. In 2008, "over 1,300 government forces, including 600 police and Mobile Police, known locally as the 'kill and go' and 700 soldiers from the

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<sup>131</sup> Oxford Pro Bono Publico (OPBP) Research Team, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, 4.

<sup>132</sup> Ben Amunwa, *Dirty Work: Shell's Security Spending in Nigeria and Beyond*, Briefing (London, UK: Platform, August 2012), 3.

Joint Task Force (JTF), a combination of the army, navy and police,” guarded Shell’s operations in the Niger Delta.<sup>133</sup>

### **Seeking justice**

In 1996 family members of the victims, unable to find justice in Nigeria, sought legal aid from the Center for Constitutional Rights (CCR), a U.S. based legal nonprofit. On November 8<sup>th</sup> of that same year CCR and co-counsel from EarthRight International filed a complaint in the Southern District Court of New York on behalf of the relatives of the murdered activists against Royal Dutch Petroleum and Shell Transport and Trading Company, of which Shell Nigeria is a subsidiary, and the head of its Nigerian operation, Brian Anderson. The case was brought before the U.S. court under the Alien Tort Claims Act (ATCA), and the 1991 Torture Victim Protection Act (TVPA), on the grounds that the defendants were complicit in human rights abuses in Nigeria including execution, crimes against humanity, torture, inhumane treatment, arbitrary arrest, wrongful death, assault and battery, and infliction of emotional distress. For over a decade the case vacillated.

In 1997 District Court Judge Wood granted the defendant’s motion for dismissal on the grounds of *forum non conveniens*, determining it was more appropriate to try the case in England. However, in September 2000, the Second Court of Appeals reversed the District Court’s ruling and determined that the U.S. was a proper forum to continue the trial since the defendant’s held offices in New York. Ultimately in July 2009, after the defendant’s exhausted all legal avenues, including a 2001 Supreme Court ruling that

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<sup>133</sup> Ibid., 6.

denied their *writ of certiorari*, all parties agreed to a \$15.5 million dollar settlement, which in addition to covering the victim's compensation also established a trust for the Ogoni people.<sup>134</sup>

Experts agree that the most important argument in this case was that of the defense's petition for *forum non conveniens*. The appellate court concluded that the TVPA provided an effective forum for torture victims who, having suffered at the hands of their own government, would otherwise not have one. Furthermore, in what attorney Aaron Xavier Fellmeth calls a remarkable statement, the court held that the TVPA:

Convey[s] the message that torture committed under color of law of a foreign nation in violation of international law is our business, as such conduct not only violates the standards of international law but also as a consequence violates our domestic law.<sup>135</sup>

This case demonstrated that TNCs could no longer assume that suits based upon their violations of international law committed abroad, "insofar as US courts have recognized any particular rule of international law, [would] be dismissed for their convenience, even when the inconvenience might be considerable."<sup>136</sup> And though the case clearly demonstrated a deficit in effective mechanisms necessary to prosecute TNCs under international law, it also marked a milestone in the treatment of human rights violations filed under domestic laws and how those laws may be interpreted in consultation with international customary norms.

The *Wiwa v. Royal Dutch/Shell Petroleum Co.* case determined that, so far as human rights law is concerned, sovereign states should closely analyze defendants'

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<sup>134</sup> "Wiwa et Al V. Royal Dutch Petroleum et Al | Center for Constitutional Rights."

<sup>135</sup> Fellmeth, "Wiwa V. Royal Dutch Petroleum Co.," 247.

<sup>136</sup> *Ibid.*, 253.

claims of *forum non conveniens* as a means of protecting themselves against the ATCA. Today, despite the environmental tragedy of the Niger Delta region and unending standoffs, “local claims against industry may be asserted in the domestic and international juridical arena, thus employing liberal rights institutions.”<sup>137</sup> However, the objection of *forum non conveniens* has not been the only hurdle in lawsuits against human rights violations. For the *Wiwa* plaintiffs, the best recourse for justice against their corporate human rights offenders was under the United States’ domestic laws. Though some argue whether the out-of-court settlement really was a win: from the victims’ perspective—for having lost the opportunity for public vindication, and from the human rights legal perspective—because settling out of court avoided setting legal precedent for future cases. Regardless, the *Wiwa* trial “left its mark on law and legal culture ... in this respect the movement for business human rights is the big winner.”<sup>138</sup>

Current international treaty regimes still lack the direct mechanisms necessary to prosecute multinational corporations. Until international hard laws are implemented to complement existing customary norms, the possibility remains for transnational corporations to walk away from their human rights violations unscathed and unaccountable, as was demonstrated in *Kiobel v. Royal Dutch Petroleum*, a separate case filed in New York by CCR in 2002, on behalf of Dr. Barinem Kiobel’s family—one of the Ogoni Nine. Despite the successful *Wiwa* settlement one year earlier, on September 17, 2010 the 2<sup>nd</sup> Circuit Court of Appeals ruled that corporate liability was not applicable

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<sup>137</sup> Anna Zalik, “The Niger Delta: ‘Petro Violence’ and ‘Partnership Development’,” *Review of African Political Economy* 31, no. 101 (2004): 418.

<sup>138</sup> Michael D. Goldhaber, “A Win for *Wiwa*, a Win for Shell, a Win for Corporate Human Rights,” *Law.com*, June 11, 2009, <http://www.law.com/jsp/article.jsp?id=1202431368718&slreturn=20130723103349>.

to the Alien Tort Statute (ATS) because it was not a universally recognized norm of customary international law. Following several petitions and briefs, the Supreme Court agreed to hear the case. On April 17, 2013, the Court unanimously found that a presumption against extraterritorial application of the ATS does exist, and that “Congress is presumed not to intend its statutes to apply outside the United States unless it provides a ‘clear indication’ otherwise.”<sup>139</sup> However the Court’s wording in its decision left room for much interpretation from both sides of the corporate human rights argument.

The *Kiobel* case was not the end of Shell’s problems. Decades of environmental damage resulting from oil spills and gas flares have continued to infringe on the human rights of the people of the Niger Delta, and they are increasingly taking action. On January 30, 2013 a Dutch court found the oil giant guilty of environmental damage and negligence resulting from oil spills near the Ogoni village of Ikot Ada Udo, and therefore “liable of tort negligence.”<sup>140</sup> This is a huge milestone for the international human rights community because it is the first time a transnational corporation has been convicted by a legal court in its home country for offenses carried out by its subsidiaries in the host country. The court in the Hague succeeded where the American courts could not: it found Shell guilty for inflicting damage outside of its home country in a court outside of the country in which it inflicted damage—in this case, an oil spill in Nigeria.

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<sup>139</sup> “Supreme Court Observations: *Kiobel V. Royal Dutch Petroleum & the Future of Alien Tort Litigation - Forbes*,” *Forbes*, April 18, 2013, <http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>.

<sup>140</sup> Andy Rowell, “Legal Precedent Set as Shell Found Guilty in the Hague - Oil Change International,” accessed August 23, 2013, <http://priceofoil.org/2013/01/30/legal-precedent-set-as-shell-found-guilty-in-the-hague/>.

## Conclusion

Today, despite Shell's claims that its issues in the Niger Delta are a thing of the past, locals say nothing has changed. As recently as 2010 there have been documented cases of extra-judicial killing in Ogoniland, and the beating and torture of "casual workers" from nearby communities at the hands of the JTF soldiers.<sup>141</sup> Many claim that pollution is only getting worse, and accuse Shell of "ecocide," having been displaced by oil spills, shorter life expectancies, and no possibilities to earn living wages. A 2011 United Nations Environmental Programme (UNEP) report supports these claims. Based on a two-year assessment (2009-2011) of the environmental and public health impacts of oil contamination in Ogoniland, UNEP concluded that environmental restoration is possible but could take up to 30 years, making it perhaps the world's most extensive and longest environmental clean-up ever.<sup>142</sup> The study also concluded that although there has been no oil production in Ogoniland since 1993, industry best practices have not been applied—including Shell's own internal procedures—thus creating public safety issues such as a deteriorating infrastructure that continues to wreak environmental damage.<sup>143</sup>

Sahli Tripathi of International Alert speaks to the fact that, to address the many concerns surrounding the Niger Delta, the international community has come up with the

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<sup>141</sup> Ben Amunwa, *Counting the Cost: Corporations and Human Rights Abuses in the Niger Delta* (London, UK: Platform, 2011), 16, [http://platformlondon.org/nigeria/Counting\\_the\\_Cost.pdf](http://platformlondon.org/nigeria/Counting_the_Cost.pdf).

<sup>142</sup> United Nations Environment Programme, *Environmental Assessment of Ogoniland*, Environmental Assessment (Nairobi, Kenya: UNEP, 2011), 12, <http://www.unep.org/disastersandconflicts/CountryOperations/Nigeria/EnvironmentalAssessmentofOgonilandreport/tabid/54419/Default.aspx>.

<sup>143</sup> Ibid.



Voluntary Principles for Security and Human Rights,<sup>144</sup> which urge companies to analyze their own security operations and risks in the regions they operate, and to improve on them to ensure that populations' fundamental freedoms and rights are secured. However he concedes that though these initiatives "have collectively helped create a climate in which companies begin addressing their responsibilities ... to achieve meaningful change in behavior," the reality is often too violent and too complicated.<sup>145</sup>

Additional guidance is needed from the international legal community. Existing soft laws, as outlined in the United Nations' Global Compact and Ruggie's Guidelines, are a constructive beginning to the future implementation of universal hard laws that can effectively hold corporations responsible to the principles of transnational accountability. The compliance mechanisms that come out of international non-binding codes are a necessary first step in the direction of transforming international soft laws into legitimate hard laws that can be addressed in international courts and hold corporations accountable for human rights violations.

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<sup>144</sup> "The Voluntary Principles on Security and Human Rights | The Voluntary Principles Are the Only Human Rights Guidelines Designed Specifically for Extractive Sector Companies." accessed August 23, 2013, <http://www.voluntaryprinciples.org/>.

<sup>145</sup> Tripathi, "International Alert," 4.

## CHAPTER FIVE

### ANVIL, THE DRC, AND THE KILWA MASSACRE

#### **The DRC's Copperbelt**

The Democratic Republic of Congo with vast deposits of precious metals, including gold, copper, and cobalt, receives the majority of its income from these minerals since independence from Belgium in 1960.<sup>146</sup> As with most resource-rich countries in the developing world, the DRC has profited little from its natural wealth due to corruption, instability and civil conflict. According to the most recent World Bank reports, of the DRC's population of 70 million, 71 percent live on less than the international poverty line of \$1.25 U.S. dollars per day. The only people to profit have been those associated with the military regimes that have reigned over the country since independence, beginning with the Mobuto regime, which by 1997 had stolen an estimated \$5 billion U.S. dollars from the country's natural resources over its thirty-year reign. The corruption continued with Mobuto's successor Laurent Kabila, whose government began selling mining rights to foreign companies in attempts to raise funds to maintain political

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<sup>146</sup> Joe Bauwens, "Amnesty International Reports on the Mining Industry in Katanga Province, Democratic Republic of Congo.," *Sciency Thoughts*, accessed August 16, 2013, <http://sciencythoughts.blogspot.com/2013/06/amnesty-international-reports-on-mining.html>.

control, and which eventually led to a rebel campaign and the country's second Civil War in a decade.<sup>147</sup>

On March 23, 2013 separatist militias fighting with the army and police killed at least 35 people during an attack in the Katanga region of the Democratic Republic of Congo (DRC) before surrendering the following day at a UN compound. The UN mission to the DRC, MONUSCO, reported the peaceful surrender of 245 members of the Kata Katanga militia group, which means “cut out Katanga” in Swahili—one of several local militias operating in the province.<sup>148</sup> Katanga is just one of many regions in this “resource-cursed” country to witness conflicts over the struggle for control of its copper and gold mines. Rebel movements have been occurring in the region since the country's independence from Belgium, and the March incident is just the latest example of how little the situation has changed since the October 2004 massacre in the small town of Kilwa in the Katanga region, which left over 100 innocent civilians dead, and of which this case study will focus.

Katanga lies on what is known as central Africa's copperbelt, which supplies approximately 10% of the world's copper reserves. The Dikulushi mine, located in the small town of Kilwa in the eastern part of Katanga, is owned by Perth-based Australian company Anvil Mining, and has been described as one of the world's highest-grade copper-silver mines. Anvil mining, though not considered a large extractive company at

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<sup>147</sup> “The Kilwa Incident: An Australian Company Implicated in a Massacre,” *FOUR CORNERS: Pilot Special Edition* (Australia: ABC, June 6, 2005), [http://www.abc.net.au/4corners/special\\_ed/20050620/mac\\_norm.htm](http://www.abc.net.au/4corners/special_ed/20050620/mac_norm.htm).

<sup>148</sup> Michael J. Kavanagh, “Congo Rebel Attack in Katanga Province Leaves 35 Dead, UN Says - Bloomberg,” *Bloomberg News*, March 24, 2013, <http://www.bloomberg.com/news/2013-03-24/congo-rebel-attack-in-katanga-province-leaves-35-dead-un-says.html>.

the international level, was until recently the largest mining company operating out of the DRC. As is often the case with TNCs, Anvil has a complicated jurisdictional background, to say the least, and the part of the enterprise involved in operating the Dikulushi mine consisted “of six separate companies, each one a separate legal person, incorporated in four different jurisdictions.”<sup>149</sup> This is important to the juridical segment of the story.

### **The Kilwa Massacre**

Several international and Congolese NGOs have been active in keeping the Kilwa story alive throughout the years, while advocating for justice for the victims. The majority of this case study relies primarily on the extensive reports made available by two NGOs: the Oxford, England based Rights and Accountability in Development (RAID), the African Association for the Defense of Human Rights (ASADHO), and on the UN mission to the DRC, MONUC (also sometimes referred to as MONUCSO). The following synopsis was taken from a July 2007 report compiled by RAID, and details the events that occurred October 14-16, 2004 leading up to the Kilwa massacre:

In the early morning hours of October 14, 2004, a group of approximately seven people, claiming to belong to a yet unknown rebel movement calling itself the Revolutionary Movement for the Liberation of Katanga [MRLK], attempted to occupy the small town of Kilwa.

Anvil Mining’s security personnel spoke with the rebel leader, Alain Kazadi Makalayi, in Kilwa who assured them that he had no intention of taking over Anvil Mining’s Dikulushi mine.

Regardless of assurances by Makalayi—and Anvil security’s own admission that the group seemed to be nothing more than a small band of disgruntled

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<sup>149</sup> McBeth, “Crushed by an Anvil,” 131.

individuals—between the 14 – 15<sup>th</sup> of October, Anvil Mining evacuated its staff by plane from the Dikulushi mine to the provincial capital, Lubumbashi.

Upon hearing of the insurgency, the Congolese military immediately reacted, sending soldiers in to the area with Anvil's security staff on the return trip to monitor the situation. On October 15<sup>th</sup>, the same day the military attacks began, Anvil representatives issued a press release in Perth asserting that the problem would be resolved within 72 hours.

It was also announced on public radio that, “troops being sent to the town would show no mercy and that anyone who remained would be treated as an insurgent.” At this time almost 90% of the approximately 48,000 citizens of Kilwa, not naïve to their country's history, and afraid of reprisals at the hands of the Congolese military, fled the area to the nearby island of Nshimba, or hid in the bushes.<sup>150</sup>

On the afternoon of October 15, 2004 the 62<sup>nd</sup> brigade of the Congolese armed forces, led by Colonel Adomar Ilunga, rolled into Kilwa in vehicles provided by Anvil. The insurgents gave up almost completely without a fight and within two hours the army had recaptured the town with no casualties. Yet, according to one military soldier who spoke to UN authorities investigating the incident, soldiers were under strict orders to “shoot at anything that moved,”<sup>151</sup> and this is when the killing began. Soldiers performed house-to-house searches, looking for insurgents or sympathizers; anyone suspected was shot on sight. The searches led to the looting of homes and stores, and though only three women reported they were raped, it is suspected many more were, but too afraid to give statements.

There were arbitrary arrests, detention, and summary executions. The majority of the people that were executed were said to be suspected of being rebels, or sympathizers

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<sup>150</sup> African Association for the Defence of Human Rights, *Kilwa Trial: a Denial of Justice*, Analysis (African Association for the Defence of Human Rights, July 17, 2007), 2–3, <http://reliefweb.int/report/democratic-republic-congo/drc-kilwa-trial-denial-justice>.

<sup>151</sup> “The Kilwa Incident: An Australian Company Implicated in a Massacre.”

even though they were unarmed. As documented by the Congolese NGO, African Association for the Defense of Human Rights (ASADHO), several incidents of summary executions were carried out on October 16<sup>th</sup>, one of which included 23 women, children, and elderly who were attempting to flee towards Zambia—once apprehended, they were bound and killed with machine-gun fire. Another incident recounted to authorities involved the apprehension of 47 boys who were then killed by rocket fire alongside the Katanga River. Another mother of four was shot in the head before soldiers stole her clothing, cooking utensils, and beer. These random executions continued in to the next day.<sup>152</sup> Ultimately MONUC investigators concluded that over 100 people were killed on October 15<sup>th</sup> alone, though it was only able to confirm 73 deaths, 28 of which were summary executions.

It should be noted that throughout this research I have encountered various reports as to the total number of insurgents involved—ranging from 6-7 as detailed by RAID and MONUC, to a command of thirty, to upwards of 100 recruits that may have joined after the initial occupation.<sup>153</sup> Though Makalayi made it clear he was not interested in taking over Anvil, he did use the fact that the company had little to no community involvement in order to get the community to rally behind his cause, which was the overthrow of authorities, and the secession of Katanga.<sup>154</sup> Regardless of the discrepancies concerning

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<sup>152</sup> *Report on Human Rights Violations Committed in Kilwa in the Month of October 2004*, Supplement to Human Rights Periodical (ASADHO/Katanga, June 2005), 15, [http://www.abc.net.au/4corners/content/2005/asadho\\_report\\_oct2004.pdf](http://www.abc.net.au/4corners/content/2005/asadho_report_oct2004.pdf).

<sup>153</sup> McBeth, “Crushed by an Anvil,” 131.

<sup>154</sup> “The Kilwa Incident: An Australian Company Implicated in a Massacre.” As explained during interview with Michel Bonnaredaux, Director of UN Radio in Okapi.

the numbers, where the reports do not diverge is in their unanimous view that the Congolese military's response to the minor insurgency was largely disproportionate.

During an interview with ABC reporter Sally Neighbour, for the program Four Corners, Kemal Saiki, a MONUC spokesman, said: "It is not to belittle this incident but in the general picture of chaos and instability and the war[s] that took place in the Congo, [the insurgency] is a very minor incident."<sup>155</sup> In the same segment Neighbour posed the question of why then did the government respond so harshly to UN Radio's Bonnardeaux, who replied that initially the General in charge of that region wasn't very worried, but he later received a call from the presidency "telling him to quell the rebellion, to quash the rebellion in Kilwa."<sup>156</sup> Ultimately, money was the bottom line, and whatever financial interest Anvil had was also in the interest of both the provincial and country authorities—it was imperative that the mine start operating again to generate income.

A large number of UN officials investigating the incident and other observers concur that more powerful players were involved with the incident. MONUC reported that the insurrection was "orchestrated by fewer than 10 people ... naive and poorly equipped," and that despite ambiguities regarding the identity of the initiators of the Kilwa insurrection, "serious suspicions indicate that high-ranking military officers could be involved."<sup>157</sup> In his own research, McBeth restates these suspicions, citing another

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<sup>155</sup> Ibid., interview.

<sup>156</sup> Ibid.

<sup>157</sup> *Conclusions of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004*, MONUC-Kinshasa (United Nations Organization Mission in the Democratic Republic of Congo, October 2004), 2, 11, [http://raid-uk.org/docs/Kilwa\\_Trial/MONUC\\_report\\_oct05\\_eng\\_translated\\_by\\_RAID.pdf](http://raid-uk.org/docs/Kilwa_Trial/MONUC_report_oct05_eng_translated_by_RAID.pdf).

Africa report that suggested to the majority of outside observers—based on the evidence—that the MRLK members were “set up as pawns in a power play by Congolese politicians ... encouraging the insurrection, only to move in and crush it.”<sup>158</sup> So what was Anvil’s role in all of this, and what was its relationship with the government?

### **Anvil Mining and the Kabila regime**

Anvil Mining is an Australian company headquartered in Melbourne, incorporated in Canada, and listed on the Toronto stock exchange. Its operations are primarily in Australia and the DRC, with one operation in Laos. Operating in the DRC since 2002, Anvil was the largest copper-producing company in the region until recently; though despite the 2004 Kilwa incident its main operations continue to be in the region of Katanga in a large copper mine in Kinsevere, a rural area close to the provincial capital Lubumbashi. The numerous countries involved in this story exemplify the complexity in which TNCs run their operations worldwide. The Dikulushi mine—where the story began—was operated by Anvil Mining Congo SARL, which is incorporated in the DRC, and of which Anvil Mining Holdings Limited, incorporated in the United Kingdom, owns ninety percent. The U.K. company is a wholly owned subsidiary of Anvil Mining Management, incorporated in Australia, which is, in turn, a wholly owned subsidiary of Anvil Mining Limited, incorporated in Canada.<sup>159</sup>

There are various inconsistencies regarding Anvil’s involvement in the 2004 Kilwa human rights abuses carried out by the Congolese army (FARDC). What is certain

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<sup>158</sup> McBeth, “Crushed by an Anvil,” 132. This quote was taken from the International Crisis Group, *Katanga: The Congo's Forgotten Crisis*, 103 AFRICA REPORT 10 (2006).

<sup>159</sup> *Ibid.*, 130.



is that Congolese soldiers used Anvil's vehicles—including airplanes—to evacuate its employees then to bring in troops, and trucks to transport looted goods and corpses. Anvil also admitted its role in providing food, tents, and money to Congolese soldiers during the operation.<sup>160</sup> However, as tensions rose and the incident began receiving international attention thanks in large part to the Australian news program, Four Corners' story on the case, Anvil began changing its position. Anvil CEO Bill Turner, who in his interview with Sally Neighbour initially shrugged off the insurgency as nothing more than a bunch of "rag tag" rebels wearing sandals, readily admitted providing equipment to the army. Yet once pressured regarding Anvil's hand in the human rights abuses that followed, his story shifted from one of voluntary aid to one of little choice, claiming that the army requisitioned Anvil's vehicles.

Reminiscent of Shell's defense in the Nigeria-Ogoni case, Anvil seemed to be voicing the role of innocent bystander, as a company that maintained its obligation to remain uninvolved in the legal practices of a sovereign state. McBeth cites an Anvil document released shortly following the Four Corners documentary, which defended its actions as follows:

It is true that Anvil Mining, at the request of Congolese government, gave some of its vehicles to be used by the Congolese Armed Forces (FARDC) for transport. The Company had no choice because the instruction was in accordance with the Congolese Law No 112/FP et No 170/AIMO of May 15, 1942. This sort of activity is not new ... this type of thing happens all over the world during times of force majeure or times of war.<sup>161</sup>

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<sup>160</sup> Tanja A. Börzel and Jana Hönke, *From Compliance to Practice: Mining Companies and the Voluntary Principles on Security and Human Rights in the Democratic Republic of Congo*, Governance in Areas of Limited Statehood, SFB-Governance Working Paper Series (Berlin: German Research Foundation, 2012), 16, <http://edoc.vifapol.de/opus/volltexte/2012/3600/>.

<sup>161</sup> McBeth, "Crushed by an Anvil," 134. Taken from excerpt of an August 2005 petition released by Anvil.

Yet the connections that were uncovered between Anvil and several key DRC political figures, including the President, could not be denied, evoking more doubt in the minds of outside observers as to the true nature of Anvil's involvement with the Congolese army and the Kilwa incident.

To begin, President Kabila is from the region of Katanga, making it an important stronghold for him, and where he pulled most of the money he needed to govern—his primary power base, politically and economically. Katumba Mwanke, a corrupt politician named in a UN report as a key player in a multi-million dollar mineral theft, was part of the inner circle of the Kabila clan, and the governor of Katanga. He was the person mineral companies would negotiate with and make deals with for the exploitation of mineral resources in the part of Katanga controlled by the Kabila government.

Despite CEO Bill Turner's denial of receiving any assistance in getting mining rights in the region it was later proven that, in fact, Katumba Mwanke was a founding board member of Anvil subsidiary, Anvil Mining Congo; even named as a director in the minutes of the company's first board meeting in November, 2001, as well as future ones. Bill Turner was the chair at every board meeting.<sup>162</sup> Eugene Diomi Ndongala, a former DRC minister of mining explained that it was Mwanke who promoted Anvil Mining and negotiated the company's interests through his contacts and relations. Anvil Mining was even able to reach an agreement with the government—an agreement facilitated by Mwanke—that exempted it from paying any taxes in relation to its mining exploitation.

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<sup>162</sup> “The Kilwa Incident: An Australian Company Implicated in a Massacre.”

There is nothing particularly remarkable about Mwanke or Kabila, nor is there anything spectacular about a small Australian mining company making it big in the DRC. But the deceptive relationship between Anvil and the military regime makes the company's denial of any political or economic connections with the government that much more incredulous. Despite Anvil's continuous denial of any wrongdoing and the Congolese government's attempts to protect Anvil, following the Four Corners broadcast and growing pressure from the international community, the DRC military authorities filed formal charges against seven military personnel and three Anvil employees in October 2006. Though Congo is not a party to the Statute, Canada and Australia are, and as such the ICC would have jurisdiction over any nationals involved in the crimes. Anvil's cooperation with the military authorities could be viewed as legal grounds for prosecution under article 25 of the ICC statute, which addresses individual criminal liability in crimes against humanity or war crimes.

## **Conclusion**

The seven DRC military personnel, including the Colonel in charge of raiding Kilwa, Adémar Ilunga, were charged with war crimes as outlined in Article 8 of the Roma Statute; whereas the three Anvil employees—one Canadian and two South Africans—were accused of complicity in the crimes, and charged with aiding and abetting the FARDC in their war crimes.<sup>163</sup> The prosecution's goal against the Anvil employees was to focus on their failure to demand the return of their company vehicles "once it had become apparent that they were being used in the commission of serious

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<sup>163</sup> Börzel and Hönke, *From Compliance to Practice*, 15.

crimes and human rights violations.”<sup>164</sup> Unfortunately the trial was flawed from the beginning by what many have called procedural deficiencies.

On June 28, 2007, the Military Court in Katanga acquitted the Anvil employees and five of the seven military personnel—Ilunga and one other soldier were found guilty and sentenced on charges of torture and murder of two men in the neighboring town of Pweto.<sup>165</sup> As to the military’s role, the court ruled that most of the people that were killed in Kilwa were part of the rebel group and died as a result of their clashes with the Congolese army. The Court also did not accept that the army had carried out “extrajudicial executions,” despite the evidence presented by UN human rights investigators of a mass grave, which it ruled was simply a cemetery.<sup>166</sup> Furthermore, the tribunal sided with Anvil’s claims that the company’s vehicles had been requisitioned; based on this and lack of further evidence the three employees were acquitted of all charges.

Patricia Feeney, Executive Director of RAID, cited a 2010 UN report that said that although the Kilwa case demonstrates the continued difficulty in proving private corporations legally culpable for the violations of international human rights and humanitarian law, it also showed that companies can be held accountable by “taking action internationally.”<sup>167</sup> International criminal attorney, Joseph Rikhof concurs stating that though “difficult for international institutions to hold corporations themselves

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<sup>164</sup> Patricia Feeney, “Long Road to Justice: Anvil Mining and the Kilwa Massacre,” *OSISA: Open Society Initiative for Southern Africa*, March 7, 2012, [http://www.osisa.org/sites/default/files/long\\_road\\_to\\_justice-patricia\\_feeney.pdf](http://www.osisa.org/sites/default/files/long_road_to_justice-patricia_feeney.pdf).

<sup>165</sup> McBeth, “Crushed by an Anvil,” 19.

<sup>166</sup> Feeney, “Long Road to Justice: Anvil Mining and the Kilwa Massacre.”

<sup>167</sup> *Ibid.*

responsible for breaches of international criminal law it is clear that human actors representing such corporations are not immune from the reaches of this area of the law.”<sup>168</sup>

Similar to the Nigeria case, the Kilwa victims realized they would never receive justice in the Congolese courts, and took their case outside the DRC. In 2010 the Canadian Association against Impunity (CAAI) filed a class action suit in Montreal against Anvil, on behalf of all affected by the 2004 Kilwa attack. Anvil, though incorporated in Canada and traded on the Toronto Stock Exchange, appealed, citing that Canada was not the best forum to try the case. In April 2011 a Judge overruled that appeal, but in January of 2012 an appeal Court sided with the company and ruled the case should not be heard in Quebec.<sup>169</sup>

The plaintiffs continued their fight. Adèle Mwayuma lost both her sons in the massacre stating: “All our attempts to seek justice have been fruitless ... Canada is my only hope for holding someone responsible for the murder of my children.”<sup>170</sup> On March 26, 2012 the CAAI filed an application with the Supreme Court of Canada appealing the Quebec Court of Appeal’s dismissal of the case against Anvil, and asking the Court to determine whether the appeal court’s interpretation of Quebec’s jurisdiction was unduly

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<sup>168</sup> Joseph Rikhof, “Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity,” *Criminal Law Forum* 20, no. 1 (February 19, 2009): 41, doi:10.1007/s10609-008-9092-7.

<sup>169</sup> Feeney, “Long Road to Justice: Anvil Mining and the Kilwa Massacre.”

<sup>170</sup> “Congolese Victims’ Pursuit of Justice Against Canadian Company Goes to Supreme Court | Global Witness,” accessed August 18, 2013, <http://www.globalwitness.org/library/congolese-victims%E2%80%99-pursuit-justice-against-canadian-company-goes-supreme-court>.

restrictive, thus ignoring evidence that indicated there were no other countries in which the victims could seek justice.<sup>171</sup>

Eight years after the legal battle began, there is still no closure for the victims of the Kilwa massacre, as the courts continue battling it out. But the case has demonstrated that extractive TNCs are no longer untouchable and they can and will be held to account not only in the international public court of approval, but in the legal system. Increasingly victims are seeking redress and justice outside of their own country's borders. Canada has little experience trying human rights cases that involve TNCs, and the Supreme Court's decision will be paramount to how future human rights cases involving Canadian companies are handled. Unfortunately for the victims, on November 1, 2012 the Canadian Supreme Court dismissed the CAAI's application for leave to appeal. Representatives for CAAI pointed out that the appeal was reviewed based on a technical legal issue, and neither Court considered the facts of the case; therefore their decision to dismiss the appeal does not clear Anvil Mining. The problem remains that as of this writing advocates and attorneys for the victims have not been able to find an alternative legal avenue to pursue.

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<sup>171</sup> "No Justice in Canada for Congolese Massacre Victims as Canada's Supreme Court Dismisses Leave to Appeal in Case Against Anvil Mining | Global Witness," *Global Witness*, November 1, 2012, <http://www.globalwitness.org/library/no-justice-canada-congolese-massacre-victims-canada%E2%80%99s-supreme-court-dismisses-leave-appeal>.

## CHAPTER SIX

### SUMMARY OF FINDINGS

#### **National Legal Systems**

The Nigeria and DRC cases occurred ten years apart, and though similar in many ways, my hypothesis was that the lapse of time between each of the events would have allowed sufficient opportunity for the improvement of human rights mechanisms in the business and human rights community towards holding TNCs accountable for human rights abuses. Yet even acknowledging the fact that my findings were limited to two case studies, my research suggests that although there have been positive outcomes in isolated cases, there is still a substantial gap between rhetoric and reality, leaving procedural discrepancies in the international legal system's methods, and uncertainty for victims as to how to move forward to seek justice and redress.

Both cases shared scenarios seen all too commonly in Africa—an extractive TNC operating in a poor developing country, effectively disregarding the negative effects its operations have on the local population and their environment. However, the conditions of each case were specific, in so far as the relationships that existed between each corporation, its home government, and the host state in which it operated. My research demonstrates that Shell and Anvil had close relationships with their host governments; power relationships which ultimately failed to protect the local populations and instead

led to the blatant disregard of human rights.

There still exists a complicated web of social, economic, and governmental problems that allows human rights violations to continue in the transnational corporate activities of the extractive sector. My research in the two Africa cases, however, identified several key areas that must be addressed in order to move forward in the advancement of human rights in the international business community. To summarize, the major challenges may be précised as follows:

- i. There is a lack of legal enforcement pertaining to the rules of territoriality—both in the national arena and international—and the inconsistencies between nations on this issue continue to leave substantial breaches in effective jurisdiction.
- ii. Efforts within the international community to enforce regulatory mechanisms and impose sanctions when international laws are not observed remain disjointed—including non-legally binding Codes of Conduct agreed to by TNCs.
- iii. Lastly, and perhaps the most difficult problem to address, is the culture of corruption and impunity that exists in so many resource-rich states, which only counters intergovernmental efforts to improve TNC conduct.

The first problem that needs to be addressed is the question of how states should apply territorial jurisdiction—a recurring theme in this research. If we are to examine the deficiencies that exist in the current international legal system we need to first begin at the national level, we will never be able to move forward without first establishing clearly defined guidelines for TNCs operating outside of the territorial jurisdiction of their home state. Most nations have legal dominion over their companies' activities—



whether operating within their territorial borders or outside—but they often choose not to interfere if that company is operating as a guest in another country, opting rather to “apply the laws of that country to [any] claim[s].”<sup>172</sup> Stephens asserts that the United States has always been more preemptive in addressing issues that arise in other states, which helps explain why many cases such as *Wiwa v. Shell* have been brought to the U.S. through legal avenues such as the TVPA and the ATS. However, together with countries such as Britain and Australia, which have similar tort laws, none have to date been very successful in prosecuting corporate entities under the privilege of extraterritoriality—one of the biggest hurdles being the defendants’ argument of *forum non conveniens* as argued in the *Wiwa v. Shell* and *Kiobel v. Shell* cases, as well as *CAAI v. Anvil*.

The inconsistencies among national legal systems are exemplified in these three cases; in the United States, the defendants lost their argument to dismiss on the basis of *forum non conveniens* in the *Wiwa* case, whereas they won that battle in the *Kiobel* case. The same argument occurred in the Canadian *CAAI v. Anvil* case, when the Quebec Court dismissed the suit based on *forum non conveniens*, and the Supreme Court ultimately denied the plaintiff’s appeal. As for the possibility of legal recourse against Anvil in Australia, in August 2007 the Australian Federal Police (AFP) closed an inquiry that had been initiated by the Australian Minister of Foreign Affairs in 2005, to investigate the role of Anvil Mining and its staff in the October 2004 Kilwa events.<sup>173</sup> This is partly due to the fact that Australia does not have “a systematic pattern of incorporating the

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<sup>172</sup> Stephens, “Amorality of Profit,” 83.

<sup>173</sup> “The Kilwa Appeal - A Travesty of Justice,” *Rights & Accountability in Development (RAID)*, May 5, 2008, Press release, 6.

provisions of international human rights treaties which it has ratified into domestic law,” leaving a disjointed range of legal instruments and customary laws that are difficult to interpret into the language of human rights law.<sup>174</sup>

In her 2002 article, Stephens argued that national laws were not well-structured to regulate TNC operations, which by their very definition intersect many countries, often leaving domestic judicial systems “unable to obtain jurisdiction over the piece of the multinational that actually sets human rights policies and that has the resources to satisfy a judgment.”<sup>175</sup> The same still holds true today, confirming the need for international standards in which to apply rules of jurisdiction that in so doing will also increase the protection of human rights. A coordinated international effort to provide victims easier recourse in which to litigate human rights claims would help enforce the duties of TNCs to respect and protect human rights.<sup>176</sup>

## **The International System**

Speaking to the problematic structural issues that exist within the international system, Kobrin asserts, “The lack of international *jurisdiction* to try a corporation does not mean that it does not have international legal *obligations*.”<sup>177</sup> A corporation’s operational structure, how it is managed and the authoritative power of those that manage it, all assume certain implications for the rules of extraterritoriality—inherently important to the process of imposing human rights obligations on TNCs in their home countries.

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<sup>174</sup> Oxford Pro Bono Publico (OPBP) Research Team, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, 9.

<sup>175</sup> Stephens, “Amorality of Profit,” 44.

<sup>176</sup> *Ibid.* 43.

<sup>177</sup> Kobrin, “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights,” 357.

Yet the discriminatory use of extraterritoriality should not be a barrier to holding transnational firms responsible for human rights violations.

I discussed in Chapter One how our international system continues to operate within the outdated and state-centered Westphalia ideology, which would work if economic activity was maintained within sovereign state borders. But this is not the reality of today's competitive globalized economy; rather it consists of transnational flows of trade and investment and, as such, emerging institutions—governmental and non—must be “developed to deal with transnational firms' human rights violations ... the increasing ambiguity of borders and jurisdiction; and the blurring of the line between the public and private spheres.”<sup>178</sup> To date, the international community has failed in its approach to corporate accountability. The international political and legal system must be restructured to operate more efficiently between sovereign states, NGOs, and intergovernmental organizations, such as the United Nations, the OECD, and the ILO in order to strengthen existing human rights norms.

Chris Alben-Lackey, a senior researcher for the business and human rights division of Human Rights Watch, reports on some of the major areas where we have fallen short in holding TNCs accountable for human rights violations. While the most recent UN-backed Guiding Principles demonstrate a marked improvement in some areas, Alben-Lackey critiques that they also highlight the “failures of the current approach to business and human rights issues ... driven by weak government action and undue

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<sup>178</sup> Ibid.

deference to the prerogatives of businesses.”<sup>179</sup> The problem remains that the Guiding Principles, as with most human rights mechanisms, are voluntary.

It has been demonstrated repeatedly that so long as companies are not required to abide by certain rules there is always the probability that they won't. Certainly bad publicity by NGOs, and “naming and shaming” methods used by IGOs such as the OECD and Global Compact can deter companies from poor behavior, but it is not guarantee enough where human rights are concerned. Furthermore, TNCs operating in countries overrun by corrupt governments, poor infrastructure and weak economies essentially have free reign, “standing in for absentee governments.” This lack of oversight by host governments and TNCs leads back to the argument for extraterritorial oversight and regulation. Home governments should be held responsible to ensure that their businesses “carry out human rights due diligence activity ...not only is this responsible policy, but it is supported by emerging norms of international law.”<sup>180</sup>

External codes of conduct prepared by international organizations, including the OECD's Guiding Principles and the ILO's Tripartite Declaration, have demonstrated low efficiency levels due to their voluntary nature as “soft law” instruments. Both instruments have proven to have significant implementation problems.<sup>181</sup> The principles outlined in the OECD Guidelines reflect the Westphalian standard of non-intervention, even noting, “the subsidiaries of TNCs are subject to the laws of the countries in which they

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<sup>179</sup> Christopher Albin-Lackey, “Without Rules: A Failed Approach to Corporate Accountability,” *Human Rights Watch: World Report 2013*, 31. <http://www.hrw.org/world-report/2013/essays/without-rules>.

<sup>180</sup> *Ibid.*, 35.

<sup>181</sup> Perulli, “Globalisation and Social Rights,” 124.

operate;”<sup>182</sup> consequently although allegations of non-compliance have been on the steady rise, effective government responses have remained low. Reporting mechanisms are ineffectual, with the contact points established for each member country to hear complaints regarding a company’s activities remaining “quite weak and non-adjudicatory.”<sup>183</sup> Interestingly, neither Nigeria nor the DRC are members of OECD, but more importantly the United States, Australia, and Canada are, which in theory should have allowed for closer scrutiny of Shell and Anvil’s activities.

The ILO Convention, despite its normative actions requiring that all member states respect the universal application of its core labor standards, which as Perulli notes, are “rather useful to identify universally recognized social standards,” remains largely ineffective.<sup>184</sup> As has been mentioned throughout this paper, a gap exists here too—a gap between national labor laws and international exchanges. Perulli explains, institutions such as the ILO need to encompass the transnational community in order to merge the minimum standards of labor regulations across borders. Today’s globalized economy demands a transformation of the national and international systems in order to effectively balance and distribute power, “which until the present-day has been mastered [only] by nation-states.”<sup>185</sup>

A sudden influx of reports in the 1990s detailing the negative impacts of TNC operations and their link to human rights violations, largely beginning with Shell's dealings in Nigeria, launched a number of new initiatives including the UN-backed

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<sup>182</sup> Kobrin, “Private Political Authority and Public Responsibility,” 361.

<sup>183</sup> Albin-Lackey, “Without Rules: A Failed Approach to Corporate Accountability,” 10.

<sup>184</sup> Perulli, “Globalisation and Social Rights,” 128.

<sup>185</sup> *Ibid.*, 98.

Global Compact. Though still evolving, the Compact's efficacy is questionable: its inclusive nature is reflected in its vague recommendations, thus relying primarily on the "priorities of the stakeholders involved;" and many of the actions that have been proposed by its working groups such as the Transparency Working Group, are not "part of the principles that companies must endorse."<sup>186</sup> It is not surprising then that an initiative such as Global Compact would have essentially zero impact in a case such as Anvil in the DRC (GC was not yet in existence in 1994 to apply to the Nigeria case), where the company's allegiance was clearly demonstrated by its alliance with government authorities, and its complicity and inaction following the military's abuses. Furthermore, the NGO community has gone so far as to indicate Global Compact's ineffectiveness is due in large part to "blue washing" corporate activities, that is to say—exploiting its authority as an instrument of the United Nations for public relations purposes.<sup>187</sup>

### **International Human Rights Mechanisms and the DRC**

The failure of the Congolese justice system in the Kilwa events led ASADHO, Global Witness and RAID to call on the Canadian government to prosecute against their nationals named in the trial, and against Anvil Mining as a corporate entity in both Canada and Australia. As signatories to the Rome Statute, the governments of Australia and Canada made a commitment to "investigating and prosecuting nationals who commit or are complicit in international crimes committed in foreign jurisdictions."<sup>188</sup> However,

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<sup>186</sup> Swanson, Oldgard, and Lunde, "Who Gets the Money? Reporting Resource Revenues," 70.

<sup>187</sup> Kobrin, "Private Political Authority and Public Responsibility," 362.

<sup>188</sup> "The Kilwa Appeal - A Travesty of Justice."

the failure of both governments to follow through demonstrates the need for clearer national legislation, as well as a stronger commitment by the international community to follow through with whatever necessary means available by legally binding “hard laws.” Furthermore States that have ratified the ICESCR, are legally bound to respect Article 3, which states that Parties to the Covenant “undertake to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights set forth in the present Covenant.”<sup>189</sup>

An alternative mechanism to addressing the Anvil-DRC events, and directly related to the contractual duty to respect ESC rights, is the OECD Guidelines, which address that member states are responsible for their citizens’ extraterritorial violations of said Guidelines, and therefore can be held accountable for monitoring the extraterritorial business actions of their citizens.<sup>190</sup> Pertinent to the extractive activities in the DRC, home governments must assume their equal share of responsibility, and if they do not hold their citizens “liable for violations, they too, are complicit in the violations of ESC rights.”<sup>191</sup> The concept of contractual duty could be ascribed to international human rights law in order to hold states and corporate entities punishable for the jurisdictional failures to respect human rights.<sup>192</sup> Instead what happens all too often is, rather than focusing on enforcing accountability to the UN’s guiding principles, the system overwhelmingly focuses on the agenda of member states—or powerful extractive TNCs.

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<sup>189</sup> United Nations General Assembly, “International Covenant on Economic, Social and Cultural Rights,” January 3, 1976.

<sup>190</sup> Howland, “Multi-State Responsibility for Extraterritorial Violations of Economic, Social and Cultural Rights,” 393.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

A 2008 Oxford Report clearly identifies the DRC problem as such:

DRC law contains, on paper, a number of human rights protections which might be invoked by victims of corporate human rights abuse ... Despite these formal protections, once one examines the situation on the ground in the DRC, it becomes apparent that enforcing these protections is expensive, time consuming and, ultimately, subject to the whims of a corrupt and under-resourced judiciary ...<sup>193</sup>

### **International Human Rights Mechanisms and Nigeria**

The Nigerian government has always chosen to focus on the logistical and environmental issues as they pertain to the extractive industry rather than having much to say at all about socio-economic issues. As already alluded to in the DRC case, as a member to the ICESCR, the Nigerian government should be held accountable to respect and protect the rights outlined in Article 3 of the Convention, yet the Ogoni community of the Niger Delta has rarely seen any government intervention to protect their human rights. The international outrage that followed the execution of Saro-Wiwa and the Ogoni Nine led to closer scrutinization of the plight of the Niger Delta community and the Nigerian government's actions—or lack thereof. Addressing the Ogoni's plight, ECOSOC reiterated the “importance of information in relation to the rights to health and water” to the Nigerian state. Furthermore in 2002 the African Commission, citing Articles 16 and 24 of the African Charter, held that:

These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights ... The right to a general satisfactory environment or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It obliges the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and

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<sup>193</sup> Oxford Pro Bono Publico (OPBP) Research Team, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, 64.



use of natural resources.<sup>194</sup>

Yet as of a 2009 Amnesty International report, the government of Nigeria has yet to implement the majority of recommendations given by the African Commission.

This blatant disregard to protect its own citizens, both during the 1994 Shell incident and after, constitutes a clear violation by the state of its duties under international law.<sup>195</sup> This perpetual problem can be attributed in large part to the lack of sanctions and penalties that should be imposed upon both state and non-state actors for violations of human rights law, but rarely are. “A culture of impunity has been reinforced for oil companies in the Niger Delta because of a lack of any adequate sanctions for bad practice that damages human rights.”<sup>196</sup>

This indifference to the law is also exacerbated by the rampant corruption within the Nigerian government. Another recommendation of the 2002 African Commission was to create independent oversight of the oil industry. The government not only ignored this suggestion but also instead assigned regulatory powers to the Department of Petroleum resources and the Ministry of Energy, creating a fundamental conflict of interest. Furthermore, Amnesty explains in its report that this leaves State Ministries with limited power, and the inability to enforce state level regulations for the oil industry.<sup>197</sup> When the primary regulator of the oil industry is itself a major financial recipient of that industry’s projects, the legal system is further delegitimized. The disparity gap found in petro-states,

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<sup>194</sup> “The Social and Economic Rights Action Center for Economic and Social Rights V. Nigeria, African Commission on Human and Peoples’ Rights, Comm. No. 155/96, (2001).,” *University of Minnesota Human Rights Library*, para. 53-54, accessed August 29, 2013, <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>.

<sup>195</sup> Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta - Report*, 49.

<sup>196</sup> *Ibid.*, 52.

<sup>197</sup> *Ibid.*, 43.

between the enormously wealthy on the one hand and growing inequality and poverty on the other will never lessen until existing international mechanisms are reorganized to effectively address and monitor extractive operations and government spending.

## **Recommendations**

One instrument, which could prove useful in ongoing intergovernmental efforts to combat corruption, would be the OECD's Anti-Bribery Convention, which requires the criminalization of "bribery of foreign public officials, no matter where in the world it occurs." The goal is that companies will respond to these anti-corruption laws by enforcing strict programs to ensure they are fulfilling their legal responsibilities, similar to those that the Guiding Principles promote.<sup>198</sup> Francioni discusses the progressive actions of the OECD towards a more balanced system of allocating human rights responsibilities to TNCs under international law. In 2000, the Organization set out additional principles in its Guidelines that outline corporate responsibilities to respect the human rights of citizens affected by their operations in the host countries. However, the language used is still extremely cautious insofar as introducing the "revolutionary concept that corporations are fully independent subjects of international law."<sup>199</sup>

In my literature review I discussed the problem of international economic development policies placing an unequal amount of emphasis on the position of lending and trade institutions such as the World Bank and the International Monetary Fund, at the expense of the welfare of the state. Policies surrounding trade liberalization, privatization

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<sup>198</sup> Albin-Lackey, "Without Rules: A Failed Approach to Corporate Accountability," 9-10.

<sup>199</sup> Francioni, "Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations," 258.

and governing investment practices “have cumulatively placed constraints on the state's ability to fulfill some of its human rights obligations both directly and indirectly.”<sup>200</sup> However it is possible for the international community to reconfigure the structural power of these institutions and instead focus their fiscal policies on state agency. Regulatory mechanisms should be amended to ensure TNCs, in partnership with governments, are respecting human rights in their business operations.

Another means by which governments can push companies towards better human rights practices is through existing multilateral institutions such as the World Bank’s International Finance Corporation (IFC). As an international institution and UN specialized agency, it seems not only appropriate that the World Bank, which dispenses public funds subsidized by member states, respect the principles of international human rights law, but that it be legally bound by those laws. Gradually the World Bank has “accepted the legitimacy of imposing conditions on its lending and its guarantees with a view to ... protecting and promoting human rights in some circumstances.”<sup>201</sup> As with most proposed solutions regarding closer oversight of human rights in international business, the IFC is a voluntary mechanism, yet it would allow governments to better monitor companies that receive international financing to ensure they are complying with human rights standards.<sup>202</sup> A slow, albeit progressive step in the right direction.

Unlike the regulatory goals of the IFC, the Multilateral Investment Guarantee Agency (MIGA) is a branch of the World Bank that instead strives to promote corporate

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<sup>200</sup> I. Halpern, “Tracing the Contours of Transnational Corporations’ Human Rights Obligations in the Twenty-First Century,” 143.

<sup>201</sup> McBeth, “Crushed by an Anvil,” 159.

<sup>202</sup> Albin-Lackey, “Without Rules: A Failed Approach to Corporate Accountability,” 10.

investment in developing countries. MIGA provides insurance to foreign investors, which protects them from certain risks such as war and conflict or the illegal confiscation of assets, “with the aim of encouraging financial activity in developing countries to boost their prosperity.”<sup>203</sup> In order to receive such insurance, investors must undergo specific reviews to ensure they too are following compliance procedures in the areas of safety, and social and environmental sustainability. It must be noted however, that these precautions failed in the case of Anvil in the DRC. McBeth details how Anvil did not comply with the principles outlined by MIGA, and never notified the organization of the Kilwa incident, which MIGA found out about only through the documentary, “Four Corners.”<sup>204</sup> While further precautions have been taken by MIGA to ensure compliance as an effective sanction, they will only be as effective as the agencies tasked with enforcing them.

World Bank projects should strive towards “maximizing positive human rights impacts, consistent with the Bank’s poverty alleviation mandate,” rather than exacerbating human rights violations.<sup>205</sup> Furthermore the sanction of “naming and shaming” countries that receive economic aid, as already discussed, is not going to solve the problem. Rather, a close examination of how current World Bank incentives are aggravating human rights problems—often due to their sheer inefficiency—is in order to determine how to constructively reduce those chances. In addition to imposing strict

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<sup>203</sup> McBeth, “Crushed by an Anvil,” 159.

<sup>204</sup> Ibid., 160.

<sup>205</sup> Human Rights Watch (Organization), *Abuse-free Development How the World Bank Should Safeguard Against Human Rights Violations* (New York: Human Rights Watch, 2013), 6. An extensive list of suggested amendments to existing safeguard policies, as well as how to ensure their effectiveness is also available at: [http://www.hrw.org/sites/default/files/reports/worldbank0713\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf).

regulations on corporations, financial institutions such as the World Bank must account for the “human rights obligations of recipient countries in all aspects of their negotiations to ensure that they do not undermine human rights,” because those governments as members of an international organization have equal duties to exercise due diligence in respect to human rights as well.<sup>206</sup>

## **Conclusion**

The problem is not that there is a deficit of international human rights mechanisms in respect to holding transnational corporations culpable for human rights violations. More precisely, the problem is that the international community has not focused enough on examining existing mechanisms, and restructuring them to fit the contemporary needs of a globalized economy, increasingly competing for scarce natural resources. Institutions such as the OECD and the World Bank have the potential to be extremely significant to the protection of human rights.

Throughout my research several recommendations have dominated the literature amongst NGOs, human rights scholars, and the international legal community. To summarize, they are:

- i. The OECD needs to strengthen the language of its resolutions, beginning with the Anti-Bribery Convention, so that it may enforce more rigorous sanctions on corrupt officials in resource-rich countries.

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<sup>206</sup> Ibid., 25.

- ii. The World Bank should re-examine its existing institutional policies, restructure its regulatory mechanisms, and align its mandates to benefit affected communities, not only big companies.
- iii. The need for countries to begin enforcing their extraterritorial rights in order to regulate their companies, and assure they are respecting human rights standards, cannot be overstated.
- iv. In addition to extraterritorial oversight, a stronger intergovernmental foundation is essential to implement and oversee human rights customs and laws, and to follow through with effectual penalties when those laws are violated.

The extension of liability to TNCs for violations of human rights in the present-day context can move beyond theoretical discussion. But the gap between rhetoric and reality will diminish only when the international community ensures that intergovernmental institutions hold themselves and each other accountable to the rules and norms they claim to uphold for the betterment and protection of universal human rights.

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## **BIOGRAPHY**

Paola L. Moore graduated from West Springfield High School in Fairfax, Virginia, in 1987. Following many years working in the hospitality and tourism industry, followed by a career shift to the private government services sector, she decided to return to school full time to obtain her bachelor's degree and continue on to graduate school. She received her Bachelor of Arts in Global Affairs from George Mason University in 2012.