Unfinished Business:

Legalisation and Implementation in Business and Human Rights

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ABSTRACT

Unfinished Business: Legalisation and Implementation in Business and Human Rights

Claire Palmer, St Edmund Hall – DPhil Thesis, Trinity Term 2016

The thesis explores the nature of transnational legalisation by identifying one emerging norm – corporate accountability for human rights violations – and tracing its promotion through three separate pathways of legalisation. At the domestic level, the thesis discusses the jurisprudence of domestic courts that have contemplated assuming extraterritorial jurisdiction over alleged human rights violations of transnational corporations (TNCs) in other states. At the international level, the thesis considers developments in the United Nations (UN), which in 2011 launched a new normative framework to bolster the accountability of TNCs in respect of human rights. At the transnational level, the thesis discusses the Kimberley Process Certification Scheme (KPCS), the Extractive Industries Transparency Initiative (EITI), and the Voluntary Principles on Security and Human Rights (VPs), which have been selected as representative of the range of hybrid schemes increasingly developed by government and industry representatives to ameliorate the impact of TNCs on human rights.

The thesis also develops a framework with which to analyse these trends by adopting (and further developing) the liberal institutionalist tool of legalisation, which is described in Kenneth Abbott et al's 'The Concept of Legalisation'. This thesis argues that this classic framework can be adapted and reimagined in the context of the transnational legal system, which is characterised by thick configurations of agents working across a multiplicity of issue areas. I suggest that in applying the classic framework in the transnational context, there appears to be an omitted variable – that of implementation, which exists alongside obligation, precision, and delegation.

Implementation refers to the specific actions taken by agents to translate legal or law-like principles into practical, workable instructions for courts, governments, companies and other non-state actors to follow. The thesis argues that an increased focus on implementation generally leads to more effective or greater legalisation. The empirical chapters demonstrate that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics in the long run. This suggests that agents will be willing to accept lower levels of obligation, precision and/or delegation if they believe a focus on implementation will help strengthen these characteristics over time.

ABBREVIATIONS

Acronym	Definition
ABG	African Barrick Gold (now Acacia Mining)
AFPS	Association for France-Palestine Solidarity
AFRC	Armed Forces Ruling Council (Sierra Leone)
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
ASF	Avocats sans Frontières
ATA	Anti-Terrorism Act
ATS	Alien Tort Statute
BHP	BHP Billiton
BIAC	Business and Industry Advisory Committee to the OECD
BIT	Bilateral investment treaty
BLIHR	Business Leaders Initiative on Human Rights
BP	BP plc (formerly British Petroleum)
COP	Communication on Progress (UN Global Compact)
CPA	Hamburg Consumer Protection Agency
CPC	Committee on Participation and Chairmanship (Kimberley Process)
CPR	Civil Procedure Rules
CRP	Committee Rules and Procedures (Kimberley Process)
CSR	Corporate social responsibility
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DFID	UK Department for International Development
DLH	Dalhoff Larsen & Horneman
DRC	Democratic Republic of Congo
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOMOG	Economic Community of West African States Monitoring Group
ECOSOC	UN Economic and Social Council
EEC	European Economic Communities
EITI	Extractive Industries Transparency Initiative
EU	European Union
FARDC	Congolese Armed Forces
FIDH	Fédération Internationale des Ligues des Droits de l'Homme
FNC	Forum non conveniens
FNI	Front nationaliste et intégrationniste (DRC)
FNLA	National Front for the Liberation of Angola
GC	UN Global Compact
GCNA	UN Global Compact Network Australia
GHEITI	Ghana Extractive Industries Transparency Initiative

GPs	United Nations Guiding Principles on Business and Human Rights
GRI	Global Reporting Initiative
HRD	Diamond High Council
IBM	International Business Machines
ICC	International Criminal Court
ICC	International Chamber of Commerce
ICMM	International Council on Mining and Metals
ICoC-PSP	International Code of Conduct for Private Security Providers
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
IFC	International Finance Corporation
ILO	International Labour Organisation
IMF	International Monetary Fund
IO	International organisation
IOE	International Organisation of Employers
IPIECA	International Petroleum Industry Environmental Conservation Association
IR/IL	International relations/international law
ISO	International Organisation for Standardisation
ITT	International Telephone and Telegraph Corporation
KPCS	Kimberley Process Certification Scheme
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MNE Guidelines	OECD Guidelines for Multinational Enterprises
MPLA	Popular Movement for the Liberation of Angola
MSI	Multi-stakeholder initiative
NAP	National Action Plan
NCP	National Contact Point (OECD)
NGO	Non-government organisation
NIEO	New International Economic Order
NMGML	North Mara Gold Mine Limited
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the UN High Commissioner for Human Rights
OPD	Obligation, delegation, precision framework (Abbott et al (2000))
PAC	Partnership Africa Canada
PLO	Palestinian Liberation Organisation
PNG	Papua New Guinea
PRI	Principles for Responsible Investment
PRME	Principles for Responsible Management Education
PRR Framework	Protect, Respect, and Remedy Framework
ROC	Republic of Congo
RUF	Revolutionary United Front (Sierra Leone)
RUL	Rossing Uranium Ltd
SLPP	Sierra Leone People's Party
SRSG	Special Representative of the Secretary-General
SSE	Sustainable Stock Exchanges
TNC	Transnational corporation
TRIAL	Track Impunity Always (Swiss NGO)

TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TVPA	Torture Victim Protection Act of 1991
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMSIL	UN Mission in Sierra Leone
UNCAC	UN Convention against Corruption
UNCHR	UN Commission on Human Rights
UNCTAD	UN Conference on Trade and Development
UNCTC	UN Commission on Transnational Corporations
UNDP	UN Development Programme
UNEP	UN Environmental Programme
UNHQ	UN Headquarters
UNHRC	UN Human Rights Council
UNITA	National Union for the Total Independence of Angola
UNSC	UN Security Council
UNSG	UN Secretary-General
US	United States
VPs	Voluntary Principles on Security and Human Rights
WDC	World Diamond Council
WGAAP	Working Group on Artisanal & Alluvial Production (Kimberley Process)
WGDE	Working Group of Diamond Experts (Kimberley Process)
WGM	Working Group on Monitoring (Kimberley Process)
WGS	Working Group on Statistics (Kimberley Process)
WTO	World Trade Organisation
ZANU-PF	Zimbabwe African National Union – Patriotic Front

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IT IS FOUND BY EXPERIENCE THAT ADMIRABLE LAWS AND RIGHT PRECEDENTS AMONG THE GOOD HAVE THEIR ORIGIN IN THE MISDEEDS OF OTHERS.

Paetus Thrasea, Roman Senator (62 AD)[1]

DID YOU EVER EXPECT A CORPORATE TO HAVE A CONSCIENCE, WHEN IT HAS NO SOUL TO BE DAMNED AND NO BODY TO BE KICKED?

First Baron Thurlow, Lord Chancellor (1731–1806)[2]

REINING IN THESE POWERFUL, FOR-PROFIT TN[C]S, MANY WITH RESOURCES AND ACTIVITIES THAT RIVAL THOSE OF STATES, WILL BE THE CENTRAL HUMAN RIGHTS CHALLENGE FOR THE TWENTY-FIRST CENTURY.

Rebecca M. Bratspies, Professor of Law (2005)[3]

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1 Cornelius Tacitus, *The Annals* (New York: Dover Publications, 2006), p.368.

2 Quoted in Subhabrata Bobby Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly,' *Critical sociology* 34, no. 1 (2008), p.15.

3 Rebecca M. Bratspies, "Organs of Society': A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities,' *Michigan State University College of Law Journal of International Law* 13(2005), p.14.

Introduction

This thesis is about transnational legalisation. It seeks to explore the nature of transnational legalisation by identifying one emerging norm – that of corporate accountability for human rights violations – and tracing its promotion through three separate pathways of legalisation. Each pathway takes us on a journey through one particular level of the transnational legal system, including the domestic, international, and transnational levels. In discovering each of these three pathways, we gain insight into the major legal trends in the area of business and human rights, and also explore the nature of transnational legalisation in the twenty-first century.

Before proceeding, it is important to understand the phrase 'corporate accountability'. 'Accountability' is defined in the Oxford English Dictionary as 'the quality of being accountable,' where accountable means 'liable to be called to account or to answer for responsibilities and conduct'.[4] As noted by legal scholar Nadia Bernaz, the concept of 'corporate accountability' should be distinguished from 'corporate liability', which denotes a legal obligation or duty whose breach may precipitate legal proceedings in a court of law. By contrast, accountability 'is a wider and looser concept, not limited to the consequences of the breach of a necessarily circumscribed legal obligation'.[5] It reflects the idea that companies may be held accountable for their actions in ways that extend beyond the legal sphere, through reputational damage, shareholder discontent, a drop in share or market value, ineligibility for government contracts or subsidies, or denial of access to foreign markets. [6]

4 'Oxford English Dictionary,' Available at: http://www.oed.com/ (accessed 30 September 2016).

5 Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?,' *Journal of Business Ethics* 117, no. 3 (2013), p.494.

6 ibid.

Promoting corporate accountability is one of the central human rights challenges in the twenty-first century.[7] It is well acknowledged that there exists a 'governance gap' in the area of business and human rights, caused by the fact that both international and domestic law allows corporate groups to structure themselves to avoid regulatory oversight. Victims of human rights violations regularly lack access to effective remedies at the domestic level in less developed states where the rule of law is fragile. The perceived failure of domestic legislation to adequately constrain the human rights impact of TNCs has shifted the focus of scholars to the potential of international law, but developments to date have provided victims with few opportunities for redress.

Nevertheless, agents – or 'legalisers' – at the national, international, and transnational levels continue to promote rules with the objective of compelling TNCs to protect human rights. In domestic courtrooms, lawyers are battling to win novel arguments in support of extraterritorial jurisdiction over offshore corporate human rights violations. In international organisations, prominent scholars and policymakers are advancing new frameworks to bolster the accountability of TNCs. In MSIs, government, industry and private sector representatives are together developing schemes that incentivise companies to minimise their human rights impact. The governance gap, therefore, is not a vacuum – it is 'criss-crossed with somewhat experimental expressions of an emerging practice of largely voluntary global administration'.[8] The fact that many of these instruments are non-binding does not mean that they are 'irrelevant to the interests of justice'.[9] To the contrary, the voluntary nature of individual mechanisms potentially has little impact on their ability to effect compliance.[10] In many ways, legal developments in business and human rights represent a nascent regime: a complex, networked and inter-linked system of rules that is the product of legalisation across

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7 Bratspies, 'Organs of Society' p.14.

8 Jolyon Ford, 'Business and Human Rights: Bridging the Governance Gap' (London: Chatham House), 2015, p.9.

9 ibid.

10 ibid., p.8.

domestic, international, and transnational legal spheres. In this complicated setting, understanding the nature of legalisation as it operates and interacts across national and international spheres is a key challenge for IR scholars.

This introductory chapter proceeds in three parts. First, I set out the research puzzle and research questions that the thesis attempts to answer. Second, I outline the principal argument of the thesis, and argue why this represents an important contribution to IR scholarship. Third, I discuss the choices made in the course of research design and the methodology employed by the thesis. The chapter concludes with an overview of the structure of the thesis and the specific arenas of legalisation discussed throughout.

Research Puzzle and Research Questions

How should we explain the range of hard and soft rules developing in the area of business and human rights? Traditional theories fail to provide clear answers. Realists presume that the most powerful actors in the international system have the greatest influence over legal regimes. For this reason, they would expect there to be little progress in the development of rules that meaningfully constrain the power of mighty TNCs and their sponsor states. Liberals, on the other hand, may suggest that the dearth of hard law reflects the political strength of corporate lobbying groups and their probable impact on government policy at the domestic level. Alternatively, they may propose that insufficient consensus at the international level has prevented a robust legal regime from emerging. Constructivists might valuably point to the changing expectations surrounding business, but pay less attention to the power dynamics that make TNCs so difficult to regulate in the first place.

All these perspectives, whilst partly true, fail to comprehensively explain patterns of transnational litigation and or why specific soft law initiatives in the area of business and human rights are proliferating and strengthening at a significant rate. In order to address this puzzle, this thesis starts with two research questions. The first is empirical, and the second is interpretative:

- How have agents, or legalisers, acting on national, international, and transnational levels, attempted to institutionalise the norm of corporate accountability for human rights violations in connection to the activities of TNCs?

- What do these initiatives tell us about the nature of transnational legalisation, and how legalisation should be 'framed' or conceptualised in an era of global governance? How could a new framework of legalisation assist in determining when transnational litigation and soft law initiatives are more likely to succeed?

Why are these questions important? First, the ascendancy of powerful TNCs in significant numbers is one of the most striking aspects of globalisation. The fact that an overarching legal framework has not materialised to address the global governance challenge presented by TNCs raises critical issues about the international system and the role of power and global justice in that system. International law, therefore, has a complex relationship with TNCs that is deserving of further investigation and analysis.

Second, the law of business and human rights is a dynamic area presently developing across both national and transnational spheres. Tracking and analysing these developments constitutes an important academic contribution in its own right. Although it is beyond the scope of this thesis to systematically identify and map every business-human rights initiative currently being developed, the arenas of legalisation discussed in the thesis have been selected to highlight some of the most important patterns in the field, including diverging trends in litigation across the US, Canada and Europe, the expanding impact of the UN Guiding Principles (GPs) and the rise in multi-stakeholder initiatives (MSIs) in industry-specific areas.

Finally, the subject of business and human rights is an attractive subject from an international relations perspective. A true example of global governance in action, rule-making in connection to business and human rights incorporates an ever-increasing assembly of actors, including governments, international organisations, NGOs, and civil rights activists. At times in opposition, at others in concert, these actors play contrasting and complementary roles in implementing, monitoring and enforcing new law and law-like arrangements.

The thesis therefore makes two principal contributions. Empirically, the thesis tells a story about legalisation by identifying and describing some of the most significant legal trends in business and human rights. As we shall see, these trends are unfolding against a highly fluid normative landscape. More and more, expectations regarding what the corporate sector ought to contribute to society are changing. There is also more widespread awareness and greater discontent over the perceived lack of alignment between the impact of TNCs and their degree of accountability, especially in countries with weaker legal systems. Third, companies are increasingly aware that market position depends upon their good reputation, and that there may be advantages in pre-empting or anticipating future regulation. Against this background, legalisers are driving important developments in transnational litigation (Chapter 3), rule generation in international organisations (Chapter 4), and the creation of industry-specific MSIs (Chapter 5).

In addition to mapping out advances in the law relating to business and human rights (in itself an important contribution), the thesis sets out a new framework outlining how legalisation could be reframed in the transnational context (Chapter 1). This is an interpretative rather than an empirical endeavour, which explores how scholars have traditionally framed processes of legalisation and builds upon this foundation to suggest a revised legalisation framework.

This represents an important contribution for several reasons. First, legal and IR scholars have developed few tools for the purpose of analysing legalisation in the transnational context. This is perhaps understandable given that the concept of ‘transnational law’ is relatively new.[11] However, it is also significant that international lawyers have traditionally invested a substantial amount of intellectual energy in questions related to enforcement. At times, this has unhelpfully diverted attention from in-depth analysis of softer, more flexible rules. This thesis attempts to address this issue by considering the various ways that rules are operationalized even when they are not strictly enforced.

Second, the shortage of frameworks designed to assist in the examination of transnational legalisation represents an important omission in the IR/IL toolkit. The fact that few tools are available in this area is out-of-step with other developments in the discipline: the concept of global governance has existed for more than two decades, it is well-known that non-state actors play an increasingly substantive role in rule-making, and many accept that authority is becoming more diffused across broad transnational networks. It is therefore timely to consider ways in which scholars should analyse transnational legalisation, and to consider how these processes are systematically different from the development of law at the national level.

Key Findings

In order to analyse legal developments in business and human rights, the thesis proposes a new framework that adopts – and further develops – the liberal institutionalist tool of legalisation, which is most famously described in Kenneth Abbott et al’s ‘The Concept of Legalization’.[12] Here, legalisation is described as a type of institutionalization defined by three components: obligation, precision, and delegation. Under the legalisation framework, *obligation* means that states or other actors are ‘bound by a rule of

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11 ‘Transnational law’ was first defined in 1956 by international lawyer Philip Jessup as ‘all law which regulates actions or events that transcend national frontiers…[including] [b]oth public and private international law…[plus] other rules which do not wholly fit into such standard categories’: Philip Caryl Jessup, *Transnational Law* (New Haven: Yale University Press 1956), p.2.

12 Kenneth W. Abbott et al., 'The Concept of Legalization,' *International Organization* 54(2000).

commitment or by a set of rules or commitments'.[13] More particularly, it means that those actors are '*legally* bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often domestic law as well'.[14] *Precision* indicates that rules 'unambiguously define the conduct they require, authorize, or proscribe'.[15] Finally, *delegation* means that third parties have been 'granted authority to implement, interpret and apply the rules; to resolve disputes; and (possibly) to make further rules'.[16]

In many respects, this classic framework provides an excellent description of legalisation. However, it has certain limitations. First, the concept of legalisation has generally been used in a rather limited fashion in order to characterise rules produced by international organisations. Second, it fails to fully appreciate the expanding role of non-state actors in the transnational system. Third, it does not accurately conceptualise legalisation as a dynamic process that necessarily unfolds over time.

This thesis argues that the classic framework can be adapted and reimagined. I suggest that in applying the classic framework in the transnational context, there appears to be an omitted variable – that of implementation, which exists alongside obligation, delegation, and precision. Implementation encompasses a range of indicators that, at the most general level, reflect specific actions taken by agents to promote legal or law-like principles and translate these into practical, workable rules for courts, governments, companies and other non-state actors. These agents are 'legalisers' – individuals or groups who agitate for normative change within a specific legal institution or framework. At a very general level, the thesis hypothesises that there is a causal relationship between high implementation (the independent variable) and increased

[13] ibid., p.17.

[14] ibid.

[15] ibid.

[16] ibid.

legalisation (the dependent variable). This revised framework is outlined more fully in Chapter 1.

The thesis provides empirical evidence for this hypothesis by identifying one emerging norm – that of corporate accountability for human rights violations – and tracing its promotion through three separate pathways of legalisation. These pathways are forged against the background of the international legal framework as it currently applies to TNCs and human rights violations, which is described in Chapter 2. Each pathway takes us on a journey through one particular level of the transnational legal system, including the domestic, international, and transnational levels. At the domestic level, I discuss the jurisprudence of domestic courts that have contemplated imposing extraterritorial obligations on TNCs operating in other states (Arena 1). At the international level, I consider developments in the United Nations (UN), which in 2011 launched a new normative framework to address the accountability of TNCs (Arena 2). At the transnational level, I contemplate the Kimberley Process Certification Scheme (KPCS), the Extractive Industries Transparency Initiative (EITI), and the Voluntary Principles on Security and Human Rights (VPs) (Arena 3). These initiatives have been selected as representative of the range of hybrid schemes increasingly developed by government and industry representatives to prevent TNCs committing serious human rights violations. I have used the term 'arena' to describe the specific venues or institutions in which law-making occurs, almost as if they are physical spaces designed for rules to be proposed, contested, renegotiated, criticised and/or supported by a broad group of parties and stakeholders.

Arena 1 – Domestic Courts and Extraterritorial Jurisdiction (Chapter 3)

It is in domestic courtrooms – often far from where the alleged abuses occur – that some of the most definitive battles over the role and responsibilities of TNCs are fought. Extraterritorial cases are consummate examples of transnational legalisation in action, and often showcase innovative lawyering that seeks to apply established legal principles in new and creative ways. Nevertheless, these cases remain highly challenging. Specific characteristics and procedural barriers within each jurisdiction make it more or less likely that litigation against TNCs for human rights litigation will succeed there.

This thesis finds that it is the combination of particular characteristics that indicate whether an individual legal system should be characterised as possessing high or low implementation. For instance, in jurisdictions where implementation is high, legal causes of actions may be available to plaintiffs, legal aid or pro bono assistance is more likely to be available, and prudential grounds for non-exercising jurisdiction are only moderately employed by judges. In jurisdictions where implementation is low, there may be no available causes of action, judges may be conservative in exercising jurisdiction over offshore events, and legal assistance is less likely to be available to plaintiffs. Because some legal systems have high implementation and others have low, the system has compromised capacity and a distorted pattern of case distribution.

The thesis demonstrates that the US and the UK jurisdictions exhibit relatively more indicators of high implementation, and, as anticipated, consequently experience more legalisation. Canada and European states, by contrast, exhibit fewer indicators of high implementation, demonstrating why legalisation has moved more slowly in those jurisdictions. This explains why the US has been the centre for most transnational litigation against TNCs, chiefly aided through a legal framework that provides several unique causes of action and other plaintiff-friendly characteristics.[17] The application of FNC in Canada has proved a formidable barrier in the absence of a statutory equivalent to the ATS (although the decision in one Canadian case that held a parent corporation's duty of care might depend on its voluntary commitments suggests more cases may flow to Canada in the future). In continental Europe, the most serious obstacles to corporate accountability include the absence of class actions for human rights cases, the overriding discretion of public prosecutors, and the absence of binding documentary disclosure rules. The sum of variations across domestic jurisdictions has led to an overarching

17 However, as discussed further in Chapter 3, US plaintiffs are likely to face a more challenging legal landscape in the future following the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013).

litigious global system that exacerbates inequalities, and is patchy, fragile, and unpredictable. In this important sense − in the sense of implementation − laws relating to corporate accountability therefore remain incompletely legalised in the domestic arena.

Arena 2 – The UN and the Guiding Principles on Business and Human Rights (Chapter 4)

The second arena of legalisation examined is the UN, which endorsed a new set of Guiding Principles on Business and Human Rights (GPs) in 2011. This chapter analyses the numerous attempts at legalisation that have unfolded in relation to TNCs and human rights at the UN since the 1970s. First, the chapter considers the UN Code of Conduct for Transnational Corporations, and illustrates why this initiative failed to materialise despite many years' work. Second, the chapter discusses the Global Compact (GC) and concludes that this project − whilst voluntary and vague in its elucidation − placed a particular emphasis on implementation that has proven to be representative of new trends in legalisation. The GC was innovative in that it encouraged the participation of non-state actors and prioritised consensus-building, networks and norm promotion. The GC and its associated local networks continue to flesh out the GC principles today by offering detailed guidance to companies and industry bodies working in particular regions. The nature of newer legalisation initiatives such as the GC also tells us that implementation is a useful dimension to include in the legalisation analysis.

Third, the chapter considers the development and demise of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms). On one view, the Draft Norms can be seen as a reversion to traditional legalisation attempts through the conventional methods of treaty negotiations, with state parties acting as the dominant players. Certainly the lesson to be taken from the Norms is that the result was not only unsuccessful in producing an agreement, but more importantly proved to have an enduring and divisive impact on the state of the debate. This illustrates that when demanding far-reaching and fundamental change of huge corporate entities, an emphasis on implementation, rather than the binding quality of proposed rules, must stand at centre stage.

Fourth and finally, this chapter discusses the development of the GPs, the most recent UN legalisation initiative in the field of business and human rights. This section highlights the innovative nature of Professor Ruggie's approach to generating new legal and social norms, and argues that this methodology was grounded in his background as an IR and constructivist scholar. It concludes that the GPs rank low in terms of the traditional legalisation characteristics of obligation, precision, and delegation. However, it argues that assessing legalisation on the basis of these criteria fails to capture the true extent of legalisation engendered by the GPs. The GPs have had disproportionate influence for a soft law instrument, especially in light of the fact that they have existed for only four years. This can be explained by their focus on implementation, manifested through the establishment of a UN Working Group, the exponential growth of National Action Plans, a significant uptake of the GPs by international organisations, and the ongoing creation of standards through groups such as Shift, national human rights institutes, and national bar associations. The rise of the GPs clearly illustrates that legalisation in the transnational context is better explained with reference to the quality of implementation, in addition to the characteristics of obligation, delegation and precision.

Arena 3 –Multi-stakeholder Initiatives: The Kimberley Process, the Extractive Industries Transparency Initiative, and the Voluntary Principles on Security and Human Rights

This chapter focuses on processes of legalisation in the context of MSIs in the extractive industry. The first MSI discussed is the Kimberley Process Certification Scheme (KPCS), which was launched in 2002 in response to the flow of conflict diamonds from Africa. The second is the Extractive Industries Transparency Initiative (EITI), a major global transparency standard designed to improve governance of natural resources. The third is the Voluntary Principles on Security and Human Rights (VPs), which was adopted in 2000 in order to address the problem of human rights violations committed by security personnel hired to protect company assets in developing states.

This chapter shows that MSIs challenge traditional conceptions of 'obligation' and 'delegation'. The thesis finds that the traditional OPD definition of 'obligation' − focused on the legally binding quality of the rule − appears to be too narrow. Under these schemes, actors are incentivized to comply with the rules because there is an economic or reputational incentive to do so, rather than because the rules possess the binding normativity characteristic of domestic (and some international) law. Governments will 'jump through hoops' set by the KPCS, even unwillingly, to avoid the economic impact of permanently leaving. The EITI is ostensibly voluntary, but 51 countries have signed in its short lifespan even though the scheme compels them to impose compulsory requirements on corporations through legislation. Similarly, the VPs are voluntary but regularly incorporated into private contracts. Finance providers, such as the World Bank's International Finance Corporation, have incorporated the VPs into its Performance Standards on Social and Environmental Sustainability, and the potential for soft law such as the VPs to be hardened through the process of litigation has been illustrated in the Canadian matter of *Choc v. Hudbay Minerals Inc.*

The MSIs discussed in this chapter also illustrate inventive approaches in relation to delegation. Peer review is often encouraged to give participants feedback on their progress and generate discussion around best practices. Participants that fail to comply with the rules are unlikely to face criminal sanctions in a domestic court, but instead may be requested to exit the relevant scheme and face the serious economic or reputational implications that this entails. Members invest substantial time and energy in these delegation-type processes, even if these processes may be relatively soft and regularly ineffective, or slow in changing the behaviour of participants.

Finally, these regimes illustrate an obvious focus on implementation. Participants that join these schemes are regularly given substantial support to assist them in the implementation of the rules. An enormous range of state and non-state actors are involved in the production of further guidelines, toolkits, and performance indicators precipitate by these MSIs in order to assist corporations in the implementation of the rules on the ground and in specific contexts. When transgressions occur, other participants may assist the transgressing member in implementing reforms rather than (or before) imposing sanctions.

Overall, these empirical chapters demonstrate that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics over time. In these instances, legalisers are playing a long game. They accept lower levels of obligation, delegation, and/or precision in the belief that over time these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance.

Methodology

An International Law/International Relations (IL/IR) Approach

In its examination of transnational legalisation, this thesis combines insights from the academic disciplines of international law and international relations. International relations and international law have much to offer one another, as acknowledged by a range of scholars including Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, who wrote as early as 1998 that 'political scientists and international lawyers have been reading and drawing on one another's work with increasing frequency and for a wide range of purposes'.[18] I argue that a combined IL/IR approach is particularly suited for analysing changes in the law in the context of a transnational legal system.

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18 Andrew S. Tulumello and Stepan Wood Anne-Marie Slaughter, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship,' *The American Journal of International Law* 92, no. 3 (1998), p.367.

First, social science has a vital role to play in analysing the role of international law in influencing the behaviour of states. Social science methods can highlight broad legal patterns that might be difficult to systematically evaluate through legal analysis alone.

Second, in distinction to traditional legal scholars, IR academics have demonstrated that soft law can be meaningfully characterised as a type of law even in the absence of certain qualities exhibited by hard law, such as strict enforcement. Contrary to many lawyers who might be reluctant to characterise soft law as genuine 'law', IR scholars have proved adept at discussing the development of soft legal principles and other norms. This is an important point in the context of business and human rights, as many of the relevant norms and principles are not enforceable in the traditional legal sense. Failing to properly examine these principles also leads to a less than comprehensive consideration of the nature of international law itself. As prominent IR/IL scholars Ken Abbott and Duncan Snidal note, 'even if law, or norms short of law, does not immediately have strong impacts on behaviour, it may initiate processes of legalisation that will move in the desired direction'.[19] This is a significant insight in that it suggests the power of international law lies not just in its capacity to demand compliance, but in its ability to generate processes that may strengthen the normative pull of existing principles, expand the application of principles to new areas, or eventually generate new patterns of compliance.

Third, the use of a legal approach may assist IR scholars to, first, discriminate between various types of norms and rules, and, second, measure the strength and degree of acceptance of specific norms throughout certain sections of the community. In the context of TNCs and human rights, it is only through legal analysis that we can identify the precise nature of the limitations that the common law places on corporations. Courts do not legislate nor promote overriding norms that can be easily coded and measured by quantitative assessment. On the contrary, judges hand down specific

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[19] Kenneth W. Abbott and Duncan Snidal, 'Law, Legalization and Politics: An Agenda for the Next Generation of IR/IL Scholars,' in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark Pollack (Cambridge: CUP, 2013), p.34.

rulings that are both tailored to the circumstances of each case but have implications for norm development more broadly. To capture the nuance inherent in the common law, legal analysis is required. This is why lawyers have traditionally pursued an 'illustrative and expositive' approach to their subject area.[20]

Finally, working at the juncture of law and international relations is valuable because it draws attention to what patterns of law suggest about power, governance, and cooperation at the international level. According to some, increased collaboration between international relations and international law can be seen as a response to 'globalisation' or 'transnationalism', both associated with the emergence of complex global issues that require coordinated responses but may be difficult to regulate using traditional legal approaches.[21] At the same time, one can observe growing interest in the area of 'international' or 'global' governance, which draws on regime theory and legal analysis in order to understand 'the formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and non-state actors in international affairs'.[22] It is more apt to speak of global governance as distinct from a global government (comprised of more formal international institutions) precisely because the role of informal institutions and non-state actors in international and transnational law is now so significant.[23] For all these reasons, it is essential that any in-depth analysis of the transnational legal system apply ideas and concepts from the disciplines of both law and international relations.

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[20] Traditionally, international legal analysis focuses on written laws, judicial cases, and relevant supplementary material to reveal what rules of international law actually exist. A secondary purpose may also be to identify which rules require modification, and what such modification should look like: Charlotte Ku, *International Law, International Relations, and Global Governance*, Routledge Global Institutions Series (Oxford: Routledge, 2012), p.23.

[21] Anne-Marie Slaughter, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' p.370.

[22] ibid., p.371.

[23] Anne-Marie Slaughter, *A New World Order* (New Jersey: Princeton University Press, 2009), p.745.

Selection of Pathways

We noted above that legal developments in business and human rights represent a nascent regime: a complex and interrelated network of rules across domestic, international, and transnational legal spheres. The three specific arenas of legalisation discussed – transnational litigation (Arena 1), the development of principles by international organisations (Arena 2) and the creation of standards by MSIs (Arena 3) – have emerged amongst a wide and expanding network of rules that concern business and human rights, including international arbitration, financial and insurance standards, and national corporate and securities disclosure laws.

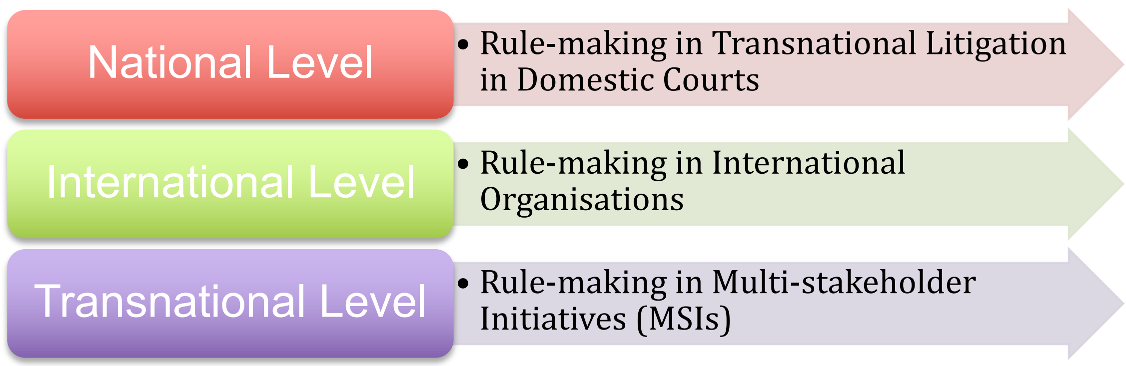
Due to the number of initiatives underway, it is beyond the scope of this thesis to systematically identify and map every business-human rights project currently being developed. However, the three pathways of legalisation explored in this thesis have been chosen for several reasons.

In particular, some of the most important rules relating to TNCs and human rights have been generated through transnational litigation, international organisations, and MSIs. Court judgments from the US, Canada, Europe, and the UK paint a picture of domestic courts as hugely dynamic venues of norm entrepreneurship in the field of business-human rights. Widely publicised cases have regularly succeeded in creating new standards for TNCs operating overseas, and have simultaneously cast a spotlight on serious human rights violations implicating well-known companies.

Rule-making at the UN is another focus due to the organisation's high level of norm activism in connection to TNCs and human rights. Since the 1970s, the UN has four times attempted to develop codes relating to business and human rights, offering excellent material for the purpose of comparing and contrasting successful and unsuccessful processes of rule-making. It is also noteworthy that the UN is responsible for producing the GPs, almost certainly the most important soft law instrument to emerge in the area in recent years.

The final empirical chapter examines three MSIs (the KPCS, the EITI, and the VPs) that have developed to address specific human rights issues. Although MSIs exist across a range of industries, this chapter focuses particularly the extractives sector. This is partly because the MSIs in this sector are amongst the most advanced, and so provide the most material for analysis. In addition, focusing on one particular industry makes it possible to draw out the different approaches in regulation most keenly. This is illustrated by the fact that the KPCS is a certification-based initiative, the EITI has progressively developed into a performance standard that requires participating governments to impose legal obligations on companies operating within national territory, and the VPs are softer principles that have enjoyed excellent uptake and are increasingly incorporated into contractual agreements between companies and private security providers.

Figure 1: Three Pathways of Legalisation



Selecting and discussing specific examples of legalisation from each of the three layers of the transnational system offers several other advantages. First, each of these three pathways represents rule-making at a particular level of analysis within the transnational legal system. Transnational litigation unfolds in domestic courts and so highlights trends in legalisation at the national level; the GPs were debated and created in the UN, one of most important institutions and a key producer of international law; and MSI-generated rules are produced by a range of diverse national and international actors working in a transnational space. Through this selection method, we are better able to glean insights into the overall development of the global business-human rights regime, as well as the nature of transnational legalisation itself.

Second, the method reflects the concept of 'transnational legal process' as described by Harold Koh. Koh considers a deeper understanding of the transnational legal system crucial to explaining state compliance with international law. Koh contends that in the first stage of norm internalization, states, international organisations, NGOs, business, entities and other norm entrepreneurs provoke interactions with one another in an international arena.[24] These interactions 'force an interpretation or enunciation of the global norm applicable to the situation' and eventually a legal rule is produced.[25] Repeated participation in the process assists actors to reconstitute their identities and their interests.[26] The three arenas of legalisation examined in this thesis are similar to those envisaged by Koh − sites of contestation and competition between various stakeholders that eventually result in the production of legal rules.

Third, this approach confirms that in some areas there is substantial overlap between levels. In the material presented in this thesis, for example, the domestic and international levels intersect when international laws are used as the basis of litigation launched at the domestic level, or when standards established by MSIs require participating governments to pass legislation through their national legislatures.

Fourth, this approach demonstrates that developments across arenas are not consistent with the emergence of an overarching norm of corporate accountability. Nor are they merely the product of top-down influence. On the contrary, transnational legalisation involves a wide range of actors across a range of arenas seeking to advance their own interests in a variety of ways. In order to best illustrate the multiplicity of legalisers and

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24 Harold Koh et al., 'Why Do Nations Obey International Law?,' *Yale Law Journal* 106(1997), p.2603.

25 ibid., p.2646.

26 Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law,' in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: CUB, 2013), pp.131-33.

the complexity of governance in the business and human rights area, the three arenas have been selected for their diversity rather than their similarities. In other words, this thesis does not attempt to compare legalisation outcomes across pathways by identifying or holding constant specific variables in order to explain causation. The terms 'pathway' or 'arena' cannot be substituted for the term 'case study'. Rather, the purpose of the thesis is to: first, illustrate the diversity of contributions of a range of actors in the generation of transnational law as it relates to business and human rights; second, identify how the dimensions of obligation, delegation, and precision can illuminate processes of legalisation at the transnational level; and third, demonstrate that the dimension of implementation is useful for understanding processes of legalisation at all levels.

From this perspective, the research design is more accurately described as a single case study of transnational legalisation, with the case study in question being the transnational law of business and human rights. John Gerring defines a single case study as 'an intensive study of a single unit for the purpose of understanding a large class of (similar) units'.[27] By studying transnational legalisation in the area of business and human rights, we may be able to draw conclusions applicable to other growing regimes, such as environmental or climate change law. Admittedly, single-case studies have their limitations, but nevertheless have proved able to provide tests that strongly able support or impugn theories.[28] Furthermore, delving in depth into one case study may enable scholars to engage in 'intensive empirical analysis that can find previously unnoticed causal factors and historical patterns'.[29]

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27 John Gerring, 'What is a Case Study and what is it Good For?,' *American political science review* 98, no. 02 (2004), p.342.

28 Andrew Bennett, 'Case Study Methods: Design, Use, and Comparative Advantages,' in *Models, Numbers, and Cases: Methods for Studying International Relations*, ed. Detlef F Sprinz (University of Michigan Press, 2004), p.29.

29 Christopher H Achen and Duncan Snidal, 'Rational Deterrence Theory and Comparative Case Studies,' *World politics* 41, no. 02 (1989), pp.167-68.

Process Tracing

Each empirical chapter provides a contextually rich description of how specific legal rules are developing in order to constrain TNCs from in connection to serious human rights violations. Following an examination of histories, archival documents, interview transcripts, and other sources, the thesis reaches an overall conclusion that an increased focus on implementation throughout the legalisation process generally leads to more effective or greater legalisation. In light of the qualitative nature of the thesis, it is appropriate to use process tracing to highlight the causal processes that link high implementation to increased or more effective legalisation. By tracing the chain of events that lead from high or low implementation, it is possible to enhance the validity of the claim that implementation matters.[30] However, given the many and varied interacting causal variables present across all arenas, any conclusions reached on this point are general only.

Sources

The thesis has adopted particular research techniques in relation to each of the arenas studied. In researching the international legal framework that governs corporations (Chapter 2), I refer to the well-known works of Olivier De Schutter, Andrew Clapham, Peter Muchlinski, Michael Addo, Sarah Joseph, Jennifer Zerk, and Nadia Bernaz, who have all written on the applicability of international law to non-state actors. In considering transnational litigation (Chapter 3), I reviewed and analysed all relevant judgments. For certain US cases, I also considered the submissions of various parties and amicus curiae briefs available online, and listened to the oral submissions of parties available on the US Supreme Court website (http://www.supremecourt.gov/). For judgments in non-English speaking jurisdictions, I relied on academic articles, blogs, and web summaries (although this represented only a very small number of the cases considered). I was also assisted in the research for this chapter by the wealth of US literature that has been written in connection to the *Alien Tort Statute* since the 1980 case

[30] John Gerring, *Case Study Research: Principles and Practices* (Cambridge: CUP, 2006), pp.173-84.

of *Filártiga v. Peña-Irala*. These articles include summaries and analyses of specific cases, contributions on the implications of US courts accepting litigation in relation to events that have occurred overseas, and hypotheses as to how this type of litigation will develop in the future. Fewer articles have been written from a comparative perspective or on litigious developments in Canada and the UK, as the jurisprudence is less developed in these jurisdictions. The Business & Human Rights Resource Centre hosts an excellent website (http://business-humanrights.org/) that helpfully provided an overview of the most significant cases in the field across almost all jurisdictions.

In considering processes of legalisation in the UN (Chapter 4), I conducted thorough searches of the online UN documentation database for relevant reports and resolutions, and also searched contemporary newspaper articles and published commentary from key individuals and organisations. In researching the Global Compact, I considered a range of complementary articles and reports, including a number written by Georg Kell, the former director of the initiative. In analysing the Draft Norms on the Responsibilities of TNCs and Other Business Enterprises, I reviewed the work and opinions of practitioners and writers who remain prominent in the field today, including David Weissbrodt, Surya Deva, Larry Catá Backer, David Kinley, and Justine Nolan. The GPs have already generated a substantial amount research material, including several reports, articles, and a book by Professor John Ruggie. Practitioners and scholars have produced a broad range of commentary and criticism, whilst the UN Working Group, national human rights institutions, and other organisations have published a number of reports and working papers. All these documents are canvassed in the examination of the GPs in Chapter 4.

Chapter 5 discusses MSIs in the extractive industry, including the KPCS, the EITI, and the VPs. In relation to each of these initiatives, I reviewed the scheme's foundational documents and the many associated reports available online at their respective websites. Some academic articles are available, especially in connection to the origins of the Kimberley Process and the diamond wars that preceded the initiative. In addition, I conducted newspaper searches to investigate the most recent successes and failures attributed to each initiative.

Finally, I conducted background interviews with a number of experts in the field. In contrast to the document-based research, these interviews steered me towards the most relevant and dynamic areas in business and human rights, and assisted me in crystallising my ideas on legalisation and the role of implementation in particular. When subjects discussed during these interviews overlapped with documentary material previously examined, I was able to use the method of triangulation to confirm and complete my findings. Individuals interviewed included John Ruggie (Professor in Human Rights and International Affairs, Harvard Kennedy School of Government); Kathleen Sullivan (Quinn Emanuel, New York, lead counsel for the defendants in *Kiobel v Royal Dutch Petroleum*); Salil Tripathi (Director, Institute for Human Rights and Business, London); Claire Methvan O'Brien (The Danish Institute for Human Rights, Copenhagen); Rachel Davis (Managing Director, Shift, New York); Yousuf Aftab (Human rights lawyer/Consultant, Enodo Rights, New York); Tim Cooke-Hurle (Barrister, Doughty Street Chambers, London); Sarah Altschuller (Lawyer, Foley Hoag, Washington DC); Anna Kirkpatrick (Lawyer, Clifford Chance, London); Richard Boele (Partner, KPMG, Sydney); Alice Cope (Network Contact Person, UN Global Compact Australia, Sydney); Alexandra Readhead (Resource Governance Consultant, World Bank Group) and Katherine Teh-White (Managing Director, Futureye, Melbourne).

Conclusion

In addition to outlining the key findings, the methodology, and the structure of the thesis, this introductory chapter set out the principal questions that the thesis attempts to answer. How have agents, acting on national, international, and transnational levels, attempted to institutionalise the norm of corporate accountability for human rights violations in connection to the activities of TNCs? What do these initiatives tell us about the nature of transnational legalisation, and how legalisation should be 'framed' or conceptualised in the twenty-first century? Could a new framework of legalisation assist in determining when transnational litigation and soft law initiatives are more likely to succeed?

This thesis answers this question in the affirmative. Despite the dearth of hard law in this field, business and human rights is a dynamic nascent regime, making it an ideal context in which to explore processes of transnational legalisation. Soft law and private law initiatives have proliferated and strengthened in contrast to the development of hard law in this area. How to analyse these types of initiatives in the age of global governance is therefore a key challenge for both IR and international legal scholars. The thesis takes up this empirical and normative challenge by examining three pathways of legalisation that are unfolding at the national, international, and transnational levels in domestic courts, international organisations, and MSIs respectively. This chapter anticipated that insights could be gleaned by examining these three arenas through the lens of 'legalisation', a term borrowed from the IR rationalist-institutionalist literature. How the 'tool' of legalisation can be used to illuminate trends at the nexus of business and human rights – and in transnational legalisation more generally – is the subject of the next chapter.

Chapter 1: A New Framework for Transnational Legalisation

'Laws are like sausages. It is best not to see them being made.'

-John Godfrey Saxe (1869) [1]

'The real challenge is not designing new regulations, but finding ways to make existing ones effective. The catchword is implementation.'

-Georg Kell (2005) [2]

The introduction set out the principal research questions addressed by this thesis. How have agents, acting on national, international, and transnational levels, attempted to institutionalise the norm of corporate accountability for human rights violations in connection to the activities of TNCs? What do these initiatives tell us about the nature of transnational legalisation, and how legalisation should be 'framed' or conceptualised in an era of global governance?

It is the second of these questions that is illuminated through the application of theory. In international relations, theory assists scholars to identify patterns in data and make sense of the real world. Theory may provide a framework for hypothesising, understanding, or analysing; theory 'holds out the tools by whereby the observer can discover in the welter of events that which is recurrent and typical'.[3] As foreshadowed in

1 Often incorrectly attributed to Otto von Bismarck. Lawyer John Godfrey Saxe wrote in the *Daily Cleveland Herald* on 29 March 1869 that: 'Laws, like sausages, cease to inspire respect in proportion as we know how they are made': Fred R. Shapiro, 'Quote...Misquote,' *The New York Times Magazine* 21 July 2008.

2 Georg Kell, 'The Global Compact: Selected Experiences and Reflections,' *Journal of Business Ethics* 59, no. 1-2 (2005), p.74.

3 Kenneth W Thompson, 'The Study of International Politics: A Survey of Trends and Developments,' *The Review of Politics* 14, no. 04 (1952), pp.735-36.

the introduction, the 'tool' that this thesis employs to analyse legal developments in the area of business and human rights is the concept of legalisation. The thesis aims to develop and add to the legalisation framework in order to show how processes of legalisation could be reimagined at the transnational level.

This chapter proceeds in four parts. First, the chapter considers how IR has approached two questions in relation to international law and legalisation: why do states create international law, and what makes a particular norm 'legal' in nature? Second, the chapter describes the concept of legalisation as outlined in Abbott et al's well-known article of the same name. Under the classic legalisation framework, legalisation has three components: obligation, precision, and delegation. I then set out the advantages and limitations of this framework, and argue that the classic OPD framework fails to first, recognise the expanding role of non-state actors; and, second, conceptualise law as a process. Third, the chapter shows that the classic OPD framework can be adapted and reimagined in the context of the transnational legal system, which is characterised by thick configurations of agents working across a multiplicity of issue areas. I suggest that in applying the classic framework in the transnational context, there appears to be an omitted variable – that of implementation. Implementation refers to the specific actions taken by agents to translate legal or law-like principles into practical, workable instructions for courts, governments, companies and other non-state actors to follow. The third section foreshadows that the empirical chapters demonstrate that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics over time. In these instances, legalisers are playing a long game. They accept lower levels of obligation, precision, and/or delegation in the belief that, in the long-run, these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance. Finally, the chapter argues that focusing on implementation – rather than enforcement – has far-reaching consequences for analysis in international relations.

International Relations, International Law and Legalisation

In the introduction, we established that IR and IL have much to offer one another. Nevertheless, there is an inherent tension between the disciplines. IR is a subject that focuses on the existence and nature of anarchy in the international system. Legal scholarship, by contrast, traditionally accepts that an overarching sovereign and the ability to impose sanctions are essential elements in a legal system.[4]

How, then, should IR scholars conceptualise international law in an anarchical system? IR scholars tend to address this issue by focusing on three questions in particular. First, why do states create international law at all? In an anarchical world where state autonomy would be less constrained by avoiding legalisation completely, why would states voluntarily create binding rules that limit the scope of possible action? The second question concerns why states comply with international law. As legal scholar Louis Henkin famously noted, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[5] How should IR scholars explain such compliance in the absence of an overarching sovereign that compels states to comply with their international legal obligations? The third question focuses on whether it is possible to distinguish legal norms from other norms in the international system. Fundamentally, this question concerns what makes law 'law' in the international system, where there is no means of hard enforcement as exists in the domestic sphere.[6]

This thesis focuses on processes of legalisation, or how certain actors (or legalisers) attempt to make specific norms more 'legal' in nature. The subject thus engages to some extent with the first and third questions set out above: why do states create international

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4 See, most prominently, John Austin, *The Province of Jurisprudence Determined* (London: John Murray, 1832).

5 Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), p.47.

6 These questions have generated a vast literature across the various IR schools. It is beyond the scope of this thesis – not to mention unnecessary – to comprehensively outline this literature in its entirety.

law, and what makes a norm 'legal'? I briefly consider these questions before moving on to a more detailed discussion of the legalisation literature in particular.

The puzzle as to why states create international law lies in explaining why self-interested states would voluntarily adopt law when their autonomy would be less constrained by avoiding legalisation.[7] For realists, the answer is that international law may be a useful tool if it assists a state to achieve its short or long-term interests. Like other institutions, international law essentially reflects the distribution of power in the international system, and will be made and unmade in accordance with the interests of the most dominant players. Law, from this perspective, 'serves largely to rationalise the policies of powerful states, which exploit its symbols to manage international affairs for their own purposes'.[8] This view suggests that law has no real ability to resolve collective action problems, and that states do not possess any moral obligation to follow legal norms when noncompliance serves a state's interests. [9]

Liberal institutionalists, by contrast, emphasise that realists are unable to explain why international law and institutions have proliferated so extensively since 1945.[10] They provide their own explanation by showing that institutions reduce transaction costs, provide arenas for regular communication and informational exchange, and assist in promoting cooperation even in an anarchical environment.[11] Legal institutions, like other institutions, are characterised as 'rational, negotiated responses to the problems

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7 Judith Goldstein et al., 'Introduction: Legalization and World Politics,' *International Organization* 54, no. 3 (2000), p.391.

8 Terry Nardin, 'Theorising the International Rule of Law,' *Review of international studies* 34, no. 03 (2008), p.387.

9 Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: OUP, 2005).

10 See, for instance, Robert O Keohane, 'Twenty Years of Institutional Liberalism,' *International Relations* 26, no. 2 (2012); Abbott et al., 'The Concept of Legalization'.

11 Barbara Koremenos, 'Institutionalism and International Law,' in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark Pollack (Cambridge: CUP, 2013), p.60.

international actors face'.[12] Like realists, liberal institutionalists accept that law will reflect power and interests, although they allow that ideas may also influence interests.[13] Thus states will create international law because they benefit through enhanced cooperation. Liberals may also emphasise that underlying domestic structures determine how a state conducts its foreign policy, suggesting that international order is made from the bottom-up.[14]

Constructivists approach international law from yet another perspective. This group rejects the rationalist assumption that anarchy is unavoidably hostile, and that state interests are necessarily limited to the pursuit of security, power, or wealth. On the contrary, constructivists argue that states and their interests are socially constituted and defined in both material and non-material terms.[15] For constructivists, international law is created to reinforce shared norms. New international legal rules may be deliberately made by states to disseminate a norm more widely, or alternatively can be construed as a 'by-product' of norm internalisation.[16] Actors may follow norms for a range of reasons – they may wish to preserve reputation, demonstrate credible commitment, perceive themselves as a 'good' citizen of an international society, or have actually internalised the norms.[17] Relevantly for the purpose of this thesis, constructivists also emphasise the

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12 Barbara Koremos, 'The Rational Design of International Institutions,' *International Organization* 55(2001), p.768.

13 Christian Reus-Smit and Duncan Snidal, 'Between Utopia and Reality: The Practical Discourses of International Relations,' in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (New York: OUP, 2010), p.21.

14 Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics,' *International Organization* 51, no. 04 (1997).

15 Brunnée and Toope, 'Constructivism and International Law,' p.121.

16 Janina Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing* (Cambridge: CUP, 2014), pp.21-22.

17 ibid., pp.23-24.

role of agents, both in promoting norms through the norm life cycle,[18] or through the idea-generating force of epistemic communities.[19]

Despite the differences between these views, all three perspectives accept that it is material interests or shared norms that cause states to create IL.[20] This means that IL is essentially torn between the material and the ideational, as it must be both 'deferential to interests and faithful to norms'.[21] The implications of this statement are clear in the context of business and human rights. Legalisation in this area is propelled by the normative conviction that human rights violations should not go unpunished. Nevertheless, legalisation will fail to progress when the interests of powerful corporations (and their home states) are not taken into consideration.

A more nuanced understanding recognises that international law does not exclusively follow either interests or norms. As Janina Dill states so well:

> *But that does not mean it has to decide between what I refer to as utility and appropriateness; it integrates them. IL is at heart a compromise between diverging reasons for actions...Laws are neither merely stipulated instrumental considerations nor congealed beliefs about appropriateness because every legal rule is both.*[22]

If international law is 'at heart' a compromise between diverging reasons for action, legalisation is about the processes of contestation through which actors reach that compromise. As we shall see in this thesis, how norm entrepreneurs – or legalisers – advance their objective of legalisation depends upon the level of the transnational system and the particular arena of legalisation in which they are operating. In domestic

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18 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change,' *International Organization* 52, no. 04 (1998).

19 Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination,' *International Organization* 46, no. 01 (1992).

20 Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing*: pp.27-28.

21 ibid., p.29.

22 ibid., pp.50-51,59.

courtrooms, lawyers fight to win novel arguments in support of extraterritorial jurisdiction over offshore corporate human rights violations. In international organisations, prominent scholars and policymakers are advancing new frameworks to bolster the accountability of TNCs. In MSIs, government, industry and private sector representatives are together developing schemes to incentivise companies to minimise their human rights impact.

In each of these illustrations, we see actors fighting to find a workable compromise between: (1) interests, represented by the material business prerogatives of powerful corporations (and their supporting states); and (2) the ideal, represented by a global legal regime that provides robust and consistent accountability for corporate human rights violations, wherever in the world they occur. The law that results from the efforts of legalisers can be viewed as a compromise that lies between these two points. Certainly, '[l]egalisation is inevitably political…[t]he resulting law is always to some extent 'victor's law', reflecting the values and interests who were best positioned to affect its development'.[23]

It is also significant that in all of these examples, agents are working to advance a specific norm through particular institutional and normative structures. When legalisers successfully advance the legalisation of a particular norm, they transform the structures in which they are operating and create more space for future legalisation to occur. This reflects the constructivist perception of the international system as 'a historically created, and evolving, structure of common understandings, rules, norms, and mutual expectations'.[24] According to this perspective, structures are constituted and reproduced

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23 Abbott and Snidal, 'Law, Legalization and Politics: An Agenda for the Next Generation of IR/IL Scholars,' p.39.

24 Andrew Hurrell and Terry MacDonald, 'Ethics and Norms in International Relations,' in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A Simmons (London: Sage Publications, 2013), p.68.

in agents' practice.[25] Thus legalisation has a cyclical element – legalisers who successfully advance new rules also transform the legal framework through which future legalisation endeavours will be pursued.

The Concept of Legalisation

At this point, however, we need to take a step back. In examining the efforts of legalisers to create new legal rules, we need to look first at what makes a rule 'legal' in the international system. Legal positivists historically have queried whether international law is actually 'law'. Most famously, John Austin argued that law must flow from a 'precisely determined party […] capable of issuing a command', or a sovereign capable of enforcing rules.[26] For H.L.A Hart, however, the absence of sanctions is not determinative. He states: '[t]o argue that international law is not binding because of its lack of organised sanctions is tacitly to accept the analysis of obligation contained in [Austin's] theory that law is essentially a matter of orders backed by threats'.[27] Hart finds this approach problematic because it fails to distinguish between coercion and duty.[28] However, while Hart finds that international law is in fact law, he does not consider it to be a legal system. This is because it lacks 'secondary rules of change and adjudication which provide for legislature and the courts'.[29]

This brings us to how we should identify the particular characteristics of legal norms that make those rules 'legal' in nature. This issue was first addressed by IR scholars in Kenneth Abbott et al's 'The Concept of Legalisation'.[30] This article was written in response to the perceived increase in the use of law by states to structure their

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25 Alexander E Wendt, 'The Agent-Structure Problem in International Relations Theory,' *International Organization* 41, no. 03 (1987).

26 Austin, *The Province of Jurisprudence Determined*: p.136.

27 H.L.A. Hart, *The Concept of Law*, 3rd ed., Clarendon Law Series (Oxford: OUP, 2012), p.214.

28 David Armstrong, Theo Farrell, and Hélène Lambert, *International Law and International Relations* (Cambridge: CUP, 2012), p.82.

29 Hart, *The Concept of Law*: p.214.

30 Abbott et al., 'The Concept of Legalization'.

interactions.[31] In this work, the authors describe legalisation as a particular form of institutionalization characterised by three characteristics: obligation, precision, and delegation, which can be defined along three dimensions. Crucially, each of these dimensions is a 'matter of degree and gradation' rather than a 'rigid dichotomy'.[32] None of the characteristics is considered by the authors to be completely sufficient or totally sufficient, although it has been argued that 'obligation' perhaps closely resembles a necessary or almost necessary condition.[33]

Obligation

Obligation means that states or other actors are 'bound by a rule of commitment or by a set of rules or commitments'.[34] More particularly, it means that those actors are '*legally* bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often domestic law as well'.[35] Such obligations are distinct from obligations based solely on coercion, comity, or morality, and engage the 'established norms, procedures, and forms of discourse of the international legal system'.[36] The degree of commitment can vary widely along the continuum of obligation. At one end, a treaty framed as a 'convention' and requiring the traditional legal formalities of signature, ratification, and entry into force is a typical hard legal rule.[37] At the other extreme, some institutions such as 'recommendations' or 'guidelines' may explicitly refute any intention to create legal obligation.[38] Actors can specifically design institutions to vary legal obligation

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31 Louis Bélanger and Kim Fontaine-Skronski, ''Legalization' in International Relations: A Conceptual Analysis,' *Social Science Information* 51, no. 2 (2012), p.239.

32 Abbott et al., 'The Concept of Legalization' p.17.

33 Bélanger and Fontaine-Skronski, ''Legalization' in International Relations: A Conceptual Analysis' p.243.

34 Abbott et al., 'The Concept of Legalization' p.17.

35 ibid.

36 ibid., p.25.

37 ibid., p.26.

38 ibid.

between these two points, and may utilise techniques such as escape clauses or contingency provisions to soften obligation in particular circumstances.

Precision

A precise rule 'specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it'.[39] Precision also implies that individual rules within an overarching set are 'related to one another in a non-contradictory way'.[40] The authors also note that in international law, many conventions are quite precise (such as the WTO trade agreements and Montreal and Kyoto environmental agreements) whereas others are relatively vague. Where instruments are imprecise, this is often a deliberate choice in light of particular domestic and international circumstances rather than failure of legal drafting.[41] The authors also make an important distinction between 'rules' and 'standards', and suggest that standards are more easily applied when well-established courts or agencies are available to interpret them:

> *In highly developed legal systems, normative directives are often formulated as relatively precise 'rules' ('do not drive faster than 50 miles per hour'), but many important directives are formulated as relatively general 'standards' ('do not drive recklessly'). The more 'rule-like' a normative prescriptive, the more a community decides ex ante which categories of behaviour are unacceptable; such decisions are typically made by legislative bodies. The more 'standard-like' a prescription, the more a community makes this determination ex post, in relation to specific sets of facts; such decisions are usually entrusted to courts….Domestic legal systems are able to use standards like 'due care'…because they include well-established courts and agencies able to interpret and apply them (high*

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39 ibid., p.28.

40 ibid., p.29.

41 ibid., p.31.

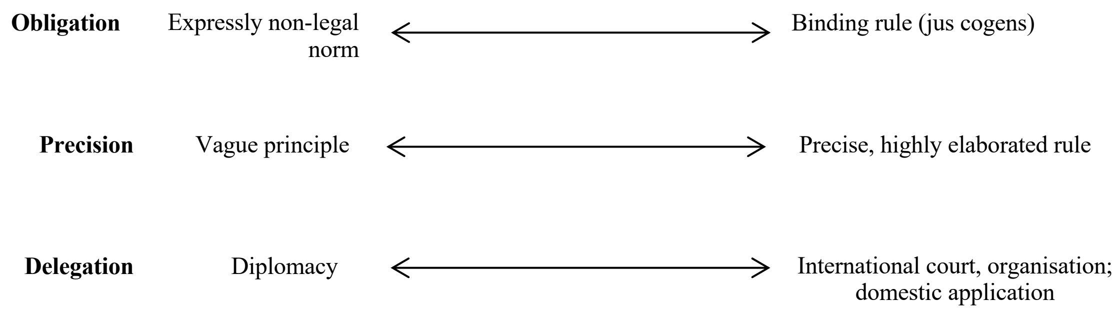
delegation), developing increasing precise bodies of precedent. In some international regimes, the institutional context is sufficiently thick to make similar approaches feasible.[42]

Delegation

Delegation refers to the extent to which states and other actors delegate authority to designated third parties to implement agreements.[43] Once again, there is a high level of potential variability. The most highly legalised institutions are interpreted and enforced by independent third parties such as courts. They are least legalised when the delegation process 'involves political bargaining between parties who can accept or reject proposals without legal justification'.[44] Importantly, the authors note that in the most highly legalised institutions, rules of adjudication are also likely to be adopted:

> *[A]s one moves up the delegation continuum, the actions of decision-makers are increasingly governed, and legitimated, by rules […] Thus, this form of legal delegation typically achieves the union of primary and secondary rules that Hart deemed necessary for the establishment of a legal system.*[45]

Figure 1: The dimensions of legalisation[46]



[42] ibid., p.29.

[43] ibid., p.31.

[44] ibid.

[45] ibid., pp.32-33.

[46] ibid., p.20.

Figure 1 shows that each element of the definition appears as a continuum, ranging from the weakest form at the left to the strongest (or 'hardest') form on the right. The authors also emphasise that this figure showcases the independence of each dimension from the others, allowing the creators of a legal instrument 'to combine any level of obligation, precision, and delegation to produce an institution exactly suited to their specific needs'.[47] Using the format of Figure 1, it is possible to plot where a particular arrangement falls on the three dimensions of legalisation.

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47 ibid.

Table 2: Indicators of Obligation, Precision, and Delegation[48]

Obligation ↕	High Unconditional obligation; language and other indicia of intent to be legally bound Political treaty: implicit conditions on obligation National reservations on specific obligations; contingent obligations and escape clauses Hortatory obligations Norms adopted without law-making authority; recommendations and guidelines Explicit negation of intent to be legally bound Low
Precision ↕	High Determinate rules: only narrow issues of interpretation Substantial but limited issues of interpretation Broad areas of discretion "Standards": only meaningful with reference to specific situations Impossible to determine whether conduct complies Low
Delegation ↕	a. Dispute resolution High Courts: binding third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules; domestic courts have jurisdiction Courts: jurisdiction, access or normative authority limited or consensual Binding arbitration Nonbinding arbitration Conciliation, mediation Institutionalized bargaining Pure political bargaining Low b. Rule making and implementation High Binding regulations; centralized enforcement Binding regulations with consent or opt-out Binding internal policies; legitimation of decentralized enforcement Coordination standards Draft conventions; monitoring and publicity Recommendations; confidential monitoring Normative statements Forum for negotiations Low

48 ibid., pp.26,31-32.

Advantages of the Original OPD framework

Selection of characteristics

In many respects, the classic legalisation framework provides a helpful description of legalisation. First, it practically focuses on the characteristics of rules as functional institutions, distilling those qualities that make certain rules law-like in their operation. The first characteristic of obligation reflects the fact that the essence of law lies in its capacity to oblige. This echoes Hart's emphasis on law as encompassing duty rather than sanctions: 'where there is law, there human conduct is made in some sense non-optional or obligatory'.[49] However, as discussed below, the authors fail to adequately explain the nature of obligation, meaning that the essential normativity of international law is left underexplored.

The second characteristic of precision is widely recognised among legal scholars as an essential characteristic of law. Precision in the law may act both as a coordinating and legitimating device, and promotes the values of predictability and certainty. With reference to domestic law, former UK Lord Chief Justice Tom Bingham writes that 'the law must be accessible and so far as possible, intelligible, clear, and predictable'.[50] This is because if individuals or other entities are to perform the obligations that the law imposes upon us, it is important to know what those obligations are.[51] Using slightly different language, international legal scholar Thomas Franck reminds us that 'determinacy' bolsters legitimacy of the law and ultimately compliance, along with three other characteristics of symbolic validation, coherence, and adherence. [52]

Finally, the third characteristic of delegation follows from the fact that rules will be more effective if they are operationalized. In the absence of structures that administer and

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49 Hart, *The Concept of Law*: p.82.

50 Tom Bingham, *The Rule of Law* (London: Penguin, 2011), p.37.

51 ibid., p.38.

52 Thomas M Franck, *The Power of Legitimacy Among Nations* (New York: OUP, 1990).

enforce them, the power of rules to oblige and to compel is necessarily reduced. This characteristic also reflects the conversation amongst IR and IL scholars regarding the role of adjudication and enforcement in making law 'legal' at the domestic and international levels.[53]

Capacity for institutional comparison

Another advantage of the OPD framework is that is permits a range of institutions at various stages of legalisation to be compared to one another. The authors use the three dimensions to set out a typology that dichotomizes each dimension using a Low/High scale, resulting in a typology of eight possible combinations. Weighting *obligation* as the most important dimension, and *precision* as the least, the eight combinations are ranked on a continuous scale. This ranges from an 'ideal type' of legalisation, where all three dimensions are maximised; to 'hard' legalisation, where all three dimensions (or at least obligation and delegation) are high; through multiple forms of partial or 'soft' legalisation involving different combinations of attributes; and finally to the complete absence of legalisation, another ideal type. One can identify that a principle with high obligation, low/high precision and high delegation (*O; p/P; D*) is likely to be more legalised than a principle with low obligation, low/high precision, and low delegation (*o; p/P ;d*). For instance, a multilateral treaty which delegates decision-making to a national court is categorically more legalised than a set of nonbinding guidelines.

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[53] As noted above, John Austin argued that in the absence of a sovereign power, international law is not really 'law'. Hans Kelsen in 1952 similarly considered international law to be merely a 'primitive' form of self-help. However, more recent theorists show that ideas about the international system should not be conceived via the direct transposition of domestic concepts about government and order. Hedley Bull, for instance, has shown that although international society lacks a centralised authority capable of enforcement, it possesses unique devices that maintain order: Austin, *The Province of Jurisprudence Determined*; Hans Kelsen, *Principles of International Law* (New Jersey: The Lawbook Exchange, Ltd., 1952), pp.417-18; Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (New York: Columbia University Press, 2002).

Table 3: The original legalisation typology

Type	Obligation	Precision	Delegation
Ideal type: Hard law			
I	High	High	High
II	High	Low	High
III	High	High	Low
IV	Low	High	High (moderate)
V	High	Low	Low
VI	Low	Low	High (moderate)
VII	Low	High	Low
VIII	Low	Low	Low
Ideal type: Anarchy			

Third, the framework can be used to make explicit the relationships or tensions between the various dimensions. At first glance, it appears as though each dimension operates independently of the others. A legal institution with high obligation does not necessarily have high delegation or high precision, and vice versa. Indeed, the binding nature of an institution may be expressed by the 'obligation' dimension, but legalisation cannot be equated with obligation alone because 'many international commitments that to a lawyer entail binding legal obligations lack significant levels of precision or delegation'.[54] In this way, precision or delegation may constrain the degree to which a state has discretion to choose the manner by which it may comply with its international obligations: 'the essence of what the concept of legalisation wants to capture, or its

[54] Abbott et al., 'The Concept of Legalization' p.15.

ontology, would be the overall constraining nature of an international arrangement'.[55] However, on further examination, it is clear these dimensions are not wholly independent; some relationships between the dimensions must exist. A vague legal rule does not generate the same level of obligation as a precise legal rule, nor is it so easily delegated. Similarly, rules that are effectively delegated are more likely to be precise, and to generate a high level of obligation. On the other hand, sometimes a higher level of precision could lead to less obligation, especially when 'prospective members of legal regimes are driven away by fears of detailed rules that are inflexible'.[56]

Limitations of the Original OPD framework

We turn now to the limitations of the OPD framework. First and most critically, the OPD concept of obligation is underdeveloped. Dill, for instance, comments that 'it is unclear whether [obligation] is meant to hint either at a specific mode of operation of law…or whether it merely describes objective degrees of bindingness'.[57] In essence, the OPD framework provides us with little explanation of the essential normativity of international law.[58]

Second, the OPD framework offers few insights into why some principles are more likely to become highly legalised than others. This problem is partly resolved by drawing on Kenneth Abbott and Duncan Snidal's contribution on hard and soft law, which theorizes that states seek harder or softer institutional arrangements depending on what

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55 Bélanger and Fontaine-Skronski, ''Legalization' in International Relations: A Conceptual Analysis' p.241.

56 Martha Finnemore and Stephen J Toope, 'Alternatives to "Legalization": Richer views of Law and Politics,' *International Organization* 55, no. 03 (2001), p.748.

57 Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing*: p.33.

58 Theories as to why actors comply with international law range from the instrumental to the normative. Actors may comply for a variety of reasons related to: (a) inducement through incentives (such as foreign aid) or disincentives (such as the threat of military intervention); (b) reciprocity; (c) reputation; (d) domestic policy concerns; (e) norm internalization and/or identity; and (f) legitimacy and fairness. For an excellent overview of this literature, see: Jana von Stein, 'The Engines of Compliance,' in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: CUB, 2013)..

they are trying to achieve. Pursuing a hard law solution might be optimal if states are trying to create a credible commitment, reduce future transaction costs, or avoid incomplete contracting. By contrast, soft law solutions have their own distinct advantages if they reduce contracting and/or sovereignty costs and ease bargaining difficulties, particularly between actors with different degrees of power or different interests and values.[59] This model thus provides some assistance in explaining why some principles are more legalised than others, suggesting that the outcome reflects the cost-benefit analysis and priorities of states. When states choose non-legalised institutional forms, they are essentially seeking a lower level of constraint on their autonomy.[60]

Third, the OPD framework has also been criticised for conceptualising law and legalisation too narrowly. Martha Finnemore and Stephen J. Toope, for instance, argue that consistent with a broader view of law:

> *[T]he legalisation of politics encompasses more than just the largely technical and formal criteria of obligation, precision, and delegation. It encompasses features and effects of legitimacy, including the need for congruence between law and underlying social practice.*[61]

In particular, Finnemore and Toope complain that the authors say little about why obligation, precision, and delegation have been selected as the most important 'among the universe of legal features'.[62] Legitimacy, for instance, perhaps deserves a place in the OPD analysis. However, it is also arguable that the OPD concept of obligation (although admittedly unexplained by the authors) could feasibly be somewhat similar to the idea of legitimacy – legitimacy is recognised elsewhere as a source of obligation and

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59 Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance,' *International Organization* 54, no. 03 (2000).

60 Bélanger and Fontaine-Skronski, ''Legalization' in International Relations: A Conceptual Analysis' p.241.

61 Finnemore and Toope, 'Alternatives to "Legalization": Richer views of Law and Politics' p.744.

62 ibid., p.747.

'compliance pull' in international law.[63] Nevertheless, certainly Finnemore and Toope are correct in saying that it would be possible to identify other potential characteristics of legal norms. Elsewhere, and as noted above, Franck has suggested that norms that possess the characteristics of determinacy, symbolic validation, coherence, and adherence will possess legitimacy and, in turn, be more likely to induce compliance.[64] Alternatively, Brunnée and Toope choose eight other specific qualities that they argue indicate legality. According to these scholars, a legal norm must be general, promulgated or accessible, non-retroactive, realistic, non-contradictory, constant, and there must be congruence between the norm and official behaviour.[65]

Yet, as noted by Dill, even Brunnée and Toope's far more thorough treatment of obligation fails to ultimately capture what is distinctive about legal norms. From this perspective, IL still relies on the existence of normative beliefs that lie outside the realm of international law. Dill writes: 'It seems we have come full circle to IL's causal dependence...Legality in the interactional account does not produce or even explain compliance, it follows it'.[66] We must conclude that there is 'no set of characteristics that plausibly and definitely distinguishes legal from non-legal norms'.[67] It turns out Finnemore may still be correct: '[w]hat distinguishes legal norms from other norms is simply not clear'.[68]

But perhaps a degree of ambiguity is inevitable. Even though the OPD framework does not definitely separate legal from non-legal norms, this is not necessarily a weakness. Perhaps it legitimately reflects the messiness and uncertainty that characterises the

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63 See, for instance, Franck, *The Power of Legitimacy Among Nations*.

64 ibid.

65 Legal obligation for Brunnée and Toope is based on three factors – a norm that induces obligation possesses these eight characteristics, reflects shared understandings, and is sustained in practice: Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: CUP, 2010).

66 Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing*: p.38.

67 ibid., p.40.

68 Martha Finnemore, 'Are Legal Norms Distinctive?,' *NYU Journal of International Law and Politics* 32(1999), p.703.

beginnings of legalisation (and is amply illustrated by the empirics set out in this thesis). It may not make sense to draw a bright line between legal and non-legal norms if it is only over time that norms gradually strengthen across one or more OPD dimensions, becoming progressively more legalised in the process.

This brings us to one of the most interesting criticisms of the OPD framework – that it fails to reflect the concept of a law as a process.[69] In one sense, the concept of legalisation is so useful precisely because it implicitly distinguishes between the idea of law as a process from the idea of law as a set of principles that exist at a particular moment in time. In explaining legalisation, Abbott and Snidal helpfully draw a distinction between 'static' and 'dynamic' aspects of the legal system.[70] Adopting an earlier definition used in the definitive *International Organization* article by Abbott et al, they state that 'law' can be described as 'the legal system and body of legal rules, procedures, discourses, and institutions existing at a point in time'.[71] Law understood in this sense is static, as it represents the rules and institutions at a given moment in time that are the culmination of legalisation up to that point. By contrast, 'legalisation' is characterised as dynamic, which refers to the process of 'adding to, changing, or subtracting from the body of law and the legal system over time'.[72]

This distinction is conceptually helpful for an academic community that has regularly agonised over whether international law should be described as an established set of principles or a process. Rosalyn Higgins, for instance, has characterised international law as 'the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules"'.[73] On the other hand, Anthony Arend stresses that 'law is created through a process, and law can be changed through a process […] But

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69 Finnemore and Toope, 'Alternatives to "Legalization": Richer views of Law and Politics' p.750..

70 Abbott and Snidal, 'Law, Legalization and Politics: An Agenda for the Next Generation of IR/IL Scholars,' p.34.

71 Abbott et al., 'The Concept of Legalization' p.34.

72 ibid.

73 Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (New York: OUP, 1994), p.2.

"law" is not a process itself. To make law equal the process ignores that at a given point in time, certain concrete *rules* can be identified'.[74] 26

Identifying that legalisation is a dynamic process is therefore very important. However, the legalisation literature in general fails to capture the dynamism of the process itself. Who are the actors involved? What are the motivations or incentives that stimulate actors to agitate for change in the law? In omitting the role of the actors themselves, liberal institutionalists have failed to capture the contestation inherent in law-making processes. This has implications for how we understand law and legalisation, which 'may be much more about process than about form or product'.[75]

This limitation is actually recognised by Abbott et al in their original article. They note that some regimes (such as the ozone depletion regime) appear likely to become increasingly legalised, that others (such as the whaling regime) appear to have a constant level of legalisation, and that still others (such as fixed exchange rate regimes) are in decline. However, they explicitly state that the OPD framework 'take[s] no position' on whether international legalisation is increasing or likely to increase over time. Instead, they invite future scholars to take up this challenge: 'Exploration of the legal dynamics would be the logical next step in the research program that this volume seeks to inaugurate'.[76]

Advancing the OPD framework

The Importance of Process and Agency

This thesis attempts to do just that in considering legalisation as a dynamic process. This is an area where constructivists can assist. It is the constructivists – rather than the liberal institutionalists – who have convincingly demonstrated why and how particular

74 Anthony C Arend, *Legal Rules and International Society* (Oxford: OUP, 1999), p.26.

75 Finnemore and Toope, 'Alternatives to "Legalization": Richer views of Law and Politics' p.750.

76 Abbott et al., 'The Concept of Legalization' p.24.

actors or organisations drive processes of change forward. For instance, Brunnée and Toope suggest that scholars should 'stop looking for structural distinctions that identify law, and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behaviour'.[77] Brunnée and Toope's scholarship tries to explain the particular role of NGOs, epistemic communities and others who are actively engaged in the 'creation of shared understandings and the promotion of learning among states'.[78] Martha Finnemore and Kathryn Sikkink's work also gives agency a prominent role by making the role of 'norm entrepreneurs' central to the analysis.[79] The concept of the norm life-cycle demonstrates that: first, change in international law can occur; and second, that a variety of actors (including non-state entities) are capable of influencing key developments at each stage.[80] By focusing on the role of agency in legalisation, power dynamics and conflicting interests can be incorporated into the analysis of why particular rules embody specific degrees of obligation, precision, and delegation.

Nowhere is this more evident than in the rapidly growing area of business and human rights. Developments in the field are being propelled by a sophisticated and dynamic

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77 Jutta Brunnée and Stephen J Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law,' *Columbia Journal of Transnational Law* 39(2000), p.68.

78 ibid., p.70.

79 The life cycle of an infant norm begins when 'norm entrepreneurs' begin to try to persuade a critical mass of states to accept a new idea (*norm emergence*). If a sufficient number of this group are persuaded to adopt the idea, more states may follow suit due to pressure to conform or a desire to boost their standing in the international system (*norm cascade*). If there is not sufficient consensus at this point, the idea fails to become a norm. Finally, the norm gains such acceptance that it becomes a social fact (rather than a topic for debate) capable of influencing the actions of states (*norm internalization*). The new norm may also be incorporated into an overall 'standard of appropriateness,' which will affect emerging norms in the future: Finnemore and Sikkink, 'International Norm Dynamics and Political Change'.

80 For some scholars, this realisation amounts to a call to action for lawyers to propel the law in a progressive direction: 'if international relations are to be more than just power politics, international lawyers must serve as moral actors, who seek self-consciously to promote this process of norm internalisation. It is the job of international lawyers to promote international norms, to identify legal constraints and to identify ways to channel proposed state actions into normative frameworks'. Harold Koh, 'Opening Remarks: Transnational Legal Process Illuminated,' in *Transnational Legal Processes: Globalisation and Power Disputes*, ed. Michael Likosky (UK: Butterworths, 2002), p.332.

epistemic community, which includes representatives from business, industry, law, NGOs, governments, international organisations, and victims' group. It is telling that the annual UN Forum on Business and Human Rights has grown in just four years to include over 2300 participants, many of whom have played a pivotal role in establishing and expanding the initiatives discussed in the remaining chapters of this thesis. This industry is a living illustration of the fact that to describe legalisation in the transnational context without reference to agency is to tell only half of the story.

Non-State Actors and the Transnational Legal System

The significant role that non-state actors have played in the business and human rights arena reflects other limitations of the OPD model, which focuses almost exclusively on institutional arrangements based on state preferences. This is an overly narrow perspective: global governance today involves a range of non-state actors, incorporates a plurality of legal orders, and produces a range of legal and law-like arrangements. The traditional OPD model considered legalisation in the *international* legal system. In order to be more relevant, updated models of legalisation should focus on the *transnational* legalisation.

With this in mind, we turn to the concept of transnational law and how it is distinctive from international law. The best place to start identifying sources of international law is Article 38(1) of the Statute of the International Court of Justice. Article 38(1) provides that international conventions (i.e. treaties), international custom[81], the 'general principles of law recognised by civilised countries,' and 'judicial decisions and the

[81] A rule of customary law has two elements. First, there must be widespread and consistent state practice. Second, there must be 'opinio juris,' which means that states must obey the rule because they believe that they have a legal duty to do so. The International Court of Justice has phrased this as follows: 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. … The States concerned must feel that they are conforming to what amounts to a legal obligation': see *The North Sea Continental Shelf Cases (Germany v Denmark and the Netherlands)* ICJ Reports 1969 1, at 77. A new rule of customary international law cannot be created unless both of these elements are present.

teachings of the most highly qualified publicists' are all sources of international law.[82] To this, one could add (not without controversy) other sources, such as state practice, the practice of international organisations, and submissions by international law commissions adopted by international organisations. Turning to legal scholarship, James Crawford describes international law as 'a set of practical functions' developed since the 1648 Treaty of Westphalia that are 'underpinned by a certain history and a less certain array of theories'.[83] Anthony Arend highlights its obligatory quality in labelling international law as a 'set of binding rules that seek to regulate the behaviour of international actors by conferring rights and duties'.[84] This approach can be contrasted with that of Rosalyn Higgins, who characterizes international law as an 'entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules"'.[85] In the domain of international law, states remain the central actors and the legalisation of specific rules is based on a foundation of state contract and consent.

Transnational law, by contrast, is a far more recent invention than international law. Transnational law was first defined in 1956 by international lawyer Philip Jessup as 'all law which regulates actions or events that transcend national frontiers…[including] [b]oth public and private international law…[plus] other rules which do not wholly fit into such standard categories'.[86] With this description, Jessup was attempting to demonstrate that existing legal categories were not adequate to capture the range of

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82 Article 38(1)(d) does not differentiate between decisions of international and national courts. The former are generally considered the more authoritative evidence of international law although this is not the case in relation to those principles most commonly addressed by national courts.

83 James Crawford, 'Foreword,' in *International Law, International Relations, and Global Governance*, ed. Charlotte Ku (Oxford: Routledge, 2012), p.xv.

84 Anthony C Arend, 'Toward an Understanding of International Legal Rules,' in *International Rules: Approaches from International Law and International Relations*, ed. Robert J Beck, Anthony C Arend, and Robert D Vander Lugt (Oxford: OUP, 1996), p.290.

85 Higgins, *Problems & Process: International Law and How We Use It*: p.2.

86 Jessup, *Transnational Law*: p.2.

existing law and law-like arrangements that he observed.[87] Carrie Menkel-Meadow writes that the concept of transnational law captures that the ‘modern world of human activity [is] facilitated, regulated, sometimes thwarted, and often affected, by laws that "cross borders" in order to effectuate their purposes’.[88] Thomas Risse-Kappen describes transnational relations as ‘regular interactions across national boundaries [that] arise when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organisation’.[89]

Following on from this, transnational legal process ‘describes the theory and practice of how public and private actors – nation-states, international organisations, multinational enterprises, NGOs, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law’.[90] For Harold Koh, the dynamics that unfold during transnational legal process are so significant that they ‘provide the key’ to understanding compliance with international law. Compliance depends upon norm internalization, which is comprised of several stages. In the first stage, states, international organisations, NGOs, business, entities and other norm entrepreneurs provoke interactions with one another in an international arena.[91] These interactions ‘force an interpretation or enunciation of the global norm applicable to the situation’ and eventually a legal rule

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87 Anne Carter, 'Proportionality in Australian Constitutional Law: Towards Transnationalism?,' *Heidelberg Journal of International Law* forthcoming(2016), p.1.

88 Carrie Menkel-Meadow, 'Why and How to Study Transnational Law,' *UC Irvine Law Review* 1(2011), p.99.

89 Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Non-state Actors, Domestic Structures and International Institutions*, vol. 42 (Cambridge: CUP, 1995), p.3.

90 Harold Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process,' *Nebraska Law Review* 75, no. 1 (1996), pp.183-84.

91 Koh et al., 'Why Do Nations Obey International Law?' p.2603.

emerges from this process.[92] Repeated participation assists actors to reconstitute their interests and identities in the process.[93]

Helpfully, Koh identifies that transnational legal process has four distinctive features:

> *First, it is nontraditional: it breaks down two traditional dichotomies that have historically dominated the study of international law: between domestic and international, public and private. Second, it is nonstatist: the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well. Third, transnational legal process is dynamic, not static. Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again. Fourth and finally, it is normative. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again. Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey.*[94]

Transnational law therefore incorporates 'informal' forms of legal activity, including rules and standards developed by private organisations, signalled by some as evidence of a shift towards the privatisation and internationalisation of governance.[95] Anne-Marie Slaughter and others suggest transnational law even encompasses the product of interactions between private individuals, as manifested by informal 'networks' that have developed amongst intergovernmental and non-governmental (NGO) institutions to

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92 ibid., p.2646.

93 Brunnée and Toope, 'Constructivism and International Law,' pp.131-33.

94 Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' p.184.

95 Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (New Jersey: Princeton University Press, 2011).

address specific legal and political issues with a transnational dimension.[96] These issues include, among others, national security, international terrorism, climate change, monetary and banking policy, women's and children rights, immigration, and the regulation of the internet and intellectual property.[97]

Looking more broadly at the transnational legal system itself, we see it too possesses distinctive characteristics. Koh highlights the proliferation of international regimes and institutions, the participation of an increased number of non-state actors, and an enlarged space for interaction between domestic and international regimes.[98] Similarly, Christian Brütsch and Dirk Lehmkuhl describe the transnational system as being distinguished by a plurality of legal orders, the emergence of hybrid schemes leading to the establishment of legal and law-like arrangements, and the development of global law without the state. Importantly, Brütsch and Lehmkuhl note that this 'move' to private authority stimulates reflection on the 'analytical tools need[ed] to capture the logic of situations where public authority plays only a marginal role'.[99] All of these authors strongly emphasise the need for more scholarship to be directed to transnational law and the dynamics of law-making involving non-state actors.

This thesis discusses several initiatives that illustrate why the concept of transnational law is such a useful one. Take, for example, the Kimberley Process (KPCS), which is discussed in the final empirical chapter. The KPCS is an industry-based certification scheme designed to track rough diamonds and prevent those from conflict zones entering legitimate world markets. Countries are not legally required by treaty or other convention to participate in the scheme, therefore the initiative is not best described as a

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96 Anne-Marie Slaughter, 'Governing the Global Economy through Government Networks,' in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: OUP, 2001); Slaughter, *A New World Order*.

97 Menkel-Meadow, 'Why and How to Study Transnational Law' p.13.

98 Koh, 'Opening Remarks: Transnational Legal Process Illuminated,' p.327.

99 Christian Brütsch and Dirk Lehmkuhl, 'Introduction,' in *Law and Legalization in Transnational Relations*, ed. Christian Brütsch and Dirk Lehmkuhl (Oxford: Routledge, 2007), p.24.

product of international law. Nevertheless, the scheme requires governments to implement domestic legislation, and involves the participation of states, corporations, and NGOs. The rules created by the KPCS are certainly some type of 'law' (or at least are 'law-like'), but are not best described either as national or international law. This is why the concept of transnational law is so valuable. It describes the development and implementation of rules that involve states, corporations, IOs, and NGOs. This suggests that law as it operates at the international level should no longer be described simply as laws regulating relations between states. Rather, the international legal system is pluralistic and possibly even aspirational, comprised of 'a complex blend of customary, positive, declarative, and 'soft' law, which seeks not to ratify existing practice, but to elevate it'.[100]

Arriving at this conclusion, however, is not without its problems. In particular, if transnational 'law' is generated by a range of public and private actors, are these principles actually 'law' if they do not directly rely on the authority and power of the state? At the domestic level, the most obvious reason why legal norms exert unique influence is that they are supported by the coercive power of governments. Similarly, the authority of international law (and hence its legality) is traditionally conceived as flowing from the consent of states. This forces us to ask whether, in the absence of this explicit connection with the state, transnational law should be characterised as 'law'. However, this should not matter if we choose to view international law 'not as a pale imitation of municipal law but as an institution characterised by its own distinctive features'.[101] And ultimately, if we decide that international law can only be characterised as 'legal' due to its specific connection with authority, our idea of what constitutes international law must change as authority itself becomes diffused across new networks and new actors within international society. This claim is one of the core theoretical

100 Koh et al., 'Why Do Nations Obey International Law?' pp.2630-31.

101 Richard Caplan, *Europe and the Recognition of New States in Yugoslavia* (Cambridge: CUP, 2005), p.77.

points of the thesis, and also leads us to ask: how can legalisation be reimagined in the transnational context?

Legalisation in the Transnational Context

In order to answer this question, this thesis methodically describes the processes of legalisation driven by specific actors within three separate but related arenas. Each empirical chapter of the thesis uses the OPD framework to analyse the role of legalisers in creating the elements of obligation, precision, and delegation. In each arena of legalisation, structure is also a keen focus. It is impossible to ignore the institutions specific to each relevant arena, as they may also affect the degree to which the elements of obligation, precision, and delegation can be generated. Legalisation is one area that explicitly draws out the interaction between agency and structure for two reasons. First, agents agitating for legal change must navigate their way through complex legal institutions and structures in order to promote the legalisation of specific rules. Second, through this activity, agents actively seek to transform the relevant normative and legal frameworks through which they operate with the objective of facilitating future legalisation attempts.

One of the principal arguments of this thesis is that in order to comprehensively describe legalisation in the transnational context, it is not sufficient to rely on the characteristics of obligation, precision, and delegation. In the context of transnational legalisation, there is an omitted variable, and that variable is implementation. Implementation refers to the specific actions taken by agents to translate legal or law-like principles into practical, workable instructions for courts, governments, companies and other non-state actors to follow.

For several reasons, the characteristic of implementation takes on a particular importance in the transnational context.[102] As previously described, rules generated across several levels of global governance involve thick configurations of agents working across a multiplicity of issue areas. We know that the types of agents involved in transnational legalisation are more varied than at the domestic level, and include international organisations, national governments, business industries and NGOs. In many ways, the proliferation of rules at the international and transnational levels constitutes a significant achievement, a sign that meaningful responses to coordination problems are possible even in a globalised world where governments must continually reassess their role and readapt to rapidly changing circumstances. Yet the complexity of issues addressed by global governance initiatives – from climate change to human trafficking to disease control – generates complicated systems of rules that are not always straightforward to put into practice. In these circumstances, implementing the rules takes on increased importance.

Second, unlike domestic legal systems, the transnational legal system has not developed automatic systems of implementation and enforcement. When rules are created in a functioning state, they are operationalised through systems already established to facilitate the automatic implementation of new rules. Laws are passed and promulgated in accordance with established processes. Specific government departments or institutions are made responsible for the practical side of implementation, and police and other enforcement agencies are automatically available to enforce rules as soon as they become the law. Because implementation happens automatically at the domestic system, it is easy to underestimate the challenge of implementation when it unfolds in the less structured, more fluid environment of the transnational legal system.

In the transnational context, the description of legalisation described by the OPD framework reveals a gap between the processes that generate: (1) obligation and

102 This chapter does not attempt to rank the quality of implementation in relation to the dimensions of obligation, precision, and delegation. For the purpose of this thesis, there is little utility in expanding out the original legalisation typology to sixteen categories.

precision; and (2) delegation. Once the rules are made (obligation) and their scope defined (precision), an essential part of the legalisation process is translating those rules into workable, practical guidelines, and assistance is given to those entities that seek to apply the rules (implementation). At this point, and at this point only, it is possible to delegate to third parties to enforce the rules (delegation).

It is helpful to pause at this point to consider how the OPD authors might consider the inclusion of implementation as an additional characteristic. It is possible that they would interject to either: (1) protest against the inclusion of a characteristic such as implementation; or (2): insist that implementation is already covered by the dimension of delegation. In relation to the first point, the authors say:

> *[W]e have defined legalization in terms of key characteristics of rules and procedures, not in terms of effects. For instance, although our definition includes delegation of legal authority (to domestic courts or agencies as well as equivalent international bodies), it does not include the degree to which rules are actually implemented domestically or to which states comply with them. To do so would be to conflate delegation with effective action by the agent and would make it impossible to inquire whether legalization increases rule implementation or compliance.*[103]

However, this position is problematic and potentially not applicable in the transnational context. As will be seen throughout the thesis, the rule creation process is difficult to separate from the process of implementation. Furthermore, we miss an important element of legalisation if we lose sight of the fact that it is necessarily a process propelled by the actions of agents. In relation to the second point (that implementation is already covered by delegation), the authors might point to their comment that:

> *Virtually all international organisations gather and disseminate information relevant to implementation; many also generate new information. Most engage in educational activities, such as the WTO's training programs for developing country officials. Agencies*

[103] Abbott et al., 'The Concept of Legalization' p.18.

like the World Health Organisation, the World Bank, and the UN Environment Program have much more extensive operations. These activities implement (and thus give meaning to) the norms and goals enunciated in the agencies' charters and other agreements they administer. Although most international organisations are highly constrained by member states, the imprecision of their governing instruments frequently leaves them considerable discretion, exercised implicitly as well as through formal interpretations and operating policies. The World Bank, for example, has issued detailed policies on matters such as environmental impact assessment and treatment of indigenous peoples; these become legally binding when incorporated in loan agreements.[104]

Aside from this paragraph, however, implementation is given short shrift. These processes should be conceptualised separately from those categorised under 'delegation', which refers to the granting of authority to third parties 'to implement, interpret and apply the rules; to resolve disputes; and (possibly) to make further rules'. Delegation generally refers to the stage where rules are applied and enforced, not when they are implemented as part of the overall legal system. In all of the arenas described in the empirical chapters, we can observe various instances of implementation as set out in the table below.

[104] ibid., p.33.

Table 4: Indicators of High and Low Implementation

	Domestic	International	Transnational
High	• Cause of action available	• Consensus is prioritised	• Participation is prioritised
	• Transitory tort + class action available	• Non-state actors involved in a substantive way	• Non-state actors involved in a substantive way
	• Criminal complaint mechanism available	• Links with neighbouring regimes are encouraged	• Participants not excluded immediately if found in breach of rules
	• Parental duty of care established in common law	• Practical steps taken to encourage broad support/ wide adoption (law firms, working groups, national plans).	• Peer review and mutual assistance are encouraged
	• FNC and jurisdictional challenges moderately applied	• Rules are practical, direct, and specific	• Rules are practical, direct, and specific
	• Discovery available		• Cooperation encouraged and prioritised
	• Pro Bono /Legal Aid/NGO representation available		
Low	• Cause of action not available	• Consensus is not prioritised	• Participation is not prioritised
	• Transitory tort and/or class action not available	• Non-state actors not involved in a substantive way	• Non-state actors not involved in a substantive way
	• Criminal complaint mechanism subject to prosecutorial discretion	• No effort to forge links with neighbouring regimes	• Participants excluded immediately if found in breach of rules
	• Parental duty of care not established in common law	• No practical steps taken to encourage broad support/wide adoption	• Peer review and mutual assistance not encouraged
	• FNC and jurisdictional challenges strictly applied	• Rules are aspirational or binding	• Conflict and non-consensus makes initiative unworkable
	• Discovery not available		
	• Pro Bono /Legal Aid/NGO representation not available		

The Importance of Implementation

Why is this important? This thesis argues that the inclusion of implementation as a dimension of legalisation has far-reaching implications. First, an emphasis on implementation stresses that if international organisations and MSIs are to create effective rules that make a difference on the ground, they must create ways to facilitate the implementation of those rules. Governments and companies are likely to be more supportive of rules endorsed at the international level if they are certain of the tasks required of them and that practical assistance will be provided to assist states and business to translate those principles into practice on the ground.

Second, placing implementation at the centre gives scholars and policy-makers an area to discuss, criticise, and analyse that is distinct from delegation (and, by association, the concept of enforcement). Laws created at the international and transnational level are regularly censured for not incorporating or providing for sufficiently robust enforcement mechanisms. These criticisms are legitimate; certainly, the most effective laws are those established with appropriate enforcement and dispute resolution measures in place (as is the case with the World Trade Organisation (WTO), for example, which enforces WTO agreements made amongst nations). Nevertheless, too often these criticisms fail to acknowledge the political reality that the rules would never have been endorsed in the first place had they included robust enforcement. Where this occurs, academic contributions may miss the point, pushing discussion into less fruitful areas of debate. In the business and human rights context, a good example of this is the debate over voluntary versus compulsory standards, which continues despite the fact it is increasingly acknowledged that the distinction between the two types of standards may be blurry and the acceptance of compulsory rules politically impossible.

By failing to acknowledge the importance of implementation, scholars overlook a vast landscape that lies between (1) obligation and precision; and (2) delegation, where international and transnational law is in fact operationalised. In this space, few serious attempts have been made to measure implementation or its practical effects on the ground. In the area of business and human rights, there is a significant amount of information available on the number of companies that have human rights policies in place, but less information regarding the effectiveness of these policies in practice. This underlines the importance of measurement, which can act as an important driver of progress. Once companies know that they are being measured they are more likely to try and race to the top. In this context, implementation, rather than enforcement, is key.[105]

Third, the OPD authors argued that their conception of legalisation 'creates common ground for political scientists and lawyers by moving away from the narrow view of law as requiring enforcement by a coercive sovereign'.[106] In some respects, this is true: we noted above the fact that international relations scholarship has proved adept at highlighting the potential of soft law and emphasising institutions that promote cooperation even in the absence of hard law. However, Abbott et al's claim sits oddly with the fact that the only way that the authors measure the operationalisation of laws is through the dimension of 'delegation', which implies enforcement or oversight conducted by an independent third party.[107] If we are truly to take IR scholarship away from this 'narrow', enforcement-based view of international law, we need to push our way beyond frameworks that reinforce the traditional presumption that law without enforcement is not intrinsically law. For this reason, the dimension of implementation makes a valuable and empirically illuminating contribution to a framework designed to

105 Margaret Jungk, 'Closing Plenary Remarks, UN Forum on Business and Human Rights', 18 November 2015. Available at: http://www.ohchr.org/Documents/Issues/Business/ForumSession4/ClosingRemarksMargaretJungk.pdf (accessed 31 August 2016).

106 Abbott et al., 'The Concept of Legalization' p.18.

107 According to Abbott et al, delegation is 'the extent to which states and other actors delegate authority to designated third parties – including courts, arbitrators, and administrative organisations –to implement agreements. The characteristic forms of legal delegation are third-party dispute settlement mechanisms authorized to interpret rules and apply them to particular facts (therefore in effect to make new rules, at least interstitially) under established doctrines of international law': ibid., p.31.

describe legalisation. It is able to highlight situations where laws are not effectively enforced but are (at least in part) operationalised through a variety of methods. Implementation also plays an important role when the concept of delegation is inadequate because it necessarily implies the involvement of an independent third party. In many transnational initiatives, the delegation-type function is carried out by participants themselves, who may assist other members in breach through pledges of mutual assistance or processes of peer review. The dimension of implementation is helpful to capture these instances of delegation-type activities that are not delegated to independent third parties, but are carried out by participants themselves.

Fourth, the importance of emphasising implementation is reflected by the fact that scholars and policy-makers regularly fail to see that attempts at implementing rules may create significant benefits and capacity-building opportunities, even when the overall system remains poorly enforced. The Extractive Industries Transparency Initiative (EITI), discussed in Chapter 5, provides a good example of this phenomenon. Despite the fact that the EITI has not been perfectly enforced, the implementation efforts associated with the initiative have increased cooperation between government departments and highlighted problems in the tax and concessions systems within several African countries. If we neglect to recognise implementation as a distinct dimension of legalisation, we risk subsuming the study of the operationalization of law to a debate over enforcement that has increasingly less impact on how rules operate in the modern context.

Implementation in the OPD Framework

As illustrated above, there are strong reasons for including the additional characteristic of implementation in a new framework for transnational legalisation. One of the qualities that separates this updated framework from the classic OPD framework is that it is dynamic – implementation is a quality that is necessarily process-based and occurs over time.

Consequently, this offers us the opportunity to consider how a focus on implementation affects the other variables in play. What we find is that efforts in implementation are often undertaken for the purpose of strengthening one or more legalisation characteristics over time. In these instances, legalisers are playing a long-game. They may accept lower levels of obligation, precision, and/or delegation in the belief that in the long-run, these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance.

To give an illustration, let's turn to the first arena. In the context of transnational legalisation, efforts at implementation are in practice negotiating the procedural rules of domestic court systems, or those rules that relate jurisdiction, legal aid, and availability of damages. In other words, they are H.L.A Hart's 'secondary rules', or rules relating to delegation.[108] In arguing that the relevant procedural rules should be construed to facilitate the access of overseas plaintiffs to the courts, human rights lawyers are aiming to strengthen the characteristic of delegation over time by expanding the category of cases to which existing legal principles apply.

The second arena considers legalisation in international organisations. In this arena, Ruggie was willing to accept low obligation, precision, and delegation at the same time that he pushed for high implementation in advancing the GPs. In his view, this was a strategic choice because by advancing high implementation – as illustrated by broad participation (including that of non-state actors), consensus-building, and links and overlaps between neighbouring regimes – he expected that obligation, precision, and perhaps even delegation would be made stronger in the long run. The decision also reflected the fact that previous business and human rights initiatives that had pushed for high obligation had failed. This is consistent with the liberal-institutionalist prediction that states (and, in this case, companies) will seek institutional arrangements that demand the least constraint on their activities. Ruggie's decision appears to have paid

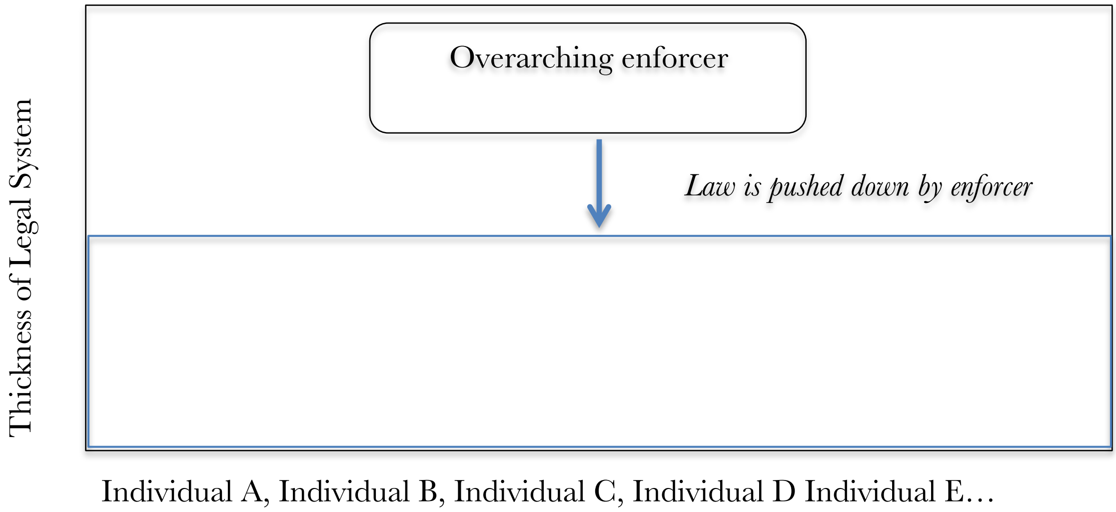
108 As previously mentioned, secondary rules are 'rules about rules', they do not impose obligations but authorize the creation, amendment, and application of primary rules: Hart, *The Concept of Law*: p.79.

off – obligation under the GPs appears to be becoming stronger as these principles are incorporated and translated into other, harder areas of law. Precision is also strengthening. Under both the GPs and the Global Compact, rules are becoming increasingly precise as additional information and guidance is provided to participant companies over time.

The third arena discusses MSIs. In this arena, legalisers strongly emphasise implementation and may deliberately soften requirements in relation to obligation, precision and (in particular) delegation in order to maintain high levels of participation. Participants that join these schemes are regularly given substantial support to assist them in the implementation of the rules. When transgressions occur, other participants may assist the transgressing member in implementing reforms rather than (or before) imposing sanctions. The tendency towards peer review and mutual assistance no doubt assists weaker states to build their capacity and increase their compliance. On the other hand, critics legitimately argue that these schemes provide no real sanction against those who repeatedly break the rules, sometimes with serious human rights consequences. The three MSIs examined demonstrate that legalisers will accept lower levels of obligation, precision, and delegation with the expectation that emphasising implementation is the best way to promote participation, transparency, cooperation and ultimately compliance.

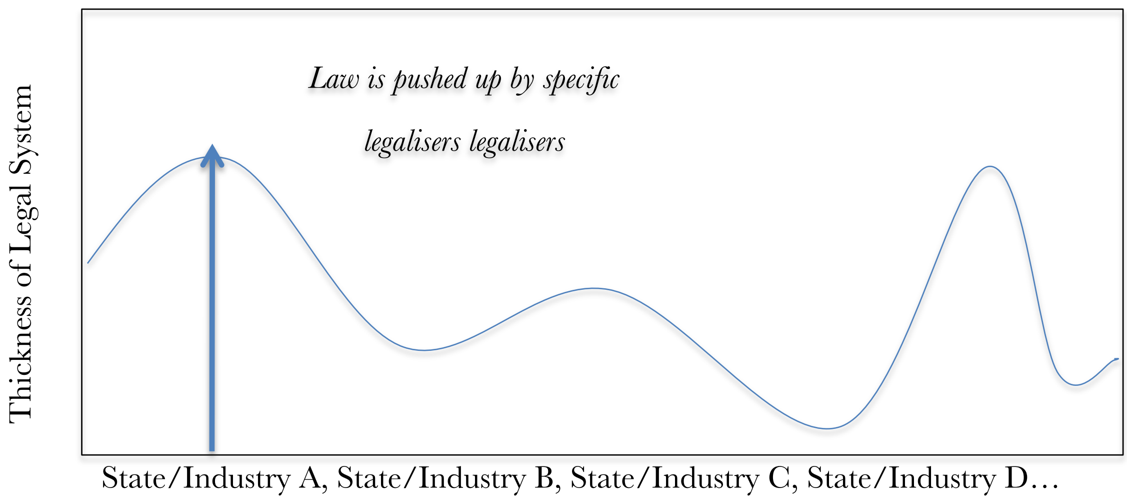
These empirics provide a compelling case for a new framework for transnational legalisation based on the characteristics of obligation, precision, delegation and implementation. Importantly, this framework focuses on the role of agents and their efforts to implement rules across a range of arenas. Because international law and transnational law are generally not enforced by an overarching body, these legalisers play an essential role both in implementing the law and making it increasingly obligatory, precise, and delegated over time. This means that a particular legal regime will be 'thickest' where legalisers are the most active – this may be in a particular country or in a specific industry. This is illustrated in the diagrams below. In a domestic system, the 'law' possesses equal 'thickness' throughout due to the presence of an overarching enforcer. All laws created by the government are evenly applied and enforced across the system.

Figure 2: Thickness of Legal System (Domestic)



In the international and transnational systems, however, the law will be thickest across the countries, industries or issue areas where it is actively 'pulled up' by legalisers who promote specific norms and seek to institutionalise rules. Conceptualising the international legal system in this way demonstrates that its shape is agency-driven, and suggests why laws and rules are more likely to cluster or create regimes around particular issues or regions.

Figure 3: Thickness of Legal System (Transnational)



Conclusion

First, this chapter considered how IR has approached two questions in relation to international law and legalisation: why do states create international law, and what makes a particular norm 'legal' in nature? Second, the chapter described the concept of legalisation as outlined in Abbott et al's well-known article of the same name. Under the classic legalisation framework, legalisation has three components: obligation, precision, and delegation. I then set out the advantages and limitations of this framework, and argued that the classic OPD framework fails to first, recognise the expanding role of non-state actors; and, second, conceptualise law as a process.

Third, the chapter showed that the classic OPD framework can be adapted and reimagined in the context of the transnational legal system, which is characterised by thick configurations of agents working across a multiplicity of issue areas. I suggested that in applying the classic framework in the transnational context, there appears to be an omitted variable – that of implementation. Implementation refers to the specific actions taken by agents to translate legal or law-like principles into practical, workable instructions for courts, governments, companies and other non-state actors to follow. The next section foreshadowed that the empirical chapters demonstrate that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics over time. In these instances, legalisers are playing a long game. They accept lower levels of obligation, precision and/or delegation in the belief that, in the long-run, these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance.

Finally, the chapter argued that by focusing on implementation – rather than enforcement – we can begin to see that a particular legal regime can vary in 'thickness'. It will be 'thickest' where legalisers are the most active (this may be in specific countries or industries) and 'thinnest' where legalisers are the least involved. With that in mind, we turn to one legal regime in particular: the international legal framework as it currently applies to TNCs and human rights violations. This is the subject of the next chapter.

Chapter 2: Corporations, Human Rights and The Governance Gap

'Then Big Oil broke my heart.'[1]

Christine Bader, 'Corporate Idealist' and Author (2014)

'The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.'[2]

John Ruggie, UN Special Representative (2008)

Of the vast range of developments ushered in by globalisation, the rise of the transnational corporation (TNC) stands out as one of the most significant. Unencumbered by traditional geographical and political barriers, the activities of TNCs reach ever farther across the globe, easily surmounting conventional national economic and legal hurdles. TNCs raise a unique challenge for the international legal system and global governance more generally. How should – how could – TNCs be absorbed under the global rule of law? This question has perplexed scholars and practitioners since the 1970s, the decade that marked the beginning of an exponential increase in the wealth and power of TNCs. Yet despite advances in ideas about human rights, public international law, and corporate social responsibility, transnational corporate accountability remains elusive.

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1 Christine Bader, *The Evolution of a Corporate Idealist: When Girl Meets Oil* (Massachusetts: Bibliomotion, 2014), p.xviii.

2 Human Rights Council, 'Protect, respect and remedy: A framework for business and human rights (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie)', UN Doc No.: A/HRC/8/5 (7 April 2008), p.3.

The purpose of this chapter is to outline the international legal framework as it currently applies to TNCs and human rights violations. As discussed further below, it is well acknowledged that there exists a 'governance gap' in the area of business and human rights, caused by the fact that both international and domestic law allows corporate groups to structure themselves to avoid regulatory oversight. This is important to the overall argument of the thesis, because it is in the context of this specific legal landscape that legalisers have tried to promote the norm of corporate responsibility in various ways.

First, the chapter sets out a brief history of the corporation. In this section, I define the concept of the transnational corporation and illustrate the global impact of TNCs on human rights with several examples. Second, I discuss why victims of human rights violations regularly lack access to effective remedies at the domestic level in less developed states, where the rule of law may be fragile. Third, I consider how the perceived failure of domestic legislation to adequately constrain the human rights impact of TNCs has shifted the focus of scholars to the potential of international law. This section also explains why the state-based international legal system has not proven capable of effectively regulating TNCs. The fourth and final section in this chapter completes discussion of the legal framework by showing that home states remain reluctant to regulate the extraterritorial activities of TNCs where they perceive that such regulation would put their corporations at a competitive disadvantage.[3]

A Brief History of the Corporation

The general notion of a corporation as a 'fictitious legal person, distinct from the actual persons who compose it' is an ancient one.[4] Although there is debate over whether the idea originated with the Romans or the Greeks, the concept was developed within

3 Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004), p.12.

4 Samuel Williston, 'History of the Law of Business Corporations before 1800,' *Harvard Law Review* (1888), p.106.

Roman law. Romans recognised a variety of institutions, including municipalities and private organisations such as political groups, religious cults, burial clubs and guilds of craftsmen, traders and artisans. These bodies had the right to own property, to contract with others, to sue and to be sued and to perform other legal acts through appointed representatives. In medieval times, the corporation enabled governments to grant special institutional status to cities, religious institutions, and universities throughout Europe.[5] By the seventeenth century, corporations were being established to pursue commercial endeavours and to create empires. The most famous of the intercontinental trading companies set up by the British and the Dutch was the East India Company, chartered by Queen Elizabeth I in 1600. The East India Company would eventually account for half of the world's trade, particularly in basic commodities such as cotton, silk, indigo dye, and salt, and would exercise control over large swathes of India with its own private armies.[6]

These trading companies pioneered concepts and practices that have since become standard features of the modern corporation, including legal personhood, separation of ownership management, limited liability for shareholders and for directors, as well as tradable shares.[7] Corporations enabled investors to accumulate the capital required to overcome the significant challenges of engaging in trade with Asia, including the long duration of voyages, the sizeable expense required to outfit ships for travel, and serious investor risks, including war and piracy. However, it is also worth noting that the corporation at this time was not perceived only as a commercial institution. Rather, each corporation 'was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of

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5 W. S. Holdsworth, 'English Corporation Law in the 16th and 17th Centuries,' *The Yale Law Journal* 31, no. 4 (1922), p.382.

6 ibid.

7 Oscar Gelderblom, Abe De Jong, and Joost Jonker, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623,' *ERIM Report Series Reference No. ERS-2012-007-F&A* (2012), p.2.

the guilds'.[8] For this reason, corporations were required to be lawfully incorporated by the common law, the authority of Parliament, or the King's Charter.[9]

By the end of the seventeenth century, the advantages of corporate enterprises were generally acknowledged. The Bank of England received its first charter in 1694, and throughout the eighteenth century, corporations were increasingly used to build canals, waterworks, and other forms of public infrastructure.[10] Following the American Revolution, corporations began to multiply on the other side of the Atlantic. The institution was fundamental to the furious development of the rail industry in the nineteenth century, and the consequential expansion of business and industry across the American West. Indeed, railroad and manufacturing conglomerates accumulated capital and power so rapidly that, within decades, public figures were expressing concern regarding the overwhelming ability of corporations to control essential infrastructure, set prices, and force smaller firms out of business.[11] These are themes that continue to permeate contemporary discussions regarding control over 'big data,' with the information highway arguably the modern equivalent of the physical infrastructure of previous eras.[12]

Definition of Transnational Corporation

Today, the corporation is the primary legal vehicle through which business is organised and conducted. The term 'corporation' may encompass a range of legal structures, including subsidiaries, holding companies, and joint ventures. In general, these institutions have separate legal personality, transferable shares, limited liability and

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8 Williston, 'History of the Law of Business Corporations before 1800' p.110.

9 Judgment of Sir Edward Coke in *Case of Sutton's Hospital* 77 ER 960(1612).

10 Williston, 'History of the Law of Business Corporations before 1800' p.111.

11 John J Binder, 'The Sherman Antitrust Act and the railroad cartels,' *The Journal of Law & Economics* 31, no. 2 (1988).

12 Giuseppe A. Veltri, 'Google still controls your information, despite EU ruling', *The Conversation* Available at: http://theconversation.com/google-still-controls-your-information-despite-eu-ruling-22925 (accessed 1 February 2016).

centralized management and investor ownership. By registering as a corporate body in a specific jurisdiction, investors are able to concentrate substantial amounts of money in capital-intensive projects, limit their liability to creditors in the event of insolvency, and delegate management to a centralised board of directors.

Transnational corporations (TNCs) are those corporations, and their related entities, which have operations in more than one state.[13] TNCs today comprise many business entities of various legal forms and display diverse forms of integration.[14] As Alexandra Gatto has observed, TNCs have 'no coherent existence as a legal entity [but are] a political and economic reality which articulates itself in a confusing variety of legal forms and devices'.[15] For this reason, as argued by Jan Wouters and Anna-Luise Chané, it is more instructive to focus on the characteristics that distinguish TNCs from their domestic counterparts. These include the ability to operate across national borders, flexibly move production, assets, and expertise between countries, and sell products and source labour in multiple markets.[16]

The Impact of TNCs on Human Rights

Since the 1970s, the wealth and power of TNCs have risen exponentially. TNCs were the primary beneficiaries of the policies of economic deregulation, trade liberalisation and privatisation adopted by many governments in the post-war era.[17] Today, TNCs are the star players in the global game of trade – able to shape national markets, move

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13 The terms 'transnational corporation', 'multinational corporation', and 'multinational entity' are distinguished by some commentators and used interchangeably by others. In this thesis, the terms are used synonymously.

14 Jan Wouters and Anna-Luise Chané, 'Multinational Corporations in International Law,' in *Non-state actors in international law*, ed. Math Noortmann, August Reinisch, and Cedric Ryngaert (London: Bloomsbury, 2015), pp.227-28.

15 Alexandra Gatto, *Multinational enterprises and human rights: Obligations under EU law and international law* (Cheltenham: Edward Elgar Publishing, 2011), p.38.

16 Wouters and Chané, 'Multinational Corporations in International Law,' p.228.

17 Claire Palmer, 'What can Post‐Democracy tell us about TNCs and Extraterritorial Violations of Human Rights?,' *The Political Quarterly* 87, no. 1 (January–March 2016).

talent and resources at will, and transfer production and capital when required. Tellingly, more than half of world trade is comprised of 'internal' transactions within networks of related corporate entities, rather than the traditional, arms-length 'external' exchange among countries.[18] Only six nations – the United States, Germany, Japan, United Kingdom, Italy, and France – have tax revenues larger than the sales of the nine largest TNCs.[19] In a startling illustration of global capital's power, researchers at the University of Zurich examined the operations of all 43,060 TNCs in 2011. They determined that a group of just 1,318 companies were by far the most influential in the global economy, and that just 147 companies controlled 40% of the wealth across this group.[20]

In numerous ways, such powerful firms have been engines of prosperity and growth across vast regions of the world. Corporations have generated valuable employment and educational opportunities, revived living conditions in flagging communities with new technologies and much-needed investment, and enhanced the prosperity of those states able to ride the globalization wave.

However, this capacity to do great good has been matched by an ability to inflict or to be complicit in serious human rights abuses. One of the most pivotal moments in the story of corporations and human rights occurred in 1995, when Ken Saro-Wiwa, a Nigerian activist, died at the hands of the Nigerian state alongside eight other members of the Ogoni people.

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18 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton & Company, 2013), p.xv.

19 ibid.

20 Andy Coghlan and Debora MacKenzie, 'Revealed – the capitalist network that runs the world', *New Scientist,* 22 October 2011.

Figure 4: On 10 November 1995, Ken Saro-Wiwa and eight other Ogoni men were executed in a prison yard in southern Nigeria after protesting against the activities of Royal Dutch Shell in the Niger Delta.

Saro-Wiwa and his fellow protestors had campaigned against the activities of Royal Dutch Shell in the oil-rich Niger Delta. The affair 'touched off spontaneous outrage' in the UN Security Council, prompted the EU to embargo arms and aid to Nigeria, and resulted in Nigeria's suspension as a member of the Commonwealth.[21] Human rights advocates and environmental organisations passionately argued that Shell should share the blame.

Just one year later, Nike came under fire when *Life* magazine published a photograph of a 12-year old Pakistani boy stitching soccer balls at a wage of 60 cents per day. The author lamented that '[s]uch are the unfair accidents of birth. Most children of the developed world are granted protection, schooling and play – including playing soccer on green, carefree fields – while in the world of poverty, children are bonded and denied school and compelled to spend their days in dreary sheds making soccer balls for those better-off'. [22]

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21 Christopher Wren, 'At the U.N., Anger Over Executions', *The New York Times,* 11 November 1995; Reuters, 'Europeans Punish Nigeria', *International New York Times,* 21 November 1995.

22 Sydney H. Schanberg, 'Six Cents an Hour', *Life Magazine,* June 1996.

Figure 5: A Pakistani boy stitches Nike soccer balls as published by Life Magazine in 1996

Two decades later, corporate human rights violations are still a recurrent problem across continents and industries. In the extractives sector, security personnel working for TNCs continue to be accused of assaulting trespassers and protestors, and indigenous communities are still forcibly displaced to make way for oil and gas installations. In manufacturing, complex and geographically dispersed supply chains allow factories that produce prestigious luxury goods to exploit children working in sweatshop conditions. In 2013, the collapse of the Rana Plaza garment factory in Bangladesh − which produced items for global brands such as Gap, Mango, and Primark − became an emblem for global inequality when 1,134 people perished in order to 'feed the world's appetite for cheap clothing'.[23]

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23 Tansy Hoskins, 'Reliving the Rana Plaza factory collapse: a history of cities in 50 buildings, day 22', *The Guardian,* 23 April 2015.

Figure 6: On 24 April 2013, an eight-story building known as Rana Plaza collapsed in Bangladesh, killing 1,134 individuals. It is considered the deadliest garment factory accident in history.

Forced labour is also a harsh reality in many agricultural operations, as evidenced in a 2014 investigation that found workers held captive in Thai factories producing prawns sold in supermarkets throughout the UK, US, and Asia.[24]

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[24] Associated Press, 'Shrimp sold by global supermarkets is peeled by slave labourers in Thailand', *The Guardian,* 14 December 2015.

Figure 7: Burmese workers are escorted by military and police as they leave a shrimp shed after a raid conducted by Thailand's Department of Special Investigation in Samut Sakhon, Thailand

Even internet service providers have been accused of disclosing personal information to national law enforcement bodies with catastrophic results. For instance, in 2007, Yahoo! allegedly gave information to the Chinese government in relation to pro-democracy activist Wang Xiaoning and journalist Shi Tao, who were subsequently sentenced to 10-year terms of imprisonment.[25] Even in developed countries with robust legal frameworks, the Starbucks and Amazons of the world have compromised government revenues by avoiding taxation through sophisticated legal and financial devices, and the reckless activities of financial institutions have sparked economic crises with devastating and cumulative effects.[26]

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25 Business & Human Rights Resource Centre, 'Yahoo! Lawsuit (Re China)', 18 February 2014. Available at: http://business-humanrights.org/en/yahoo-lawsuit-re-china-0#c9340 (accessed 16 February 2016).

26 Vanessa Barford and Gerry Holt, 'Google, Amazon, Starbucks: The rise of "tax shaming"', *BBC News Magazine,* 21 May 2013. In 2012, Starbucks had sales of £400m in the UK but paid no corporation tax. Amazon sold goods valued at £3.35bn in 2011, yet reported a 'tax expense' of just £1.8m. In the same year, Google's UK department paid £6m in tax on a turnover of £395m.

Figure 8: Cartoon by Harry Harrison, South China Morning Post, 10 February 2006

Challenges in Regulating TNCs

All these examples highlight the challenges in effectively regulating TNCs. First, the inherent complexity of running operations in a globalised world creates myriad moral dilemmas for corporations. TNCs may have commercial incentives to work with states that are corrupt or oppressive, and the structure of their business operations may obfuscate or disguise serious human rights violations. They face compliance dilemmas when confronted with national laws that contradict international standards.

Second, the operations of TNCs are often complex and geographically dispersed across many national jurisdictions with a wide variety of applicable domestic laws. The supply chains for one TNC may involve as many as ten thousand, fifty thousand, or even over one hundred thousand individual suppliers spread across different continents.[27] The fact that TNCs have this 'operational fluidity' and are able to transfer personnel, production and capital at will means that they may be 'increasingly detached' from

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[27] Shift, 'Respecting Human Rights Through Global Supply Chains' (New York: Shift), October 2012.

domestic jurisdictions, and therefore less likely to be subjected to adequate oversight by national legislators.[28]

Third, TNCs have no coherent existence as individual legal entities. Rather, each exists as a collection of various companies that may be individually registered in many separate jurisdictions with their own specific legal regimes. Each of these component companies also possesses limited liability, meaning that its shareholders – which may include companies in the same TNC group – are not held personally liable for the debts of the company, other than in exceptional circumstances. This is a foundational tenet of corporate law that provides certainty to shareholders and, from a policy perspective, aims to encourage investment and innovation. However, in the context of human rights cases, the principle of limited liability may also prevent victims from receiving proper redress and adequate damages.[29] This is especially true in instances where a TNC subsidiary is accused of wrongdoing and most company assets are held by a parent company. Victims face further legal difficulties if that parent company is registered in a different jurisdiction from where the actionable conduct took place. For a judgment to be enforceable against a parent company, the defendant must agree to submit to the jurisdiction of the host state or be legally 'present' in the jurisdiction at the commencement of the proceedings.[30]

Finally, one of the most important issues illustrated by these examples is that the concept of 'human rights' is still a contested one. Although activists regularly call attention to the universality and indivisibility of human rights, sovereign nations do not necessarily agree what kind of regulation is normatively, let alone practically, desirable. This is especially the case where governments perceive initiatives that promote human rights or better

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28 Wouters and Chané, 'Multinational Corporations in International Law,' p.228.

29 Peter Muchlinski, 'Limited liability and multinational enterprises: a case for reform?,' *Cambridge Journal of Economics* (2010), p.915.

30 Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (Cheltenham: Edward Elgar, 2015), pp.32-33.

working conditions as potentially detrimental to the development and economic success of local communities.

More broadly, the examples described above also point to the fact that there is a general lack of consensus surrounding the role and responsibilities of corporations in society. Milton Friedman famously declared that the principal duty of corporations must be to its shareholders, and that 'the one and only … social responsibility of business is to increase profits'.[31] Others in Friedman's camp argue that corporations are inappropriate agents to promote social change in developing countries, or that TNCs should not be compelled to preach 'the gospel of human rights and democracy' where they operate.[32] Indeed, a recent theoretical analysis of corporate responsibility by UK political theorist David Karp concludes that in many circumstances corporations and other non-state actors cannot be said to bear responsibility for human rights. According to Karp, theories of corporate responsibility based on legalism, universalism, and capacity should be rejected, as human rights obligations fall only on 'relevantly public' corporations.[33]

Yet as corporations continue to take on more and more traditionally public functions – running hospitals, prisons, even wars – and their capacity for impact on human rights and communities grows ever greater, Friedman's assertion becomes more questionable. The focus on the duties of corporations to shareholders – rather than to society more broadly – has arguably led to 'the growth of TN[C]s [being] largely insulated from the parallel evolution of human rights norms and expectations'.[34] Kofi Annan once commented that 'transnational companies have been the first to benefit from

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[31] Milton Friedman, 'The Social Responsibility of Businesses is to Increase Profits', *New York Times Magazine,* 13 September 1970, p.32.

[32] Marina Ottaway, 'Reluctant Missionaries,' *Foreign Policy* July/August, no. 125 (2001), p.44.

[33] David Karp, *Responsibility for Human Rights: Transnational Corporations in Imperfect States.* (Cambridge: CUP, 2014). See also: Nadia Bernaz, 'Book Review: David Karp, Responsibility for Human Rights, Transnational Corporations in Imperfect States (Cambridge: Cambridge University Press),' *Business and Human Rights Journal* 1, no. 01 (2016).

[34] Bratspies, 'Organs of Society' p.10.

globalization. They must take their share of responsibility for coping with its effects.'[35] Theories of global justice would support this view: why should a Nigerian citizen subject to severe human rights violations by a TNC have no effective recourse to remedy, when a US citizen affected by the same TNC is able to secure a court judgment for damages that is enforceable through the functioning US domestic court system? This injustice is punctuated by the fact that most of the shareholders who profit from the global operation of TNCs reside in developed states, where legal remedies are readily available to them. This suggests that individuals in developing countries bear an unfair share of the costs of TNC operations, whereas shareholders in developed states reap a greater share of the rewards.

As TNCs have accumulated power and influence traditionally vested only in sovereign states, they should arguably be held to comparable international legal standards. Garth Meintjes correctly states that 'the idea of a corporation as a legal fiction without responsibilities is no more sacred or accurate than the idea of unfettered state sovereignty'.[36] Just as efforts have been made over the past decade to incorporate a dimension of responsibility into the concept of traditional state sovereignty, there is no reason why a similar logic could not be applied in relation to TNCs.[37]

Thus it seems problematic that the global community has not generated more regulation to oversee the activities of TNCs. In other areas of public concern – such as international terrorism - we see enormous legislative dynamism on both the national and supra-national levels. Why is regulating global corporations so difficult? The bottom line is that lawmakers face numerous obstacles in regulating TNCs in relation to human

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35 Kofi A. Annan, 'Help the Third World Help Itself', *Wall Street Journal,* 29 November 1999.

36 Garth Meintjes, 'An International Human Rights Perspective on Corporate Codes,' in *Global codes of conduct: An idea whose time has come*, ed. Oliver F Williams (Notre Dame: University of Notre Dame Press, 2000), p.87.

37 The concept of 'responsibility' has been connected to state sovereignty through the emerging norm of the Responsibility to Protect (R2P), which seeks to address the failure of the international community to prevent and stop genocides, war crimes, and crimes against humanity. See Gareth Evans, *The Responsibility to Protect* (New York: Springer, 2009).

rights. First, TNCs are powerful. Since the 1970s, global firms have gained increasing influence over Western governments. Seeking to minimize unemployment and instability during economic upheaval and technological transition, governments in the 1970s attempted to assist corporations by reducing taxes, increasing employment flexibility, and relaxing restrictions on mergers and acquisitions. Businesses that survived this period of change became more competitive, and were able to take advantage of new interdependencies facilitated by technological advances, rapidly falling trade barriers, and the trend in many countries towards increased privatization.[38]

In addition, as influential players in the world system, corporations are in the advantageous position of being able to shape domestic and international regulatory regimes in ways that reduce costs to business and take advantage of government competition for their presence.[39] Under international law, corporations have obtained extensive legal rights against states. Host states often make far-reaching guarantees to TNCs under bilateral investment treaties (BITs) and multilateral investment treaties that cover terms of trade, intellectual property and investment protection. [40] Since the 1990s, there has been an exponential increase in these types of agreements, and corporations are increasingly aware of the opportunities they present to claim compensation where

38 Palmer, 'What can Post - Democracy tell us about TNCs and Extraterritorial Violations of Human Rights?' p.73.

39 See, for instance, news commentary on HSBC's decision to remain based in London rather than transfer to Hong Kong: 'Ever since HSBC raised the threat of decamping from Canary Wharf, George Osborne, the Chancellor, has pulled out the stops to make life in London more comfortable for Britain's biggest bank.' These measures include reforming the bank levy to assist lenders with big global balance sheets, softening laws to hold senior bankers to account and removing the head of the Financial Conduct Authority after he imposed a series of heavy fines on banks: George Parker, 'HSBC's threat to move forced serious thinking at Treasury ', *The Financial Times,* 15 February 2016.

40 For instance, the European Court of Human Rights (ECHR) has granted corporations protection under a range of Convention rights, including right to a fair and public hearing by an independent and impartial tribunal, access to a court, equality of arms, reasonable length of proceedings and freedom of expression: Wouters and Chané, 'Multinational Corporations in International Law,' p.230.

they are adversely affected by national laws or court decisions.[41] These agreements contribute to the governance gap by providing a disincentive for states to pass laws that bolster environmental and human rights standards.[42] As Simon Baughen notes, 'stabilisation clauses' in these agreements are particularly problematic, as they oblige a host state to freeze its existing regulatory structure for the duration of the project, which may be up to 50 years.[43]

Professor Ruggie also drew attention to this issue in his 2008 report to the Human Rights Council:

> *To attract foreign investment, host States offer protection through bilateral investment treaties and host government agreements. They promise to treat investors fairly, equitably, and without discrimination, and to make no unilateral changes to investment conditions. But investor protections have expanded with little regard to States' duties to protect, skewing the balance between the two. Consequently, host States can find it difficult to strengthen domestic social and environmental standards, including those related to human rights, without fear of foreign investor challenge, which can take place under binding international arbitration.*[44]

It is notable that agreements ensure that states adopt measures to protect private rights, yet comparatively few obligations are imposed on TNCs in return. There is also a worrying contrast between the number of forums available for corporate actors to vindicate their property rights as investors and the absence of venues available to

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41 The world's first BIT was signed on 25 November 1959 between Pakistan and Germany. There are currently more than 2300 BITs in force. See UNCTAD website: http://investmentpolicyhub.unctad.org/IIA (accessed 5 August 2016).

42 Baughen, *Human Rights and Corporate Wrongs*: pp.80-82.

43 ibid.

44 Human Rights Human Rights Council, 'Protect, respect and remedy: A framework for business and human rights (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie)', UN Doc No.: A/HRC/8/5 (7 April 2008).

individuals to vindicate human rights affected by the activities of TNCs.[45] No international court holds TNCs to account for the harms they inflict on individuals and communities when, for political reasons, no domestic legal remedy is available.

The International Legal Framework

Host State Responsibility for Acts of Private Actors under International Law

Under international law, it is the responsibility of states to protect against human rights abuses that occur on their own territory, including abuses committed by business entities.[46] States are the primary bearers of obligations under human rights instruments. This has been generally confirmed in a number of international courts. In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* the Inter-American Court of Human Rights confirmed that Nicaragua had violated the rights of the Mayagna community of Awas Tingni by granting a logging concession to a corporation within the community's traditional territory.[47] In *Social and Economic Rights Action Centre v. Nigeria African Commission*, the African Commission on Human and Peoples' Rights found that in facilitating the activities of oil corporations in Ogoniland, Nigeria had committed violations of specific rights guaranteed by the African Charter, including family rights,

45 Kate Mitchell, 'Kiobel v. Royal Dutch Petroleum and the Future of Corporate Accountability for Human Rights Violations Committed Abroad', Oxford Human Rights Hub, 21 April 2013. Available at: http://ohrh.law.ox.ac.uk/kiobel-v-royal-dutch-petroleum-and-the-future-of-corporate-accountability-for-human-rights-violations-committed-abroad/ (accessed 28 March 2016).

46 Article 2 of the International Covenant on Civil and Political Rights (ICCPR) requires States Parties 'to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant'. Article 2(2) sets out that States Parties must undertake to 'adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'. Article 2(3) provides that States Parties must ensure that persons whose rights have been violated have access to an effective remedy, that access to the effective remedy is determined by competent authorities, and that such remedies are enforced when granted. Furthermore, a State's obligations under international human rights treaties will extend beyond its territory to any area over which the State exercises effective control: *Advisory Opinion on the Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory* 43 ILM 1009 at [107-113](2004).

47 The Court held that the government had failed to obtain the consent of the community and ignored persistent complaints by the group: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

the right to health, the right to dispose of wealth and natural resources, and the right to a clean environment.[48] The principle was also endorsed by the ECHR in *Fadeyeva v. Russia*, which concerned a group of Russian citizens from Cherepovets who brought an action in the local court against Severstal, Russia's largest iron-smelting company.[49]

The obligation of states is clearly restated in both the UN Guiding Principles (GPs) and the UN General Assembly's 2005 Resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law* (the 2005 Basic Principles).[50] States are expected to try to prevent human rights abuses by enforcing laws that aim or have the effect of requiring businesses to respect human rights. They must also 'periodically…assess the adequacy of any such laws and address any gaps'.[51] States fail in fulfilling their duties when human rights abuses can be attributed to them, or where they fail to 'take appropriate steps to prevent, punish and

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48 *Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria* African Commission on Human and Peoples' Rights, Communication No. 155/96(27 May 2002).

49 The group of citizens alleged that the level of air and noise pollution from Severstal's steel plant exceeded the maximum emissions permitted by Russian law and made the area inhabitable. The local court agreed that the applicants had a right to be resettled, but made resettlement conditional on government funding being made available. While on a waiting list, Ms Fadeyeva lodged an ECHR application against the Russian government in December 1999. In June 2005, the Court unanimously held that Russia was in violation of Article 8 – which sets out the right to respect for privacy and family life – for failing to regulate environmental pollution from the Severstal plant. This decision proved to be very difficult for the plaintiffs to enforce. In October 2007, the Russian government informed the ECHR that it had rezoned the area surrounding the Severstal plant, deeming it unsafe for residential property, and had determined that Ms Fadeyeva's home was no longer in the area eligible for resettlement. Owners of the Severstal plant also claimed that they had spent a substantial sum on reducing the plant's environmental impact, although no evidence of this was provided to the ECHR: *Fadeyeva v. Russia (App No 55723/00) ECHR 2005-IV.*

50 According to Jennifer Zerk, these instruments indicate that there is an 'emerging international consensus' in relation to the actions that states must take to ensure access to justice in cases where business is involved in gross human rights abuse: Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (Office of the UN High Commissioner for Human Rights), 2015, p.63.

51 Where gaps are identified, states are urged to 'take appropriate steps' to address them, 'which may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses': UN Guiding Principles, Guiding Principle 3, UN Guiding Principles, Guiding Principle 7, Commentary.

redress private actors' abuse'.[52] States should also 'provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice…irrespective of who may ultimately be the bearer of responsibility for the violation'.[53] According to the GPs, states should also 'take appropriate steps to ensure the effectiveness of domestic mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial or access to remedy'.[54]

In most states, a multitude of national laws exist that curb corporate conduct, including criminal, anti-discrimination, occupational health and safety, environmental and labour laws. In developed countries, these laws are generally enforced and provide relatively effective oversight of corporate activity that occurs within national borders. In developing states, however, local corporations and TNCs may be able to avoid prosecution if corruption is endemic and law enforcement is patchy. Governments may have multiple incentives to retain the presence of TNCs in their territory, and so allow corporations to set standards that trend towards the bottom denominator, especially in

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52 UN Guiding Principles, Guiding Principle 1, Commentary. According to the 2005 Basic Principles, states should 'investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law'. 2005 Basic Principles, Part II, para. 3(b).

53 2005 Basic Principles, Part II, para. 3(c). The procedures for such remedy 'should be impartial, protected from corruption and free from political or other attempts to influence the outcome'. UN Guiding Principles, Guiding Principle 25, Commentary.

54 UN Guiding Principles, Guiding Principle 26. The Commentary also states that 'states should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that legitimate and peaceful activities of human rights defenders are not obstructed'.

relation to wages and employment conditions. In these circumstances, victims of human rights violations regularly lack access to effective remedies at the domestic level.[55]

This situation highlights the existence of a 'governance gap' in the area of business and human rights. States may fail to fulfil their side of the bargain in providing victims with access to remedy in respect of human rights violations committed by TNCs for a range of reasons. First, in some states, TNCs may have substantial economic power relative to the government, leading government officials to act reluctantly in enacting or enforcing laws that protect human rights. Governments may be constrained by the operation of bilateral investment agreements,[56] or wary that stricter regulation in areas such as environmental or labour law may lead TNCs to withdraw their investments.[57] Alfred Brownell, a well-known environmental lawyer in Liberia, has complained of being consistently pressured (even during a personal meeting with Liberian President Ellen Sirleaf) to drop his complaints in relation to the conduct of Gold Veroleum, a major palm oil producer allegedly engaged in the clearing of community lands.[58] Papua New Guinea (PNG) provides another excellent illustration of how a government's economic imperative can outweigh its commitment to human rights. In that situation, the PNG government sought to protect BHP from potential liability for the environmental damage caused by its operations in the OK Tedi river basin. It consequently enacted legislation that made it a criminal offence for PNG citizens to file against BHP in a

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[55] Natalya S. Pak and James P. Nussbaumer, 'Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (Berlin: Hertie School of Governance), 2009, p.5.

[56] Robert McCorquodale and Penelope Simmons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law,' *Modern Law Review* 70, no. 4 (2007), p.600.

[57] Joseph, *Corporations and Transnational Human Rights Litigation*: p.5.

[58] 'Liberia: GVL Security Wanted Me Killed', *AllAfrica* 24 June 2014. Available at: http://allafrica.com/stories/201406240649.html (accessed 29 November 2015). See also: A Brownell, 'Remarks at the UN Forum on Business and Human Rights: Addressing the challenges human rights defenders face in the context of business activities and in an age of shrinking civil society space', 18 November 2016. Available at: http://webtv.un.org/watch/addressing-the-challenges-forum-on-business-and-human-rights-2015/4619703354001 (accessed 29 November 2015).

foreign court (according to Joseph, BHP's lawyers probably drafted the legislation).[59] The lawyers who acted on behalf of the villagers in the claim before the Australian courts were also regularly harassed and prohibited from accessing their clients in PNG.[60]

Second, it is very common for TNCs, especially in the energy and extractive industries, to work closely with state military or unofficial paramilitary actors who provide security for company installations and personnel. Where both the state and the relevant company are implicated in human rights abuses, it may be pointless and potentially dangerous for victims to seek redress.[61] Global Witness highlighted this issue in its description of the problems encountered by claimants in the Kilwa trial in the Democratic Republic of Congo (DRC). This matter involved the trial of nine Congolese solders for war crimes and three employees of Anvil Mining for complicity in war crimes. The trial was held before a military court and ended with the acquittal of all defendants on war crimes charges in connection to the Kilwa events. International and domestic human rights organisations were threatened with violence during the course of the trial.[62] Global Witness said that the decision was the 'culmination of a pattern of political interference and irregularities designed to protect those responsible for the crimes'.[63] Such irregularities included the failure of the appeal court to notify witnesses regarding details of the proceedings, the appeal court judges' questioning regarding the standing of one of the victims' lawyers (on the basis that standing was incompatible with his membership of a human rights organisation), and the denial to the victims' lawyers

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59 Joseph, *Corporations and Transnational Human Rights Litigation*: p.5.

60 ibid.

61 Oxford Pro Bono Publico, 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: A comparative submission prepared for Professor John Ruggie', November 2008. Available at: http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf (accessed 29 November 2015).

62 ibid., p.4.

63 Global Witness, 'Press Release: Military Court of Appeal Succumbs to Political Interference in Kilwa Trial', 21 December 2007. Available at: https://www.globalwitness.org/en/archive/military-court-appeal-succumbs-political-interference-kilwa-trial/ (accessed 29 November 2015).

of the case file prior to the hearings (two lawyers who approached the registrar in order to obtain the files were told that the registrar was keeping the file in his private hotel room). [64]

Third, a lack of experience and capacity within the legal system may mean that local lawyers are unfamiliar with the complexities inherent in bringing a large company to court. Such cases require expertise in the discovery of documents and legal argumentation designed to pull back the ‘corporate veil’ if the parent company is also to be implicated (and therefore liable for damages). As noted by Zerk, victims and their representatives regularly report difficulties in finding lawyers who are willing to represent them in human rights cases, which are almost without exception complex, expensive and have no certain outcome.[65] Taylor, Thompson and Ramasastry also suggest that potential conflicts of interest may pose an additional barrier in this context. In many emerging markets, the relatively few major law firms are engaged working for major companies. These firms are likely to be unwilling to take on human rights cases where a conflict of interest may arise with an existing client.[66] Finally, the fact that there is rarely substantial legal aid available in developing countries presents another legal barrier to victims seeking to instigate litigation.

Fourth, the legal system within a host state may simply be inadequate to deal with the type of complicated claims common to this area of litigation. This was clearly demonstrated by the events that followed the 1984 Bhopal gas leak disaster in India. The incident left 3,000 people dead and 50,000 people permanently disabled. An additional 15,000 people died after the event from gas exposure. The Indian government subsequently brought a claim in the US on behalf of victims against the US

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[64] ibid.

[65] Zerk, 'Corporate Liability for Gross Human Rights Abuse', pp.81-82.

[66] Robert C. Thompson Mark B. Taylor, Anita Ramasastry, 'Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses', 2010, pp.17-18. It should be noted, however, that it can also be difficult in countries with developed legal systems to identify law firms willing to act against large, established corporations that may be existing or potential clients.

parent company, Union Carbide. The Indian government argued that its own judicial system was not an appropriate forum given that procedural and discovery obstacles would obstruct the victims' quest for justice.[67] Despite this, the US court declined to hear the matter on the basis that it was appropriate that new proceedings be initiated in India. Ultimately, however, this process was impeded by severe delays and other issues, such as whether the quantum of damages offered to the victims was sufficient.[68]

Finally, in conflict-affected areas there may be no working or legitimate justice system at all, making it impossible for claimants to seek redress. In general, it usually takes a long time – not to mention a change of regime – before conflict-related human rights abuses are addressed in court. Until this transformation, victims cannot be expected to have much confidence in the legal system that allows the abuse to occur in the first place. [69]

Corporate Responsibility under International Law

The perceived failure of domestic legislation to adequately constrain the activities of TNCs has shifted the focus of scholars to the potential of international law. Yet international law has developed only a limited capacity to address the human rights violations of corporations. Historically, international law as a system has focused on the institution of the state. As Simon Baughen notes, the 'traditional province of international law is the regulation of relations between States and accordingly under international law private persons incur no direct responsibility for human rights violations'.[70] It is no accident that in the context of discussions of international law, a vast range of international organisations – from NGOs to corporations – are all defined as 'non-state actors'. Because only states can formally sign treaties, non-state institutions

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67 *Re Union Carbide Corp. Gas Plant Disaster* 634 F. Supp. 842 (S.D.N.Y. 1986) p.847.

68 According to Joseph, the *Union Carbide* litigation ceased when the Supreme Court of India ordered Union Carbide to pay $470million as a final settlement in damages due to the urgent need for immediate relief to the victims, a result which was generally criticised as being wholly inadequate for the purposes of compensating the thousands of victims: Joseph, *Corporations and Transnational Human Rights Litigation*: p.141.

69 Zerk, 'Corporate Liability for Gross Human Rights Abuse', p.99.

70 Baughen, *Human Rights and Corporate Wrongs*: p.40.

have remained at the periphery of system. Philip Alston writes that the term 'non-state actor' has been 'intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve'.[71]

Arguments have been made, without great success, that international human rights instruments in fact impose direct legal obligations on corporations. To many, it is intuitive that human rights, such as freedom from torture, should apply to corporate as well as state conduct. Certainly, the preamble of the Universal Declaration of Human Rights (UNDR) declares that UNDR's substantive human rights provisions bind 'every organ of society'.[72] Legal scholar Louis Henkin has explicitly recognised that this phrase includes corporations:

> *The Universal Declaration is not addressed only to governments. It is 'a common standard for all people and all nations.' It means that 'every individual and every organ of society shall strive – by progressive measures…to secure their universal and effective recognition and observance among the people of member states.' Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.*[73]

Article 5 of UDHR also provides that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[74] This provision is not limited in any way to suggest that only states or natural persons, rather than all 'organs of society,' are capable of violating this right. This is because, as legal academic Rebecca Bratspies

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71 Philip Alston, 'The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-state Actors?,' in *Non-state actors and human rights*, ed. Philip Alston (Oxford: OUP, 2005), p.3.

72 The UNDR preamble states that 'every organ of society […] shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.'

73 Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets,' *Brooklyn Journal of International Law* 25, no. 17 (1999), pp.25-26.

74 Article 5, Universal Declaration of Human Rights.

notes, the prohibition is connected to the 'nature of the criminal action' rather than 'the identity of the actor.'[75] However, the general and preambular nature of these provisions suggests that they have no binding legal effect.[76]

Nevertheless, international law has developed in recent decades to touch private individuals in respect of certain crimes. This momentum for normative change in connection to human rights is also illustrated in the dissolution of the doctrine of state official immunity[77] and an increased emphasis on the responsibility of states for the protection of their citizens.[78] One area of international law that does in fact impose direct obligations on individuals concerns international crimes for which there is universal jurisdiction. This means that a state may charge an individual within its jurisdiction in relation to certain specific crimes committed anywhere in the world. These include piracy, torture, hijacking of aircraft, taking of hostages, slave trading, war crimes, genocide, crimes against humanity and the crime of aggression, as well as aiding and abetting such crimes.[79]

For the last four of these crimes, an individual may be tried before an international tribunal, such as the ICC (International Criminal Court), the International Criminal Tribunal for the former Yugoslavia (ICTY), or the International Criminal Tribunal for Rwanda (ICTR).[80] However, the development of corporate criminal liability at the international level has been thwarted by the fact that contemporary international

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75 Bratspies, 'Organs of Society' p.28.

76 This was noted by John Ruggie in his 2007 report to the Human Rights Council, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts (Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises)', UN Doc No.: A/HRC/4/035 (9 February 2007), para.38.

77 *R. v. Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* UKHL 17(1999). (but see recent ICJ decision in *Jurisdictional Immunities of the State (Germany v. Italy)* ICGJ 434 (ICJ 2012).

78 Evans, *The Responsibility to Protect*.

79 Baughen, *Human Rights and Corporate Wrongs*: pp.44-45.

80 Andrew Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups,' *Journal of International Criminal Justice* 6, no. 5 (2008), p.907; Baughen, *Human Rights and Corporate Wrongs*: p.44.

criminal tribunals exercise jurisdiction over natural, rather than legal, persons. Notably, the group of states that drafted the Rome Statute did consider bringing corporations within the ICC's jurisdictional reach, but no agreement could be reached in time regarding the appropriate scope of corporate liability. The relevant provisions were accordingly removed in the final version of the document.[81] In connection to the Rome Statute negotiations, Andrew Wilson writes that 'the dominant view seems to have been that criminal responsibility for legal persons was in principle desirable, but that the practical issues were simply too complex to be agreed on in the short time available. The opinion that corporations were *incapable* of breaching international criminal law…was notably absent from the discussion'.[82]

This leads to the conclusion that there is no fundamental reason why corporate liability should not exist under international law. Even though international tribunals have never asserted jurisdiction over corporations (at least until recently), they certainly have recognised the important role that groups and companies can play in human rights violations. During the Nuremberg trials, German corporations that had promoted and benefited from atrocities associated with the German war efforts were severely reprimanded, and directors of German companies Krupp, I.G. Farben, and Flick were tried for crimes against the peace and against humanity. In the end, 14 executives from I.G. Farben were convicted of gross violations of the laws of civilised nations.[83] The I.G. Farben tribunal commented that:

> *While the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization*

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81 Andrew Clapham, *Human rights obligations of non-state actors* (Oxford: OUP, 2006), p.246.

82 Andrew J Wilson, 'Beyond Unocal: Conceptual problems in using international norms to hold transnational corporations liable under the Alien Tort Claims Act,' in *Transnational Corporations and Human Rights*, ed. Olivier De Schutter (Portland: Hart, 2006), p.50.

83 In addition, two directors of the company that had produced Zyklon B (the gas used by the Nazis to kill concentration camp inmates) were tried in a British military court and were convicted of mass murder: Bratspies, 'Organs of Society' pp.23-24.

as an instrument by and through which they committed the crimes enumerated in the indictment.[84]

The ICTR would later draw on this legacy in the *Media Case* in convicting the three corporate directors of a radio station and newspaper accused of masterminding a media campaign designed to incite the Hutu population to murder Tutsis in 1994.[85] The South African Truth and Reconciliation Commission also collected testimony from a range of business representatives in the 1990s in connection to their role in the crime of apartheid.[86] It is also notable that the Office of the Prosecutor of the ICC recently issued a policy paper signalling an increased focus on crimes involving the destruction of the environment, the illegal exploitation of natural resources, and the illegal dispossession of land. This suggests that it may be possible for business and human rights violations to be prosecuted at the ICC in the future if those violations are considered to be material elements of crimes against humanity.[87]

Finally, in a small but significant step, the Appeals Panel of the Special Tribunal for Lebanon (STL) determined in October 2014 in the case of *New TV S.A.L and AI Khayat* that it had jurisdiction over corporations for the offence of contempt, despite the absence of any explicit provision granting jurisdiction over legal persons.[88] In addition, the STL Contempt Judge Nicola Lettieri entered a guilty verdict in July 2016 against the corporation Akbar Beirut S.A.L, creating an important precedent regarding the ability of international tribunals to trial corporations for interfering with justice (and

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84 'The I.G. Farben Case,' in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (Washington DC: US Government Printing, 1952), p.1108.

85 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* Case No. ICTR-99-52-T, Appeals Judgment, 28 November 2007.

86 South African Truth and Reconciliation Commission, 'Final Report', 29 October 1998, Available at http://www.justice.gov.za/trc/report/ (accessed 28 March 2016).

87 Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation' (The Hague: ICC), 15 September 2016. See also: Nadia Bernaz, 'Rights as Usual', 16 September 2016. Available at: http://rightsasusual.com/ (accessed 30 September 2016).

88 *New TV S.A.L. and AI Khayat* Case No. STL-14-05/A/AP Appeals Panel, 2 October 2014.

perhaps other criminal conduct).[89] As noted by legal scholar Nadia Bernaz, it is possible that these cases will be relied on in future business and human rights litigation as evidence that corporations may commit crimes that may be prosecuted at the international level.[90]

Interestingly, several states have implemented the provisions of the Rome Statute into their domestic law in a way that does not limit jurisdiction over the three international crimes to natural persons,[91] meaning that in these states it is possible to prosecute corporations for international crimes.[92] As mentioned in the next chapter, a very small number of cases of this type have been successfully prosecuted at the national level. Nevertheless, this still provides no remedy for corporate human rights violations that are serious but do not amount to international crimes.

Home State Responsibility and Extraterritorial Jurisdiction

Another potential avenue for accountability may exist in the capacity of states to assert direct extraterritorial jurisdiction over the activities of their corporate nationals operating abroad. This is often controversial for various reasons. First, it is a fundamental principle of international law that states generally have jurisdiction over

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89 *Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin* Case No. STL-14-06/T/CJ, Contempt Judge, 15 July 2016.

90 Nadia Bernaz, 'Corporate Criminal Liability under International Law The New TV SAL and Akhbar Beirut SAL Cases at the Special Tribunal for Lebanon,' *Journal of International Criminal Justice* 13, no. 2 (2015), p.329.

91 See, for example, sections 51(1) and 52 of the *International Crimes Act 2001* (UK), which applies to acts committed in England and Wales. In Australia, the three Rome Statute criminal offences were inserted into the Criminal Code as Division 268 by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). Under this Act, it is possible for Australia to prosecute a corporation domiciled in any state for conduct amounting to a Division 268 offence, wherever in the world it is committed.

92 For a discussion of universal jurisdiction statutes passed at the national level, see Baughen, *Human Rights and Corporate Wrongs*: pp.53-59. Baughen notes that the most famous of these is Belgium's 1993 *Act on the Punishment of Grave Breaches of International Humanitarian Law*, amended in 1999. Cases launched under this act included events arising out of genocide in Rwanda, the killing of two priests in Guatemala, and alleged crimes by Hissène Habré, the former dictator of Chad.

acts (and omissions) that take place on their territories. The UN International Law Commission stated in 2006:

> *From a practical as well as a legal perspective, the organs of a State generally perform legislative, judicial or enforcement functions only within the territory of a State. Principles of international law relating to the territorial integrity and independence of States prevent the organs of one State from being physically present or performing their functions in the territory of another State without the consent of the latter State.*[93]

This means that when a court agrees to adjudicate matters at least partially connected to another country, it potentially infringes upon the adjudicative jurisdiction of that state.[94] In some circumstances, extraterritorial enforcement is likely to be contrary to Article 2(7) of the UN Charter. As Alejandro Chehtman states:

> *[E]xtraterritorial punishment has also been considered inconsistent with… the principle of state sovereignty. The world is divided into political entities with an exclusive right to regulate the conduct of individuals within their territorial borders. A crucial normative difficulty with extraterritoriality, is, then, that it is not claimed exclusively on the high seas, or Antarctica for that matter, but rather on the territory of another sovereign state.*[95]

Second, as noted by trial attorney Dan Stigall, extraterritorial jurisdiction has a natural tendency to affect international relations between countries due to the 'inherently conflict-generative nature of extraterritoriality'.[96] Diplomatic protests, non-recognition of judgments, and legislative measures such as 'blocking statutes' and 'claw-back statutes' are all possible consequences if one state judges another to have exercised

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93 UN International Law Commission, 'Report of the International Law Commission, Annex E', UN Doc No.: A/61/10 (2006), p.519.

94 Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?' p.495.

95 Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: OUP, 2010), p.20.

96 Dan E. Stigall, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law,' *Hastings International and Comparative Law Review* 35, no. 2 (2012), p.323.

extraterritorial jurisdiction inappropriately.[97] Others call attention the fact that jurisdictional conflicts may arise if two states concurrently exercise jurisdiction in relation to the same defendant and set of allegations,[98] or note that Western states could be perceived as imperialist if their courts hand down judgments in connection to events that take place offshore.[99]

On the other hand, arguably it is unjust and immoral to allow corporations to escape liability for violations of human rights simply on the basis that the victim is from a state with a non-functioning judicial system, when a comparable victim with home state citizenship could seek remedy in that jurisdiction.[100] In its amicus brief in *Kiobel v Royal Dutch Petroleum,* Argentina argued that the US should protect its tradition of assuming extraterritorial jurisdiction under the Alien Tort Statute: '*Filartiga* represented a step against impunity when no other remedies were available, and its loss as a precedent would undermine the international system for the protection of human rights that the foreign policy of the Argentine Republic seeks to uphold'.[101] It is difficult to argue against extraterritorial jurisdiction when in some circumstances, it may be the best (if by no means perfect) option available to the victims.

These concerns are reflected in a general shift in human rights discourse that places increased emphasis on an emerging positive obligation of states to prevent and punish human rights violations committed abroad by corporate nationals. Robert McCorquodale and Penelope Simmons, for instance, refer to human rights law to commendably outline the scope of a potential duty of home states to regulate the

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97 UN International Law Commission, 'Report of the International Law Commission, Annex E', UN Doc No.: A/61/10 (2006).

98 See, for instance, 'Brief of the Governments of the United Kingdom and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in support of the Respondents,' *Kiobel v. Royal Dutch Petroleum Co No. 10-1491* (3 February 2012), p.2.

99 Ugo Mattei and Jeffrey Lena, 'US Jurisdiction over Conflicts Arising outside of the United States: Some Hegemonic Implications,' *Hastings International and Comparative Law Review* 24(2000).

100 Joseph, *Corporations and Transnational Human Rights Litigation*: p.13.

101 'Brief of the Government of the Argentine Republic as Amicus Curiae in support of the Petitioners', 13 June 2012.

behaviour of companies operating overseas.[102] Nadia Bernaz has also highlighted the significance of a 1972 UN Security Council Resolution that called upon all states with companies operating in Namibia (then occupied by South Africa and seized by labour strikes) to ensure that those corporations complied with the UN Declaration of Human Rights.[103] Clearly, as noted by Bernaz, 'the idea that states do have some obligations with regards to the human rights impacts of companies registered in their territories and operating abroad is not new'.[104]

Nevertheless, it is still premature to suggest that states presently have a general duty under international law that requires them to prevent, punish or otherwise regulate the behaviour of these businesses.[105] There is little evidence to suggest that states at the present time consider themselves obliged to assert jurisdiction over the overseas operations of their corporate nationals. Certainly, the GPs affirm that states are not at the present time obliged under international human rights law to regulate the

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102 McCorquodale and Simmons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law'. As also outlined by Jolyon Ford, some academics suggest that a state duty to regulate corporate nationals outside the jurisdiction does exist based on General Comments from treaty bodies, including the Committee on Economic, Social and Cultural Rights. The Committee adopted the 'Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights' on 20 May 2011 (Doc E/C.12/2011/3). This document provides that signatory states should take steps to 'prevent human rights contraventions abroad by corporations that have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host States'. Supporters of the state duty also refer to the *Trail Smelter* dispute, a transboundary pollution case involving the federal governments of the US and Canada. This case established the principle that a state may not use, nor allow its nationals to use, its own territory in such a manner as to cause injury to a neighbouring country: *Trail Smelter Arbitration (United States v. Canada)* 3 U.N. Rep. Int'l Arb. Awards 1905 (1941). Another relevant case is the *Corfu Channel Case*, in which the International Court of Justice (ICJ) ordered Albania to pay compensation to Great Britain in respect of damage to two British warships (and more than 40 deaths) caused when they struck mines in the North Corfu Channel. The decision was made on the basis of the ICJ's finding that the Albanian authorities were aware that the mines existed: *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania) (Merits)* ICJ Reports 1949 4.

103 UN Security Council Resolution 310 (1972), para. 5. Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?' p.506.

104 ibid.

105 Ford, 'Business and Human Rights', p.18; Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?'.

extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. However, the GPs also specify that states should 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations,'[106] and take special care to promote additional measures where there is a risk corporate nationals may violate human rights while working in conflict-affected areas.[107]

In the absence of a clear international obligation, states are hesitant to regulate the extraterritorial activities of TNCs where they perceive that such regulation would put their corporations at a competitive disadvantage in relation to foreign companies.[108] For this reason, domestic efforts to implement laws compelling companies to comply with human rights standards in their overseas operations have consistently failed.[109] In February 2009, the Canadian Parliament considered Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries.* This Act proposed that the Ministers of Foreign Affairs and International Trade be able to issue standards for Canadian extractive companies operating in developing countries, allowed those Ministers to receive complaints if a company failed to meet issued standards, and proposed that government financing, promotion, and support be linked to whether a company complied with issued standards. Canadian extractive companies responded with a huge lobbying effort: they complained that the standards imposed by the legislation were too high, that they would put Canadian companies at a comparative disadvantage, that some companies would be forced to relocate to other jurisdictions,

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106 UN Guiding Principles, Guiding Principle 2.

107 This may involve, for example, assessing whether policies, legislation and regulations address the additional risk, and considering whether human rights due diligence could ameliorate the heightened risk: UN Guiding Principles, Guiding Principle 7, Commentary.

108 Joseph, *Corporations and Transnational Human Rights Litigation*: p.12.

109 For a discussion of failed legislative initiatives in these countries, see: Palmer, 'What can Post - Democracy tell us about TNCs and Extraterritorial Violations of Human Rights?'; Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Oxford: Routledge, 2014), pp.260-70; Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat,' *Melbourne Journal of International Law* 5(2004).

and that Canadian companies would be deterred from investing in developing countries.[110] A subsequent bill that sought to amend the *Federal Courts Act (RSC 1985)* was introduced on 16 October 2013. Had it passed, Bill C-323 would have expressly permitted foreign citizens to initiate tort claims related to overseas events based on violations of international law or treaties to which Canada is a signatory.

Similar efforts in the US, the UK and Australia have also been unsuccessful. The *Corporate Code of Conduct Act* was introduced into the US House of Representatives in various forms in 2000, 2001 and 2006. These bills targeted US companies employing individuals abroad and aimed to implement and monitor a code of conduct incorporating international labour and human rights standards. The proposed legislation would have required government agencies to grant preference to code-compliant corporations in awarding procurement contracts and providing certain foreign trade and investment assistance. In the UK, three versions of the *Corporate Responsibility Bill* were introduced from 2002 to 2004. In 2004, one member introduced the *Performance of Companies and Government Departments (Reporting) Bill*, which would have required each major UK corporation to produce and publish an annual report on its social, environmental and economic impact, including effects on any communities in which it operated (the bill was not successful, but the later *Companies Act 2006* expanded the duties of directors and introduced new provisions on mandatory social and environmental reporting). In 2000, the Australian Democrats introduced the *Australian Corporate Code of Conduct Bill* into Australian Parliament, which would have applied to any corporation with more than 100 employees in any foreign country. The bill, however, was criticised by the Parliamentary Joint Statutory Committee on Corporations and Securities as 'impracticable and unwarranted'. The Committee expressed concern in relation to the bill's extraterritorial scope, the potential impact on investment in

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110 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.264.

Australian corporations, and the vagueness of its obligations.[111] A similar *Corporate Code of Conduct Bill* was considered in 2004, but also failed.[112]

Nevertheless, glimmers of hope still shine on the horizon. Certainly, there is an increased awareness that in order to encourage corporate nationals to promote human rights, states can implement domestic measures that apply extraterritorially but fall short of directly asserting extraterritorial jurisdiction. As Nadia Bernaz shows, domestic measures may include policies encouraging the establishment of improved compliance units,[113] the introduction of human rights criteria prior to the granting of specific advantages or subsidies, or incentives requiring companies to report on their human rights performance. For instance, Bernaz notes that the Hong Kong Stock Exchange requires listed mineral companies to provide information on their social, environmental and community impact, and that the 2011 EU policy on Corporate Social Responsibility (which admittedly is only recommendatory) emphasises the need to promote responsible business behaviour through investment and public procurement.[114]

Jo Ford also argues that it is likely that support will continue to grow – within Europe at least – for a clearer state duty to protect against corporations committing human rights

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111 Parliamentary Joint Statutory Committee on Corporations and Securities, 'Report on the Corporate Code of Conduct Bill 2000', June 2001. Available at: http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/1999_02/corp_code/report/report_pdf.ashx (accessed 8 October 2015).

112 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.265.

113 Compliance units examine the compliance of company operations with the domestic laws and regulations of the country in which the company operates: David Scheffer and Caroline Kaeb, 'The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory,' *Berkeley Journal of International Law* 29(2011), p.380; Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?' p.496.

114 Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: is Extraterritoriality the Magic Potion?' pp.497-98, 500; Hong Kong Exchange, 'Listing Rules (Chapter 18) Equity Securities: Mineral Companies, Rule 18.05(6),' Available at: http://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/documents/chapter_18.pdf (accessed 30 September 2016); European Commission, 'Communication from the Commission to the European Parliament, the Council, the EES Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility' (Brussels: EC), 25 October 2011, p.5.

violations abroad, albeit one limited to requiring companies to complete due diligence in relation to their human rights impact overseas.[115] In the UK, the 2015 *Modern Slavery Act* requires corporations (or corporate groups) with a turnover of more than £36 million per annum to file a statement reporting the steps taken throughout the financial year to ensure that slavery and human trafficking is not taking place in their supply chains.[116] Members of the European Parliament voted on 29 April 2015 to adopt a motion calling for mandatory human rights due diligence for corporations.[117] Similarly, the Swiss Coalition for Corporate Justice has launched a campaign calling for an amendment to the Swiss Constitution that would require Swiss TNCs to carry out appropriate due diligence. The mandatory requirements would also enable people adversely impacted by the international activities of Swiss companies to bring damages claims in Switzerland.[118] Ford surmises that it is likely we will see more proposals similar to those promoted in France and Switzerland, most particularly in high-risk sectors, activities or locations.

Yet although the direction of movement in Europe is clear, progress remains an uphill battle. On 31 March 2015, the French National Assembly endorsed a draft law which would require the largest French multinational corporations to implement due diligence plans to prevent harm to human rights and the environment. On 18 November 2015, however, the French Senate rejected the law, which will now return to the French

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115 Ford, 'Business and Human Rights', p.18.

116 Section 54, Modern Slavery Act 2015 (UK).

117 Motion 2015/2589 (RSP) demanded that the Council consider the necessity of new EU legislation 'to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency': Arnaud Poitevin, 'The EU may move towards mandatory business & human rights regulation', 9 May 2015. Available at: https://www.linkedin.com/pulse/eu-moves-towards-mandatory-business-human-rights-arnaud-poitevin (accessed 29 November 2015).

118 'Mandatory human rights due diligence: developments in Europe', 19 May 2015. Available at: http://corporate-responsibility.org/mandatory-human-rights-due-diligence-developments-in-europe/ (accessed 29 November 2015).

National Assembly for a second reading.[119] These events highlight how politically challenging it is to pass legislation that creates stronger obligations for business.

Furthermore, while extraterritorial measures may contribute positively to enhancing corporate accountability, it is important to recognise their limitations as well as their potential. For instance, Ford cautions against trusting that such initiatives are capable of providing complete accountability, as 'these will focus on preventative approaches that do not necessarily result in opening up greater remedial avenues for claimants'.[120] Others have expressed concern that the extraterritorial application of laws may result in the imposition of protectionist measures, leading to valid competitor countries being deprived of their competitive advantage in the name of human rights enforcement.[121]

Conclusion

This chapter aimed to set out the international legal framework as it currently applies to TNCs and human rights violations. It commenced with a brief history of the corporation, documented the reasons behind the rise in transnational corporate power from the 1970s, and set out a definition for TNCs. Second, the chapter emphasised the multiple ways in which TNCs can negatively impact upon human rights, drawing upon some of the most notorious incidents of the last two decades to show that TNCs affect human rights across all continents and across all industries. Third, the chapter highlighted why corporations are so difficult to regulate at the international level. TNCs are powerful, loosely structured over numerous jurisdictions, and now have extensive legal rights against states under bilateral investment treaties (BITs) and multilateral investment treaties.

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119 European Coalition for Corporate Justice, 'French Senate rejects duty of care law: a vote in favour of maintaining corporate impunity', 23 November 2015. Available at: http://www.corporatejustice.org/French-Senate-rejects-duty-of-care-law-a-vote-in-favour-of-maintaining.html?lang=en (accessed 29 November 2015).

120 Ford, 'Business and Human Rights', p.18.

121 Joseph, *Corporations and Transnational Human Rights Litigation*: pp.12-13.

Finally, the chapter comprehensively outlined the international legal framework as it currently applies to corporations and human rights. Under international law, it is the responsibility of states to protect against human rights abuses that occur on their own territory, including those committed by business entities. This means that in weaker states, TNCs are able to avoid prosecution if corruption is rife and law enforcement is patchy. The perceived failure of domestic legislation to adequately constrain the activities of TNCs has shifted the focus of scholars to the potential of international law, which so far has developed only a limited capacity to address the human rights violations of corporations. The final section in this chapter completes discussion of the legal framework by showing that home states remain reluctant to regulate the extraterritorial activities of TNCs where they perceive that such regulation would put their corporations at a competitive disadvantage.

In the face of these obstacles, creative litigants are creating new paths for holding TNCs accountable in the courts of their developed home countries. Without an obvious alternative venue (such as an international court), lawyers have become increasingly creative in pursuing corporations extraterritorially. The most fruitful jurisdiction for these efforts has historically been the US. However, as we shall see, some common law and even civil law countries are increasingly receptive to opening up national courts to overseas human rights plaintiffs, albeit in limited circumstances. This is the subject of the next chapter.

Chapter 3: Processes of Legalisation in Transnational Litigation

'We're going to fight this until hell freezes over. And then we'll fight it out on the ice.'[1]

Chevron spokesperson Donald Campbell, speaking in relation to
the Chevron/Texaco litigation in Ecuador (2009).

It is in domestic courtrooms – often far from where the alleged abuses occur – that some of the most definitive battles over the role and responsibilities of TNCs are fought. A number of these cases are extraterritorial in nature, meaning that they concern causes of action that have arisen outside the jurisdiction where the case is brought. These matters result from the fact that it is often prohibitively difficult for plaintiffs to pursue legal action against TNCs within their own legal systems. As discussed in the previous chapter, in most jurisdictions there are laws that, if properly applied, would be capable of imposing appropriate sanctions on corporations that engage in bad behaviour. However, in many states where the worst atrocities occur, insufficient political will, deficient legal capacity, or high procedural barriers can make successfully prosecuting companies impossible.

Extraterritorial cases are consummate examples of transnational legalisation in action, and often showcase innovative lawyering that seeks to apply established legal principles in new and creative ways. The majority of cases have been launched in the US, starting with *Doe v. Unocal*, in which Burmese villagers claimed that the California-based oil company was complicit in the offences of forced labour, rape, and murder allegedly

1 Patrick Radden Keefe, 'Reversal of Fortune', *The New Yorker* 9 January 2012. Available at: http://www.newyorker.com/magazine/2012/01/09/reversal-of-fortune-patrick-radden-keefe (accessed 17 June 2016).

committed by Burmese military personnel.[2] Increasingly, however, enterprising lawyers have sought to bring cases on an extraterritorial basis in a range of other jurisdictions, including Canada, the UK and several other European states.

Despite the fact that transnational cases are becoming more common, they remain highly challenging. When pursued through domestic court systems, transnational legalisation represents a delicate interplay of structure and agency. A domestic legal framework is necessarily a highly structured one that places a range of limits on judicial law-making. Law that emerges through the decisions of both national and international courts is fundamentally a product that must respond to relevant legislation and general legal principles. Its development may also be constrained by judicial doctrines – such as *forum non conveniens* (FNC) – that caution judges to refrain from exercising jurisdiction in certain circumstances. Extraterritorial cases also regularly raise difficult and interconnected legal questions regarding jurisdiction, cause of action, foreign state immunity and choice of law. A ruling on just one of these issues may be pivotal to the overall outcome of the case.

This chapter seeks to highlight the relevant characteristics and procedural barriers within each jurisdiction that make it more or less likely that litigation against TNCs will succeed. In analysing transnational legalisation at the domestic level, this thesis argues that it is these characteristics that indicate whether an individual legal system may be characterised as possessing high or low implementation. In jurisdictions where implementation is high, legal causes of actions are available to plaintiffs, legal aid or pro bono assistance is available, and judicial use of prudential grounds for non-exercising jurisdiction are only moderately employed. In jurisdictions where implementation is low, there may be no available causes of action, judges may be conservative in exercising jurisdiction over foreign parties, and legal assistance is unlikely to be available to plaintiffs.

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2 *Doe v. Unocal* 963 F. Supp. 880 (C.D. Cal. 1997).

Examining transnational legalisation in this way highlights several themes. The first is the legal ingenuity of individuals and organisations involved in these cases. Each domestic system, with all of its particular legal and procedural barriers, constitutes a precise structure in which litigators must operate. Without the commitment and creative lawyering of human rights advocates in the most influential of cases, such as *Filártiga v. Peña-Irala*, it is quite possible that many of these matters may never have seen the light of day.[3] Individual judges also play a vital role in deciding the outcomes of cases: how judges interpret legislation and past precedents, in addition to how they construct the precise language of any tests or standards for application in future matters, encourage nascent legal principles to develop and push their progression along particular legal and normative paths.

Second, in their efforts to advance a specific norm through a specific legal system, legalisers are in effect attempting to transform the legal structures that inform and steer the development of the law.[4] In this way, they aim to secure a positive result for their client and also to forge new pathways for future litigants to advance transnational claims against TNCs. Implementation can therefore become higher in domestic systems in two ways. First, governments may pass laws that make it easier or more advantageous for claimants to initiate legal action against TNCs. Second, judges may interpret existing legal principles in such a way that bolsters the chances of future claimants succeeding in the domestic forum.

The third theme concerns how implementation relates to the other legalisation characteristics of obligation, delegation, and precision when applied in the domestic context. The introduction foreshadowed that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics over time. At the international and transnational levels, legalisers are generally playing a long game – they accept lower levels of obligation, delegation,

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3 *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

4 Wendt, 'The Agent-Structure Problem in International Relations Theory'.

and/or precision in the belief that over time these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance.

At the domestic level, however, the relationship between implementation and the other legalisation characteristics is slightly different. Ordinarily, domestic rules embody high levels of obligation, delegation, and precision. States intend for the laws that they create and promulgate to be legally binding (high obligation), to be sufficiently specific that they can guide the actions of citizens without ambiguity (high precision), and facilitate the enforcement of those laws through an independent court system (high delegation). In this system, courts play an indispensable role, most obviously through providing delegation. However, courts also play a crucial part in generating the quality of precision. Where it is unclear how a specific law – or a combination of laws – should be applied, we rely on the determination of judges to carefully delineate the law's precise parameters. It is through this process of court interpretation that opportunities may arise for transnational litigators seeking to institutionalise the norm of corporate accountability for human rights violations. In this way, legalisers may effectively boost the obligation and precision inherent in this norm if they can convince a court to extend the application of high-obligation domestic law to a new class of (corporate) individuals or circumstances. The opportunity to do just that depends on the quality of implementation: whether the legal system incorporates characteristics that make it possible for litigation against TNCs to succeed.

The final theme concerns the picture that begins to materialise of an overarching, global transnational system of remedies. Due to the fact that some legal systems have high implementation and others have low, the system has compromised capacity and a distorted pattern of case distribution. As we shall see, the sum of variations across domestic jurisdictions has led to an overarching litigious global system that exacerbates inequalities, and – from an overarching transnational perspective – is patchy, fragile, and unpredictable.[5]

This chapter proceeds by setting out the major legal developments in transnational legalisation as they have unfolded in several jurisdictions in connection to corporate accountability. In addition to highlighting the most important global developments in litigation, this chapter also highlights the fundamental role of implementation at the domestic level. The range of procedural and practical barriers that arise in these cases are, in many instances, also barriers to the full legalisation of rules that otherwise strongly exhibit the characteristics of obligation, precision, and delegation. In conducting a review of the particular characteristics of each judicial system and the most relevant legal developments within each state, I draw on the comprehensive coverage provided by the Business and Human Rights Resource Centre as well as two recent (and excellent) reports.[6] This includes one by Dr Jennifer Zerk commissioned by the Office of the UN High Commissioner for Human Rights in relation to corporate liability, and another commissioned by ICAR, CORE, and the European Coalition for Corporate Justice on the subject of judicial remedies for corporate human rights violations.[7]

The United States

The majority of transnational human rights cases have arisen in the United States. This situation can be attributed to certain procedural characteristics of the US system and the existence of a number of unique causes of action available by virtue of a legal framework comprised of the *Alien Tort Statute* (ATS) and the *Torture Victim Protection Act*

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5 Zerk, 'Corporate Liability for Gross Human Rights Abuse', p.7.

6 Business & Human Rights Centre website. Available at: https://business-humanrights.org/ (accessed 1 July 2016).

7 Zerk, 'Corporate Liability for Gross Human Rights Abuse'; Gwynne Skinner et al., 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (International Corporate Accountability Roundtable), 2013.

(TVPA).[8] In discussing legal developments in the US, I turn first to practical considerations that affect the ability of potential claimants to initiate litigation. I then move on to a discussion of legal developments under the ATS and state legislation. Finally, I highlight the specific challenges to jurisdiction that may affect whether a case is permitted to proceed, including *forum non conveniens*, sovereign immunity, political question and the foreign affairs doctrine. If a defendant persuades a court that a case should be dismissed on one of these non-merits grounds, the case will not be heard in the US. For this reason, it is these questions that have become the main battleground for transnational tort claims in the US.

Practical Considerations: Legal Aid, Litigation Funding and Discovery

From a practical perspective, the US legal system contains a set of plaintiff-friendly characteristics that have proved essential in promoting transnational human rights litigation. First, unsuccessful litigants are not required to pay the costs of opposing parties, except in circumstances where the claim is deemed to be entirely vexatious. This is especially important in the context of human rights litigation, where outcomes may be very uncertain.

Second, petitioners are often able to employ lawyers on a contingency fee basis, which keeps legal costs low in the event of a loss. The large amount of potential damages available (and the correlated legal fees) incentivise law firms to take on these matters.[9] Furthermore, even though there is generally no legal aid available for plaintiffs, cases against TNCs may also qualify for pro bono legal assistance.[10] Sometimes the ability of large firms to take on this kind of pro bono work is restricted by the potential conflicts

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8 The *Torture Victim Protection Act* (TVPA) was enacted by the US Congress in 1991 as a supplement to the ATS. It explicitly provides for a civil cause of action for both aliens and US citizens against individuals who commit torture or extrajudicial killings under the 'apparent authority' of a foreign government: *Torture Victim Protection Act of 1991*, Pub L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 USC s.1350 (2006)).

9 Austen L Parrish, 'State Court International Human Rights Litigation: A Concerning Trend,' *UC Irvine Law Review* 3(2013), pp.40-41.

10 Baughen, *Human Rights and Corporate Wrongs*: p.83.

with existing corporate clients, but in general there is a broad public interest legal sector in the US willing to take on these matters.

Third, plaintiffs are able to structure their cases as class actions, which aggregate claims and allow plaintiffs to spread the costs and the risks. Finally, the US has rules relating to discovery that are favourable to petitioners. This is extremely important in these types of cases when so much salient information is likely to lie in the hands of the defendants.[11]

A Unique Cause of Action: The Alien Tort Statute

A cause of action is the legal foundation upon which a plaintiff initiates a court case. It is a set of facts that demonstrates that the legal rights of an individual have been compromised, and gives a basis for a court to provide a remedy to an affected party.[12] A key reason why the majority of extraterritorial corporate cases have been brought in the US is due to the existence of the *Alien Tort Statute 1789* (ATS), a completely unique provision. Its jurisdictional grant has been held to permit the development of a cause of action based on violations of a limited number of *jus cogens* norms of customary international law.

This section considers the history of this unusual statute and the development of the ATS jurisprudence in the US over the last three decades. This story provides an exceptional illustration of how legalisers can agitate within a domestic legal system to extend the application of legal principles to new classes of cases. In this way, lawyers and courts have contributed to the progressive legalisation of the norm that corporations should be held accountable for human rights violations, no matter where in the world those violations occurred. The conversations between judges and lawyers on this subject are documented in written judgments and submissions, providing a clear record of how the debate has been fought and unfolded in this particular arena of legalisation.

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11 Skinner et al., 'The Third Pillar', p.74.

12 Silas A Harris, 'What is a Cause of Action?,' *California Law Review* (1928).

The First Congress originally enacted the ATS as section 9 of the *Judiciary Act 1789*. This section granted the district courts original jurisdiction over 'all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States'. In its present form under the United States Code, the section now reads: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[13]

What prompted the new government in 1789 to formulate this type of provision? One of the duties of the new government was to legislate for the formation of a federal court system. It was important that this system provide certain rights to non-US citizens. Although records relating to the drafting of the provision are limited, it is generally accepted that the framers were attempting to comply with the law of nations, a 'natural inclination for a young country with the objective of establishing itself and earning the respect of its peers'.[14] By creating a 'credibly neutral forum for dispute resolution', the legislators sought to maintain peaceful relations with Europe and promote business with continental merchants and bankers eager to conduct commerce in a young, largely agrarian state.[15]

This objective was perhaps particularly important in light of two international incidents that occurred in 1784 and 1787 respectively. The first involved a former French military officer who attacked the French consul, Francis Marbois, on a street in Philadelphia. As the law of nations stipulated the protection of diplomats, it was highly problematic that the US federal law at the time provided no remedy. The second incident involved the entry of New York police into the home of a Dutch minister, Mr Van Berckel, in order to arrest a domestic servant. This action violated the minister's diplomatic immunity and, again, no remedy was available. These two incidents indicated to the Continental

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13 See *Judiciary Act* of 1789, Ch. 20, s 9(b), 1 Stat. 73, 77 (currently 28 USC s 1350 (1982)).

14 Theresa Adamski, 'The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations,' *Fordham Law Review* 34(2011), p.1507.

15 Thomas H Lee, 'The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in US Foreign Relations,' *Notre Dame Law Review* 89, no. 4 (2014), p.1646.

Congress that it was necessary to provide federal jurisdiction over such matters in order to avoid international embarrassment, protect national security, and preserve international relations.[16]

Filártiga v. Pena-Irala

The ATS was rarely invoked[17] for two centuries before the Second Circuit 'breathed new life'[18] into the statute in *Filártiga v. Peña-Irala.*[19] In those proceedings, the family of a man tortured and killed in Paraguay brought an action in the US District Court for the Eastern District of New York against Americo Norberto Peña-Irala, a former inspector-general in the Paraguayan police. It was alleged that Peña had kidnapped, tortured and caused the death of Joelito Filártiga in retaliation for the political beliefs of the seventeen-year-old boy's father.[20]

In the first instance, the district court dismissed the case for lack of subject-matter jurisdiction. It held that the tort alleged was not in violation of 'the law of nations,' and thus the ATS did not apply. However, on appeal, the Second Circuit reversed the verdict, finding that as jurisdictional matter, foreign nationals were able to sue one another in the US for international human rights violations that occurred overseas. According to the court, the claim arose under federal law because '[t]he constitutional

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16 Adamski, 'The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations' p.1509.

17 Between the time of its enactment in 1789 and 1980, the ATS was invoked twice in the late 18th century, but then only one additional time during the subsequent 167 years: See *Moxon v The Fanny*, 17 F. Cas. 942 (No. 9,895) (DC Pa. 1793); *Bolchos v Darrel,* 3 F. Cas. 810 (No. 1,607) (DC SC 1795); *O'Reilly de Camara v. Brooke,* 209 US 45 (1908); *Khedivial Line, SAE v Seafarers' International Union,* 278 F.2d 49, 51-52 cited in *Kiobel v. Royal Dutch Petroleum Co., at 3.* The fact that the ATS was largely ignored during the first two centuries of its existence led Judge Henry Friendly to memorably describe it as a 'legal Lohengrin' because 'no one seems to know whence it came': *IIT v. Vencap Ltd.* 519 F.2d 1001, 1015 (2d Cir. 1975).

18 Anthony J Bellia Jr and Bradford R Clark, 'The Alien Tort Statute and the Law of Nations,' (2011), p.83.

19 *Filártiga v. Peña-Irala*.

20 Dolly Filártiga, the sister of Joelito, learned of Pena's presence in New York after moving to the US herself, and subsequently filed a complaint alleging a violation of the ATS.

basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law'.[21]

Filártiga was a breakthrough case in several respects. First, the case created a pathway by which plaintiffs could bring cases based on violations of customary international law rather than ordinary tort claims. Second, it held that the ATS should be interpreted using contemporary standards rather than those of 1789.[22] In the late 18th century, the types of norms that would have been accepted as violations of the law of nations included violation of safe conduct, infringement of the rights of ambassadors, and piracy.[23] However, in the view of the court, international law should be viewed as an evolving body of law reflected in the 'general usage and practice of nations'.[24] Thus it found that torture violated international law, as based upon customary international law, international agreements, and the general criticism of torture within the international community.[25] It was therefore possible for a US court to hold Peña liable for the torture and murder of Joelito Filártiga.

Third, the judgment captured a certain idealism that reflected a particular moment in time. The court emphasised that 'for the purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind'.[26] The decision, according to the court, was 'a small but important step in the

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21 *Filártiga v. Peña-Irala*, at 885.

22 ibid., at 881.: '[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today'.

23 Michele Potestà, 'State Immunity and Jus Cogens Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the Law of Nations,' *Berkeley Journal of International Law* 28(2010).

24 *Filártiga v. Peña-Irala*, at 880.

25 ibid.: The court held that 'in light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations'.

26 ibid., at 890.

fulfilment of the ageless dream to free all people from brutal violence'.[27] It was also consistent with President Jimmy Carter's desire to advance a foreign policy with human rights at its centre, and envisaged a global role for US federal courts willing to enforce individual rights. Even Congress offered tacit support when in 1991 it enacted the *Torture Victim Prevention Act*, a new statute that permitted both aliens and US citizens to sue foreign state actors in US courts for torture or extrajudicial killings.[28]

Filártiga would pave the way for hundreds of new cases to be brought in the courts of the US.[29] These related to a broad range of atrocities including, in addition to torture, crimes from the Nazi era, ethnic cleansing and genocide, terrorism, extrajudicial killings, war crimes, and the suppression of religious groups. Helpfully for plaintiffs, the substantive law of liability in ATS cases is construed according to principles of international law, which have been developed through the jurisprudence of the international criminal tribunals. In addition, courts have the flexibility to offer more generous limitation periods than those available in tort cases. Baughen notes that a 10-year period of limitation has been applied in line with the limitation period contained in the TVPA.[30]

Sosa v. Alvarez-Machain

The Supreme Court considered the ATS for the first time in 2004, no less than 24 years after *Filártiga.* [31] The plaintiff in *Sosa v. Alvarez-Machain* was Humberto Alvarez-Machain, was a Mexican doctor charged with participating in the torture and murder of a Drug Enforcement Agency agent. It was alleged by Alvarez-Machain that he had been

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27 ibid.

28 Lee, 'The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in US Foreign Relations' p.1665.

29 In 2012, Donald Childress wrote that since *Filártiga* there had been 173 judicial opinions in cases brought at least in part under the ATS, and at least 1,914 law review articles written that mention the term: Donald Earl Childress, 'The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation,' *Georgetown Law Journal* 100(2011), p.718.

30 Baughen, *Human Rights and Corporate Wrongs*: pp.122-23.

31 *Sosa v. Alvarez-Machain* 542 US 692 (2004).

abducted and transported to the US to be charged and tried. On this basis, he brought a claim against Sosa, another Mexican national, and the US. The Supreme Court found this claim to be without basis because kidnapping was not an actionable violation of international law under the ATS.

Nonetheless, the decision affirmed *Filártiga*'s holding that the ATS authorised federal courts to recognise causes of action for sufficiently particularised 'violation[s] of the law of nations', as determined according to modern international law. However, the court emphasised the necessity of exercising restraint in allowing ATS claims. Justice Souter, delivering the opinion of the Court, argued that the limits of section 1350's reach must be defined by actions that violate 'definable, universal and obligatory norms'. Souter J observed that 'the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts'.[32] Moreover, the judgment clarified that the ATS was jurisdictional in nature, and did not independently create a cause of action. It also emphasised that the lower courts must be concerned with 'vigilant doorkeeping', and added that 'the door is still ajar […] and thus open to a narrow class of international norms today'.[33] Nevertheless, the court also declared that 'nothing Congress has done is reason for us to shut the door to the law of nations entirely'.[34]

Importantly in the context of considering corporate accountability, *Sosa* raised in footnote 20 the question of whether corporate liability existed under the ATS. The Court did not provide a direct answer, but instead stated that 'a related consideration is

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32 ibid., at 724-25.

33 ibid., at 729.

34 ibid., at 731. Nevertheless, despite having set out the criteria to be used by courts to determine whether a particular tort violates the law of nations, *Sosa* left several important questions unanswered. For example, it did not address whether state action is required to establish liability for a particular tort, or what theories of liability (e.g. whether a defendant can be liable for 'aiding and abetting' for actions taken by subordinates) might apply. Nor did *Sosa* discuss governmental immunity under the *Foreign Sovereign Immunity Act*, the applicability of the political question doctrine, the act of state doctrine, or other immunities and defences.

whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual'.[35]

Here the Court referenced two contrasting decisions. The first, *Tel-Oren v. Libyan Arab Republic*, was decided in 1984.[36] This was the first case to discuss whether non-state actors could be deemed liable under international law. Although there was no overriding consensus, two of the judges seemed to suggest that alleged actions were not actionable under the ATS. The second case referred to by the Supreme Court in footnote 20 was *Kadic v Karadžić*, a Second Circuit decision decided in 1995.[37] In this case, the court held that Radovan Karadžić, who had asserted himself as head of the Republika Srpska, could be sued as an individual for his participation in the atrocities in Bosnia despite the fact that he was not acting in the capacity of a governmental official. Significantly, this case established the principle (contrary to *Tel-Oren*) that private individuals and other non-state actors (such as corporations) could be held liable for violations of international law. This decision ultimately led to jury verdicts of a sum totalling $US5.245 billion against Radovan Karadžić.[38]

Doe v. Unocal

Kadic v Karadžić was significant because it prefaced a new group of ATS cases in which plaintiffs made claims against TNCs, especially oil, gas, and mining companies.[39] This

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35 ibid., Footnote 20.

36 The matter concerned victims of an attack in Israel who brought a claim against the Palestine Liberation Organisation in Israel. The three judges on the District of Columbia Circuit Panel each prepared separate and divergent opinions, but did agree that the case should be dismissed. Justice Edwards was of the view that torture only violated international law if it were undertaken by state actors, whereas Justice Bork rejected the reasoning in *Filártiga* and found that international law generally does not provide for private rights of action: *Tel-Oren v. Libyan Arab Republic* 726 F.2d 774 (D.C.C. 1984), at 791-95.

37 *Kadic v. Karadžić* 70 F.3d 232 (2d Cir. 1995).

38 Peter Henner, *Human Rights and the Alien Tort Statute: Law, History, and Analysis* (United States: American Bar Association, 2009), p.7.

39 ibid.

marked the first point where the norm of corporate accountability began to be promoted through the mechanisms of the ATS. One of the most important cases in this group was *Doe v Unocal*, a case that was reported to have settled for approximately $30 million.[40] This case involved two sets of plaintiffs, which were subsequently consolidated into one group. The plaintiffs were Myanmar residents who had allegedly been forced to work in a labour programme and on a pipeline project by the Myanmar military.[41] The plaintiffs claimed that Unocal was liable because it had aided and abetted the military. The court proved especially concerned about comments made by the Unocal president, who was reported to have said in conversations with NGOs in the US, '[i]f forced labour goes hand in glove with military, yes there will be more forced labour'.[42] The matter stretched out over eight years. In 2000, both actions were dismissed on the basis that the plaintiffs were unable to show that Unocal had participated in state action or exerted control over the military. This decision was reversed on appeal, and then the matter settled out of court. [43]

Following the landmark cases of *Filártiga*, *Sosa*, and *Doe v Unocal*, foreigners were able to use the ATS in increasing numbers to address alleged human rights violations committed abroad. As discussed by Peter Henner, fewer and fewer cases have followed the *Filártiga* fact pattern consisting of an alien who was subject to human rights abuses at the hands of an agent of a foreign government.[44] Over the past two decades, more than 150 applications have been filed against US and foreign corporations accused of

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[40] ibid., p.76.

[41] According to the plaintiffs' claims, the military had kidnapped villagers and forced them to work, tortured and executed those individuals who had refused to work or attempted to flee, and systematically raped women had who attempted to escape from the labour programme.

[42] 'Shortening the Long Arm of the Law', *The New York Times* Available at: http://www.nytimes.com/2010/10/09/opinion/09iht-edbellinger.html?scp=1&sq=%22alien%20tort%22&st=cse (accessed 3 January 2012).

[43] Henner, *Human Rights and the Alien Tort Statute: Law, History, and Analysis*: p.76.

[44] ibid., p.82.

violating international law in more than 60 countries.[45] Plaintiffs embracing the ATS have pursued a range of multinational giants including Coca-Cola, Yahoo!, Chevron Corp, and ExxonMobil for alleged human rights violations committed on non-US soil.[46]

Kiobel v. Royal Dutch Petroleum

The rise of 'F-cubed'[47] human rights litigation in the US received a mixed reception, highlighting the contestation inevitable in processes of legalisation. The US State Department expressed concern about the ATS's potentially grave impact upon international relations.[48] Businesses warned of 'nightmare scenarios' involving high punitive damages and negative economic consequences for developing states.[49] Questions were raised about the dangers of forum shopping, and the fact that US taxpayers necessarily foot the bill for the court system that must hear these cases. The debate also focused upon more fundamental questions relating to the democratic accountability of courts, the distribution of power across the executive, legislative and judicial spheres, theories of US exceptionalism, and the role of international law and its application in US courts.[50]

In an effort to constrain the impact of the ATS, business groups lobbied for new legislation that was introduced in October 2005 but ultimately not passed. The *Alien Tort*

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45 The 'Law's long arm: A review of extreme extraterritoriality', *The Economist* 2012. Available at: http://www.economist.com/node/21564251 (accessed 2 January 2013).

46 See for instance *Sinaltrainal v. Coca-Cola* 578 F.3d 1252 (11th Cir. 2009); *Doe v. Exxon Mobil Corp.* 573 F. Supp. 2d 16 (D.D.C. 2008); *Wang Xioning v. Yahoo!* No. 07 Civ. 02161 (N.D. Cal. Nov. 9 2007); *Bowoto v. Chevron Texaco Corp.* 621 F.3d 1116 (9th Cir. 2010). See also Jonathan C Drimmer and Sarah R Lamoree, 'Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions,' *Berkeley Journal of International Law* 29(2011).

47 'F-cubed' lawsuits refer to those in which foreign plaintiffs invoke the jurisdiction of US courts against foreign defendants to claim in respect of human rights violations committed on foreign soil.

48 Gary Clyde Hufbauer and Nicholas Mitrokostas, 'Awakening Monster: The Alien Tort Statute of 1789' (Institute for International Economics), 2003.

49 Adamski, 'The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations' p.1504.

50 Childress, 'The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation' pp.713-14.

Statute Reform Act would have limited ATS liability strictly to 'a direct participant acting with specific intent to commit' one of six international law offences, including torture, genocide, and slavery.[51] Corporations have also pushed back against the ATS in the courtroom, and have won some important battles.[52] One of their most successful lines of argument relates to whether customary international law recognises corporate liability for aiding and abetting in circumstances where a corporation has allegedly collaborated with a repressive regime. Following a split on the question between (i) the Second; and (ii) the Ninth and Eleventh Circuits, this issue came to a head in the case of *Kiobel v. Royal Dutch Petroleum.*[53]

This matter involved a group of Nigerian nationals who filed a lawsuit against three oil companies.[54] The petitioners claimed that the respondents had enlisted the Nigerian government to suppress demonstrations after Ogoniland residents began protests against the environmental effects of the companies' operations. It was alleged that Nigerian military and police had beat, raped, killed and arrested residents. The companies had allegedly aided and abetted these atrocities by providing Nigerian soldiers and police

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51 *Alien Tort Statute Reform Act*, S.1874, 109th Congress 2005-2006 was introduced on 17 October 2005 by Senator Dianne Feinstein (Democrat) of California but was ultimately withdrawn. Available at https://www.govtrack.us/congress/bills/109/s1874 (accessed 9 December 2015).

52 For instance, in 2012, the Supreme Court held that the ATS's domestic counterpart, the TVPA, 'does not impose liability against organizations': *Mohamad v. Palestinian Authority* 132 S. Ct. 1702 (2012), at 1705. As discussed by Thomas Lee, the decision did not involve a corporation as defendant, but it would appear that the Court's holding - 'that the term 'individual' in the Act encompasses only natural persons' – should also apply to corporations: Lee, 'The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in US Foreign Relations' p.1666.

53 *Kiobel v. Royal Dutch Petroleum Co.* See also: *Bowoto v. Chevron Texaco Corp*; ibid.; *Romero v. Drummond* 552 F.3d 1303 (11th Cir. 2008).

54 When the complaint was filed, respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company Plc were holding companies incorporated in the Netherlands and England respectively. Their joint subsidiary, the respondent Shell Petroleum Development Company of Nigeria, Ltd (SPDC), was incorporated in Nigeria and ran oil exploration and production operations in Ogoniland: *Kiobel v. Royal Dutch Petroleum Co.*, at 2.

with food, transportation, and compensation, as well as permitting them to use company land to launch attacks.[55]

Following these events, the petitioners moved to the US and filed an ATS action in the US District Court. They argued that the respondents had violated the law of nations by aiding and abetting the Nigerian government in crimes against humanity, torture and cruel treatment, and arbitrary arrest and detention. On an interlocutory appeal, the Second Circuit dismissed the complaint on the basis that the 'law of nations' did not recognise corporate liability.[56] This decision was a surprise to many, as previous cases such as *Doe v Unocal* had seemed to affirm that corporations could be held liable under international law. In order to understand the reasoning of the Second Circuit, it is instructive to draw directly on the words Chief Judge Jacobs, who openly voiced his own doubts regarding the appropriateness of using the ATS to impose corporate accountability for overseas activities:

> *All the cases of the class affected by this [ATS] case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors – and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them – and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance—the very opposite of the universal consensus that sustains customary international law. […] Is it*

55 ibid.

56 *Kiobel v. Royal Dutch Petroleum Co* 621 F.3d 111 (2d Cir. 2010).

plausible that customary international law supports proceedings that would harm other civilised nations and be opposed by them – or be tantamount to 'judicial imperialism?'[57]

Kiobel was subsequently appealed to the Supreme Court on the narrow question of whether a corporation may be held liable for violating fundamental human rights under the ATS. However, early in the first oral arguments in February 2012, Justice Alito asked the lawyer for the petitioners a simple but important question: 'What business does a case like [this] have in the courts of the United States?'[58] Within a few days, the Court had ordered a second round of briefings and oral argument on an additional question: whether and under what circumstances does the ATS allow courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the US? Counsel for the parties, who had prepared to argue chiefly on the corporate liability point, went back to their drawing boards to develop additional argumentation. Interested parties wrote and filed record numbers of submissions in a second round of *amicus curiae* briefs.[59] Suddenly the entire ATS human rights framework appeared to be at stake.

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57 ibid., at B.

58 Oral arguments are available at https://www.oyez.org/cases/2011/10-1491 (accessed 9 December 2015).

59 In a clear demonstration of international public interest, more than ninety amicus curiae briefs were filed before oral submissions in October 2012. Briefs were filed by the UN High Commissioner of Human Rights (Navanethem Pillay), the UN Special Rapporteur on Torture (Juan E. Mendez) and Former UN Special Representative for Business and Human Rights (John Ruggie); a wide range of legal and human rights organisations including the Former State Department Legal Advisors, the Law of Nations Scholars, the South African Jurists, the American Bar Association, Earth Rights International, Genocide Victims of Krajina, and Victims of the Hungarian Holocaust; TNCs including Rio Tinto, Chevron, and BP America; and several states including Germany, the Netherlands, the EU, Australia and Argentina. The interest of human rights organisations and multinational corporations is to be expected in a case of this nature, but the range of vested interests embodied in submissions from state governments, prominent scholars (across the fields of law, economics and business), and key UN personnel suggests that the stakes in this case were particularly high. All the amicus briefs are available to the public on the SCOTUS Blog: http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/ (accessed 9 December 2015).

In October 2012, the parties reassembled at the Supreme Court to make new oral arguments. In April 2013, the Supreme Court handed down its judgment. The majority judgment was written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas and Alito. Instead of deciding on the initial, narrower question of corporate liability, the Chief Justice addressed whether and when the ATS applies extraterritorially, or when all the relevant conduct took place outside the US. Following the judgment of *Morrison v National Australia Bank*,[60] which held that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none', the majority held that the presumption against extraterritoriality must apply, and could only be rebutted if the relevant claims 'touch and concern the territory of the United States' with 'sufficient force to displace' this presumption. However, the '[m]ere corporate presence' of a defendant was not considered to be sufficient for this purpose. The Chief Justice left unclear, however, exactly what circumstances would be sufficient to displace the presumption.[61]

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60 This F-cubed case involved a class of Australian investors who alleged that they were the victims of fraud executed by the defendants, a group of Australian citizens. The US connection in this case was that the principal defendant had a wholly owned subsidiary in Florida, and the alleged fraud took place in Florida. Justice Scalia, writing for the Court, judged that it is presumed that the 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the jurisdiction of the United States,' so that 'when a statute gives no clear indication of an extraterritorial application, it has none': *Morrison v National Australia Bank* 130 S. Ct. 2869 (2010), pp.2877-77.

61 *Kiobel v. Royal Dutch Petroleum Co.*, at IV. Justice Breyer also prepared a minority opinion, which was joined by Justices Ginsburg, Sotomayor and Kagan. Breyer J agreed that the case should be dismissed, but dissented in relation to the majority's reasoning on the applicability of the presumption against extraterritoriality. His Honour stated that, unlike the majority, he would find jurisdiction under the ATS where the alleged tort occurred on US soil, the defendant was an American citizen, or the conduct of the defendant was such that it raised an important US national interest (such as preventing the US from becoming a safe harbour for someone who had committed torture or perpetrated genocide). He further added that Congress had created the ATS with 'foreign matters in mind'. On the specific facts of *Kiobel*, however, Breyer J found that there was no jurisdiction. The relevant defendants had only limited connections to the US (company shares were traded on the NYC stock exchange and the defendants had offices in New York): ibid., (Breyer J concurring) at B.

The Importance of a Sufficient Nexus

Following *Kiobel*, a number of cases have been dismissed on the basis that there is an insufficient nexus with the US. First, in *Balintulo v. Daimler*, the Second Circuit found that corporate citizenship in the US constituted an 'irrelevant factual distinction' in assessing the parameters of the 'touch and concern' standard when all relevant conduct occurs outside of the US.[62] According to the Second Circuit, the alleged conduct in the US must itself violate the law of nations (although this violation could consist of aiding and abetting a human rights violation abroad).[63]

Second, the *South African Litigation* concerned defendants Ford and International Business Machines (IBM), who were accused of aiding and abetting tortious conduct by South Africa's apartheid regime.[64] In that case, the Second Circuit on appeal found that in deciding whether the plaintiff's claims 'touch and concern' the US, the focus should be the 'nature and location of the conduct constituting the alleged offenses under the law of nations'.[65] The court must therefore identify and isolate the relevant conduct and perform a two-step enquiry of whether: (1) the relevant conduct sufficiently touches and concerns the US so as to displace the presumption against extraterritoriality; and (2) that same conduct gives rise to a claim for a violation of the law of nations or aiding and abetting a violation of law of nations as executed by another.[66]

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62 *Balintulo v. Daimler AG* 727 F.3d 174 (2d Cir. 2013).

63 *Mastafa v. Chevron Corp.* 770 F.3d 170 (2d Cir. 2014), p.189-87.

64 *Balintulo v Ford Motor Co.* No. 14-4104 (2d Cir. 2015).

65 ibid., p.11.

66 ibid. Basing its decision on *Presbyterian Church of Sudan v. Talisman Energy*, the court decided that a claim could only be brought on the basis of aiding and abetting if the plaintiffs could demonstrate that a defendant had: (1) provided practical assistance to the principal that had a substantial effect on the perpetration of the crime; and (2) did so with the purpose of facilitating the commission of that crime. In connection to the allegations against Ford, the court found that it was Ford's subsidiary, rather than Ford, that had committed the relevant acts (i.e. assembled and sold specialised vehicles to South African police and security forces, and allegedly given the apartheid government information about anti-apartheid activists in South Africa). By contrast, the court discerned that IBM's conduct was such that the presumption against extraterritoriality may be displaced because IBM had allegedly developed hardware and software used by the apartheid government to implement an ID system that

Finally, in *Doe v. Cisco Systems*,[67] the District Court for the Northern District of California dismissed a claim against Cisco Systems alleging that it had committed human rights abuses against Falun Gong practitioners in China through the development of a customised security system known as 'the Golden Shield'.[68] The applicants argued that the system had been used to intercept communications and to apprehend Falun Gong practitioners. The court found that Cisco's alleged actions did not sufficiently touch and concern the US because the plaintiffs could not demonstrate that the human rights abuses were planned or committed in the US.

By contrast, the Fourth Circuit adopted a somewhat broader approach in *Al Shimari v. CACI.*[69] In this case, the court found that the presumption against extraterritoriality did not apply to claims brought by Iraqi plaintiffs against a US government contractor that provided interrogation-related services to the US military in Iraq. The claimants alleged that they had been subject to torture and other mistreatment while interred at Abu Ghraib prison. The court observed that in *Kiobel*, the Supreme Court had prescribed that the claims – rather than the alleged tortious conduct – must 'touch and concern' the US. This meant that the court was able to consider a wider range of factors than merely the location where the plaintiffs sustained their injuries, including the identities of the parties and their relationship to the cause of action. The court found that the facts were such as to overcome the presumption against extraterritoriality. In particular, the court noted that the contractor was a US corporation, the employees of the relevant

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supported racial segregation (i.e. the first prong of the test was satisfied). However, the court determined that the plaintiffs had not demonstrated that IBM acted with the purpose of supporting human rights abuses in South Africa, meaning that the second prong specified by the court was not satisfied. See also *Presbyterian Church of Sudan v. Talisman Energy* 582 F.3d 244 (2d Cir. 2009); Sarah A. Altschuller, 'Alien Tort Case Development: Second Circuit Affirms Dismissal of Claims Against Ford and IBM', 31 July 2015. Available at: http://www.csrandthelaw.com/2015/07/31/alien-tort-case-development-second-circuit-affirms-dismissal-of-claims-against-ford-and-ibm/ (accessed 14 December 2015).

67 *Doe v. Cisco Systems, Inc* 5:2011-cv-02449 (N.D. Cal. 2014).

68 The court also found that even if Cisco had known that Chinese authorities used the Golden Shield to apprehend individuals, it was not proven that the defendant knew that the claimants might then be tortured.

69 *Al Shimari v. CACI International Inc* 658 F.3d 413 (4th Cir 2011), 679 F.3d 205 (4th Cir 2012).

contractor were US citizens, those employees were obliged to obtain security clearances from the US Department of Defense, the contractor's contract was issued in the US by the US Department of Interior, and it was alleged that the managers of the contractor based in the US approved, encouraged, and/or attempted to cover up the alleged misconduct in Iraq.[70]

Impact of Kiobel on Extraterritorial Litigation

Despite the more generous approach of the Fourth Circuit, there is little doubt that *Kiobel* represents a significant setback for those seeking to promote the accountability of TNCs through litigation in US courts. Several claimants seeking compensation for human rights violations have likely lost their sole avenue for redress as a result. The decision will eliminate from future ATS litigation many so-called foreign-cubed cases, in which foreign defendants are sued for conduct that occurred entirely on foreign territory.[71] However, a foreign plaintiff may still be able to sue a foreign or domestic defendant under the ATS for acts or omissions that occurred wholly inside the US and allegedly violate the law of nations. It is also significant that the Supreme Court did not create any blanket immunity for corporations under the ATS. Although the Court did not specifically address the question of corporate liability, which was the original issue submitted to the Court, it is significant that the Court did not create any blanket immunity for corporations under the ATS.[72] The issue continues to cause division at the lower court levels; for instance, the Second Circuit still holds that suits against

70 After the Fourth Circuit affirmed jurisdiction and remanded the case to the district court, the matter was dismissed on 18 June 2015 on political question grounds. At time of writing, the plaintiffs had appealed this decision: Center for Constitutional Rights, 'Al Shimari v. CACI et al', 2016. Available at: https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al (accessed 5 April 2016).

71 Matteo M Winkler, 'What Remains of the Alien Tort Statute after Kiobel,' *North Carolina Journal of International Law* 39(2013), p.173.

72 Katie Redford, 'Commentary: Door still open for human rights claims after Kiobel', *Supreme Court of the United States Blog* 17 April 2013. Available at: http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/ (accessed 10 December 2015).

corporations cannot be brought under the ATS at all, because the law of nations does not recognise corporate liability.[73]

Second, the *Kiobel* decision signals that perspectives on extraterritorial litigation have demonstrably shifted since *Filártiga.* According to Lee, the US 'no longer appears to have the luxury or the appetite for championing international human rights claims […] the prevailing view is that the judicial branch should defer to the political branches in US foreign relations and policymaking'.[74] Lee also adds that courts are more conscious that US taxpayer-funded judicial resources should not be devoted to foreign-cubed suits with little obvious advantage to US interests, especially if this development also avoids complications in foreign relations with countries with questionable human rights records, such as China and Russia.[75]

Third, the result in *Kiobel* provides important insight into the limits of agency in promoting legalisation through domestic courts. In this instance, the composition of the Supreme Court was a relevant factor. The Roberts Court has acted conservatively across several areas in US law. A good example of this conservatism is the *Morrison* case cited by the Court in *Kiobel*, which concerns the extraterritorial effect of US securities legislation.[76] The Court effectively said in this case that if a foreign securities transaction takes place in Australia, the Court is not prepared to use the *US Securities Exchange Act* for the basis of a suit in a US court. In other words, the Court seeks to be more conservative in applying US law to foreign events. In that sense, *Kiobel* has simply brought the ATS into harmony with the interpretation of other US federal statutes to make them inapplicable to foreign activity unless Congress has explicitly and plainly stated that is its

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73 *Chowdhury v. World Bangladesh Holding Ltd* 746 F.3d 42 (2d Cir. 2014). However, as discussed in Chapter 2, see two recent decisions of the Special Tribunal for Lebanon which suggest the law of nations may recognise corporate liability: *Akhbar Beirut S.A.L. and Ibrahim Mohamed Al-Amin*; *New TV S.A.L. and AI Khayat*.

74 Lee, 'The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in US Foreign Relations' p.1648.

75 ibid.

76 *Morrison v National Australia Bank*.

intent. The Roberts Court was also sympathetic to two domestic policy concerns. First, the Court sought to be respectful of interests in international comity, avoiding conflict with foreign nations and the interference of US courts without the approval of the political branches that are primarily tasked with foreign trade and affairs. Second, the Roberts Court may also have been sensitive to the fact that bringing civil actions in the US is comparatively easy, given the exceptional attributes of its legal system, including civil juries, punitive damages, class actions, and − above all − the no costs rule for unsuccessful applicants.[77]

Alternative Strategies

Kiobel will not completely eliminate federal litigation under the ATS, but potential claimants are likely to consider alternative strategies. The *Anti-Terrorism Act* (ATA) provides a potential source of redress against TNCs in circumstances where US nationals are victims of terrorism.[78] It is also highly possible that the next wave of transnational litigation will take place in state courts, as discussed in more detail below.

(a) Anti-Terrorism Act

Corporations can be held liable for supporting terrorist activities under the ATA. One advantage of the ATA is that it is designed to apply to extraterritorial conduct, and therefore does not have to meet *Kiobel*'s requirement that the relevant conduct sufficiently touch and concern US territory. In *Linde v. Arab Bank*, the claimants were victims and families of victims of Hamas terrorist attacks in Israel. They sued Arab Bank for hosting accounts of Hamas-affiliated charities, which used Arab Bank accounts to provide 'martyr benefits' to families. The jury found Arab Bank liable for aiding 24

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77 Interview with Kathleen Sullivan, Quinn Emanuel partner and lead counsel for the defendants in Kiobel, 22 October 2013, New York.

78 18 USC s 2333 provides that: 'Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees'.

Hamas terrorist attacks over a period of four years. Arab Bank said it would appeal this decision but later decided to settle.[79]

(b) State Common Law and Transitory Tort Claims

Even prior to *Kiobel*, foreign plaintiffs had commenced tort actions against US companies for transnational torts, in both federal and state courts.[80] In general, claims based on state law are framed either as state common law torts or transitory torts that may require the law of the host state to be applied, depending on the choice of law analysis generally employed in the forum state.[81] In practice, pleading human rights claims as domestic torts rather than as violations of international law means that one might plead assault and battery, or intentional infliction of emotional harm rather than torture, or wrongful death instead of extrajudicial execution.[82]

There are some advantages in framing human rights claims in this way. For instance, Yousuf Aftab highlights that transnational torts may offer a more flexible route to corporate liability for injury than ATS suits. According to Aftab, most claims can be framed in tortious terms, and entering the courtroom by a route other than the ATS means that plaintiffs are not required to: '(1) pass the high threshold of demonstrating

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79 *Linde v. Arab Bank* 269 F.R.D. 186 (E.D.N.Y. 2010). See also *Weiss v. National Westminster Bank, PLC* 768 F.3d 202 (2d Cir. 2014).: Brad Goldstein, 'What Anti-Terrorism Act Cases Can Teach Alien Tort Statute Litigants About Proving Aiding and Abetting Claims', 25 November 2014. Available at: http://www.iradvocates.org/blog/what-anti-terrorism-act-cases-can-teach-alien-tort-statute-litigants-about-proving-aiding-and (accessed

80 Yousuf Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies,' *Proceedings of the 60th Annual Rocky Mountain Mineral Law Institute* (9 October 2014), pp.19-23.

81 In general, transitory tort claims may be brought if a court has personal jurisdiction over a defendant and the conduct in question would give rise to an action in the host state where the conduct occurred. In certain circumstances, the case can be brought under the substantive law of the forum state if the forum state has a significant public interest in the matter: Skinner et al., 'The Third Pillar', p.29.

82 Lawsuits alleging violations of human rights framed as state law claims in state court include: *Doe v. Unocal* Nos. BC 237 980, BC 237 679 (Cal. App. Dep't Super. Ct.)(7 June 2002); *Bowoto v. Chevron Corp.* 312 F Supp 2d 1229 (ND Cal.); *Doe I v. Wal-Mart Stores Inc.* (C.D. Cal. Mar. 30, 2007) (this case was later transferred to the federal jurisdiction).

that the alleged wrong is prohibited under customary international law; (2) prove any element of intent beyond negligence; (3) prove a government nexus to abuse; (4) meet the higher pleading thresholds in federal court; or (5) meet the stricter *forum non conveniens* concerns of federal courts'.[83] In addition, as human rights litigation is generally tort-based in other significant jurisdictions (such as the UK and Canada), there is value for both parties and judges in being able to measure relevant developments in other courts for the purpose of developing legal argumentation with a comparative perspective.

On the other hand, some suggest that state law is 'ill-fitting' for human rights claims. Parrish for instance, suggests that 'there is something uncomfortable about addressing claims like genocide or torture through state common law claims of wrongful death or battery'.[84] These torts fail to 'capture the gravity and the seriousness of the offenses […] state claims potentially undermine the expressive function of human rights cases by belittling the importance of the claims'.[85]

In addition, cases brought in state courts may raise even more significant jurisdictional and procedural challenges than ATS suits. For instance, there is much uncertainty around how choice of law analysis and international law will be applied by state courts.[86] In some circumstances, state choice-of-law principles may point towards the application of foreign rather than state law, which in most scenarios will be disadvantageous to potential claimants.[87] Second, statutes of limitation may be barriers

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83 Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies' pp.19-23. It should be noted, however, that state courts have proved willing to impose the FNC doctrine at a relatively high standard. This is discussed further below.

84 Parrish, 'State Court International Human Rights Litigation: A Concerning Trend' p.41.

85 ibid.

86 Baughen, *Human Rights and Corporate Wrongs*: pp.184-85.

87 However, a recent exception to this was *Bowoto v. Chevron* WL 2455752 (ND Cal. 2006). In that case, the Californian federal district court determined that based on the Californian choice of law rules, the substantive law of California should be applied, despite the fact that the relevant events occurred in Nigeria. Had Nigerian law been applied, the claimants would have been prevented from recovering any damages. In another ATS case against Exxon Mobil, a federal district court in the

to matters brought under state law, as these can be fairly short (often 2-3 years for intentional tort claims).[88] Third, it is not clear the extent to which having state courts rule on international matters results in the application of the federal pre-emption and the foreign affairs pre-emption.[89] It is also possible for proceedings in state courts to be transferred to the federal system where the case concerns issues involving foreign relations of the US.[90]

(c) Consumer fraud and misrepresentation laws

A final avenue open to claimants in state courts may be found in state consumer fraud and unfair competition laws. Claims based on these laws contend that TNCs are liable for misrepresenting their efforts to eradicate forced labour from their global supply chains. In August and September 2015, six class action cases were initiated in California against companies for their alleged failure to disclose forced labour in their supply chains based in Thailand and West Africa. The sources of these representations included corporate codes of conduct, CSR reports, industry public commitments (signed by three of the defendant companies) in addition to disclosures made on company

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District of Columbia ruled that DC and Delaware law should be applied to activities that took place in Indonesia due to the fact that Indonesian law did not provide for punitive damages. The court also commented that the US 'has an overarching, vital interest in the safety, prosperity, and consequences of the behaviour of its citizens, particularly its super-corporations conducting business in one or more foreign countries': *Doe v. Exxon Mobil Corp* 654 F 3d 11 (DC Cir 2011).

88 Skinner et al., 'The Third Pillar', p.7.

89 Federal pre-emption is the invalidation of a US state law that conflicts with federal law. The foreign affairs pre-emption doctrine dictates that federal law regarding such claims should displace state law: *Boyle v. United Technologies Corporation* 487 US 500 (1988). *Galvis Mujica v Occidental Petroleum Corporation* 381 F Supp 2d 1164 (CD Cal 2005). concerned claims relating to bombings in Columbia allegedly carried out to provide security for the defendant in protecting its pipeline. The State Department filed a Statement of Interest stating that it preferred the matter to be handled by the Columbian justice system in order to preserve diplomatic relations with Columbia. The District Court dismissed on this basis, finding that California had comparatively a weak interest. This holding was later affirmed by the Ninth Circuit, but on the grounds of comity: *Mujica v. Airsca* 771 F 3d 580 (9th Cir 2014). By contrast, other cases have been held not to raise any foreign policy concerns: *Doe v Exxon Mobil Corporation* WL 4746256 (D.D.C. 2014).

90 Baughen, *Human Rights and Corporate Wrongs*: pp.107-08.

websites pursuant to the *California Transparency in Supply Chains Act (2010)*.[91] In these matters, the plantiffs argued that when a corporation refers in company codes to international standards – such as the UN General Principles or the ILO Conventions – these contribute to the duty to disclose the use of forced labour in its supply chains. Framing corporate liability cases in this way is a tremendously significant development in legalisation because it gives otherwise soft international law instruments real legal heft. Although breaches of international standards could not directly form the substantive basis of a claim, these cases show that voluntary standards may play a significant role in proving corporate fraud or misrepresentation, or even substantiating the existence of a particular duty between a parent corporation and company employees.[92]

Challenges to Jurisdiction

This section focuses specifically on the preliminary challenges to jurisdiction that US claimants experience when they initiate transnational litigation in the federal or state court system. Once a plaintiff has established jurisdiction, they must be prepared to resist any challenges to jurisdiction raised by the defendant. In ATS cases, it is regularly these issues, rather than substantive issues relating to corporate liability, that determine whether or not a case will proceed.[93] Claims in state courts are not vulnerable to dismissal based on the doctrines of act of state, political question, or comity, but the doctrine of *forum non conveniens* (FNC) may still apply depending on the state.

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91 Stefan Marculewicz et al., 'California Laws Are Being Used to Advance Human Rights Claims Based on Global Supply Chain Activities', 14 October 2015. Available at: https://www.littler.com/publication-press/publication/california-laws-are-being-used-advance-human-rights-claims-based (accessed 18 August 2016).

92 See *Choc v. Hudbay Minerals Inc* 2013 ONSC 1414., discussed below in the context of Canadian jurisprudence.

93 An examination of claims under the ATS by Michael Goldhaber involved 167 suits against corporate defendants between 1980-2012. The study found that 17 cases settled, four proceeded to trial, and 99 were dismissed. Of these, five were dismissed on FNC grounds, three on grounds of political question, two on sovereign immunity, and one on grounds of state secrets: Baughen, *Human Rights and Corporate Wrongs*: pp.88-89.

These legal questions go directly to the issue of implementation in the domestic legal sphere, and illustrate that it is the negotiation and contestation over what Hart would call 'secondary rules' that determines whether a particular case will be allowed to proceed.[94] These challenges also illustrate the extent to which a legaliser's exercise of agency is limited by the specific legal structures in which he or she operates. In order to contest substantive issues of corporate liability, these procedural obstacles must first be overcome.

(a) Forum non conveniens

The doctrine of FNC allows a defendant to make an application that a US court should not hear a particular case because it would be more appropriately heard in an alternative jurisdiction. If a defendant is able to successfully demonstrate that an alternative forum exists (this is usually the place where the alleged violations occurred, or the plaintiff's place of residence), it is then up to the court to perform a balancing exercise regarding the merits of each forum.[95] The court will consider: (1) the private interests of the litigants, including costs and access to documents and witnesses; and (2) public interest factors, such as the interests of the forum state, the burden on the courts, and judicial comity.[96] The court may also take into account corruption in the judicial system of the alternative forum, or the interest of a host state in having the case proceed where the relevant events occurred.

Several of these issues were considered in *Wiwa v. Royal Dutch Petroleum.*[97] In this case, the Second Circuit found that a dismissal would severely disadvantage the plaintiff, who would be required to restart litigation and obtain new counsel and a new residence in another country. The plaintiff also faced potential danger in initiating a case where the

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94 Hart, *The Concept of Law*.

95 An alternative forum is generally regarded as adequate when: (1) the defendant is subject to the service of process there; and (2) the forum permits litigation of the subject-matter of the dispute: *Bank of Credit and Commerce International (Overseas) Ltd v. State Bank of Pakistan* 273 F 3d 242 (2d Cir 2001).

96 Baughen, *Human Rights and Corporate Wrongs*: pp.88-89; *Piper Aircraft v. Reyno* 454 US 235 (1981).

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

alleged torture occurred.[98] The court also noted the huge discrepancy in the resources of the plaintiff and the defendant, and recognised that the plaintiff had secured excellent pro bono counsel in New York, the jurisdiction in which the proceedings had commenced.

Environmental tort cases such as *Union Carbide,* which concerned the 1984 Bhopal gas explosion, have been treated quite differently. In those circumstances, courts are more likely to place weight on the interest of the host state in regulating activities within its jurisdiction. It is also relevant that when a matter concerns an environmental event of this magnitude, evidence and witnesses are likely to be located in the alternative forum.[99]

A plaintiff may face additional challenges in circumstances where courts insist on applying exhaustion requirements. These require a claimant to show that he or she has not merely initiated a suit in the host state, but has obtained a decision from its highest court. In *Sarei v. Rio Tinto,*[100] for instance, the court decided that the defendants were permitted to argue for an exhaustion requirement although they would 'bear the burden to plead and justify [it], including the availability of local remedies'.[101]

(b) Foreign Sovereign Immunity and State Secrets

Foreign states and their agencies are immune from legal suit in the US under the *Foreign Sovereign Immunity Act*,[102] including under the ATS.[103] This remains the position even

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98 A similar argument was submitted in *Sarei v Rio Tinto,* which concerned alleged human rights violations that occurred in Papua New Guinea during the Bougainville civil war: *Sarei v. Rio Tinto Plc* F Supp 2d 1116 (CD Cal 2002).

99 *Re Union Carbide Corp. Gas Plant Disaster*.

100 Christopher A Whytock, Donald Earl Childress, and Michael D Ramsey, 'Foreword: After Kiobel: International Human Rights Litigation in State Courts and Under State Law,' *UC Irvine Law Review* 3, no. 1 (2013).

101 *Sarei v. Rio Tinto* 671 F.3d 736 (9th Cir. 2011), at 748.

102 *Foreign Sovereign Immunity Act* 28 USC s1330, s1391(f), s1441(d), ss1602–11.

103 *Argentine Republic v. Amerada Hess Shipping Corporation* 488 US 428 (1989).

where the claims are based on the violation of *jus cogens* norms.[104] An exception is available where the matter is based on: (1) a commercial activity carried on in the US by the foreign state or; (2) an act performed in the US in connection with a commercial activity of the foreign state elsewhere; or (3) an act outside the US in connection with the commercial activity of the foreign state and that act causes a direct effect in the US.[105] Claims against the US and its officials are also eligible for a plea of sovereign immunity unless such immunity has been waived.[106] Finally, in relation to TNCs, private companies that are sued in connection to activities conducted for the US government may rely on the state secrets doctrine, which requires litigation to be dismissed whether there is no feasible way to litigate the defendant's alleged liability without creating an unwarrantable risk of divulging state secrets. In *Mohamed v Jeppesen Dataplan,* for instance, a plaintiff was unable to sue a private company for providing the aircraft by which he was escorted to US detention centres in states such as Morocco, Egypt and Afghanistan as part of the US extraordinary rendition program. [107]

(c) Act of State

This act of state doctrine prevents a US court from hearing claims that would require a court to invalidate the acts of a foreign state within its own territory.[108] It is based on the

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104 *Siderman de Blake v. Republic of Argentina* 965 F 2d 699 (9th Cir. 1992).

105 *Doe v. Unocal Corporation* 110 F Supp 2d 1294 (CD Cal 2000).

106 *Al-Aulaqi v. Obama* 727 F Supp 2d 1 (DDC 2010). Note, however, that the *Federal Tort Claims Act 1948* (the FTCA) provides a waiver of immunity that permits private parties to sue the US in a federal court for the majority of torts committed by persons acting on behalf of the US. This in turn is subject to a 'combat exception' contained in 28 USC s 2680(j) that negates the waiver in relation to: 'Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war'. This applies to the activities of private military contractors when they are integrated into combatant activities over which the military still has command authority: *Saleh v. Titan Corporation* 580 F.3d 1 (D.C. Cir. 2009). Claims by Guantanamo Bay prisoners against US authorities are pre-empted by the Military Commissions Act: *Allaithi v. Rumsfeld* 753 F.3d 1327 (D.C.C. 2014). See also: and Baughen, *Human Rights and Corporate Wrongs*: pp.97-98.

107 See *Mohamed v. Jeppesen Dataplan* 614 F.3d 1070 (9th Cir 2010).

108 In order to rely on this doctrine, a defendant must show that: (a) the claim involves an official act of a foreign sovereign; (b) the relevant act was performed in the territory of the host state; and (c) a claim for relief would require the court to declare the relevant act invalid. If the defendant meets this

principle that a government's domestic activities should not be questioned in the courts of another state. It also protects the executive's prerogative in foreign affairs from being frustrated by judicial decisions. The doctrine was considered in *Sarei v. Rio Tinto,* which involved alleged violations of international law by the defendant Rio Tinto and the PNG Defence Force during the Bougainville civil war. The court held that the act of state doctrine could not apply to the claims related to war crimes and crimes against humanity, as such illegal acts could not be considered the official acts of a foreign sovereign.[109]

(d) Political Question

The political question doctrine restricts the courts' ability to adjudicate certain issues on the basis that to do so would compromise the separation of powers as set out in the Constitution.[110] In ATS cases, the courts have been prepared to dismiss cases where there are claims of corporate complicity in international crimes by foreign state actors. *Doe I v Exxon Mobil Corporation* concerned human rights violations allegedly committed by Indonesian security forces.[111] In that case, the Bush Administration filed a Statement of Interest claiming that the suit would compromise US activities against Islamic terrorists in the Indonesian province of Aceh. The court subsequently ruled that this justified dismissal of the ATS claims on the basis that courts must be wary of the 'collateral

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burden, the court will then consider the potential impact on US foreign relations, whether there has been a change in government since the violations, whether the conduct was undertaken for a public purpose, and the degree of international consensus regarding the claims in issue (e.g. do they concern allegations of a *jus cogens* norm, which would weigh against the application of the doctrine). See Baughen, *Human Rights and Corporate Wrongs*: pp.100-01.

109 *Sarei v. Rio Tinto Plc*.

110 In deciding whether the doctrine should apply, the courts will consider: (1) the existence of any textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the claims; (3) the impossibility of deciding without an initial, non-judicial, policy determination; (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect for the coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question: *Baker v Carr* 369 US 186 (1962).

111 *Doe I v Exxon Mobil Corporation* 393 F Supp 2d 20 (DDC 2005).

consequences' of interfering with US foreign relations. Furthermore, the claims could not proceed at all against the Indonesian defendant, but could proceed as a transitory tort against the US corporate defendants so long as discovery was conducted in a manner that avoided intrusion into Indonesian sovereignty.[112] Similarly, *Corrie v. Caterpillar Inc* concerned a case filed on behalf of four Palestinian families whose relatives were killed or injured when Caterpillar bulldozers demolished their homes in Palestinian Territories.[113] Crucially, because the US bulldozers sold to Israel were paid for by the US executive, the court found that allowing the action to proceed would require the judiciary to review the executive's decision to grant military aid to Israel. The court was therefore unable to hear the matter.

(e) Principal place of business

Crucially, one recent case has restricted the circumstances in which courts may assert jurisdiction over businesses. This decision could have an impact on transnational litigation as profound as *Kiobel*. *Bauman v DaimlerChrysler* was a case brought by 22 Argentinian plaintiffs against the German automobile company in California for the actions of its Argentinian subsidiary in relation to the deaths, kidnappings, torture and detention of employees.[114] In its decision, the Supreme Court substantially narrowed the law of jurisdiction in both US federal and state courts as it applies to corporations. The Supreme Court found that a court may assert jurisdiction over a business only if the business is incorporated or has its principal place of business in the forum state.[115] Some anticipated that in this case, the Supreme Court would explore the level of connection required to allow the exercise of personal jurisdiction over a foreign corporation in ATS cases, and specifically whether a wholly-owned US subsidiary could be used to create a sufficient territorial nexus to allow the exercise of jurisdiction. All nine Supreme Court

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112 See Baughen, *Human Rights and Corporate Wrongs*: pp.102-03.

113 *Corrie v. Caterpillar Inc* 503 F.3d 974 (9th Cir 2007).

114 *Daimler AG v. Bauman* 571 US (2014).

115 Childress, 'The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation' p.729.

judges agreed that the foreign-cubed lawsuit did not belong in the US based on the *Kiobel* presumption against the extraterritorial application of the ATS. In addition, Justice Ginsburg was joined in an opinion by seven of the other eight judges (with the exception of Justice Sotomayor) that found that Daimler did not have sufficient 'affiliations' with California to subject it to the general jurisdiction of the courts of that state. As Vivek Krishnamurthy states, what 'was widely expected to be an important decision regarding the scope of the ATS has instead turned out to be a landmark ruling on the much more general question of when large, complex corporations may be sued in U.S. courts'.[116] In summary, corporations may still be sued in connection to claims arising from any business conducted in a specific state, but suits arising from other situations may only be brought in the limited number of states where a TNC can be considered to be 'at home'.[117]

(f) Enforcement of foreign judgments

As discussed above, many foreign tort claims brought in the US against TNCs are dismissed on FNC grounds. Historically, few have been re-filed in alternative fora abroad.[118] However, an increasing number of cases dismissed in the US have been heard overseas since 2000, especially in Latin America.[119] Where a US court dismisses a

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116 Vivek Krishnamurthy, 'Daimler AG v. Bauman: In Latest ATS Decision, the Supreme Court Limits Jurisdiction of U.S. Courts over Multinational Corporations', 18 January 2014. Available at: http://www.csrandthelaw.com/2014/01/18/daimler-ag-v-bauman-for-corporations-home-is-now-where-the-lawsuits-must-now-be/ (accessed 14 December 2015).

117 Xander Kerr Meise, 'The ATS's Second Act: The Supreme Court Looks to Address the Unanswered Questions of Kiobel', 23 April 2013. Available at: http://www.csrandthelaw.com/2013/04/23/the-atss-second-act-the-supreme-court-looks-to-address-the-unanswered-questions-of-kiobel/ (accessed 14 December 2015).

118 Drimmer and Lamoree, 'Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transitional Tort Actions' p.471.

119 However, several Latin American countries have reacted to FNC dismissals by passing blocking statutes with the intent of preventing US courts from dismissing such lawyers, effectively denying foreign plaintiffs their day in court. Casey and Ristroph show that in practice, 'boomerang litigation' permits defendant US companies to avoid adverse judgments and puts severe pressure on judicial resources: M Ryan Casey and Barrett Ristroph, 'Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation,' *Brigham Young University International Law & Management Review* 4(2007).

case on a FNC basis, it will often make its decision conditional on the defendant consenting to US enforcement of any final judgment.[120] This condition is imposed in case a defendant tries to avoid payment by removing assets from the alternative forum.

However, difficulties can arise if a US court later refuses to recognise a foreign judgment in light of concerns related to judicial process in the foreign state. Christopher Whytock and Cassandra Burke argue that this has generated an 'access to justice' gap:

> *Specifically, a US court may deny a plaintiff access to the US legal system if the foreign judiciary is deemed adequate ex ante under the lenient standard, but then decline to give effect to a remedy obtained in the same foreign judiciary because it is deemed inadequate ex post under the stricter standard. A transnational access-to-justice gap may also arise if a suit is dismissed in favour of a foreign court on forum non conveniens grounds, but enforcement is denied on public policy or reciprocity grounds.*[121]

The complications associated with 'boomerang litigation' and enforcement are illustrated by several cases, including *Aguinda v Texaco Inc.*[122] This matter concerned personal injury claims and environmental damage in the Amazon linked to the management of oil pipelines from the 1960s to the 1990s. In 2001, the two class actions were dismissed in New York on FNC grounds. The defendant, Texaco, agreed to accept service in Ecuador and comply with any judgment given in favour of the plaintiffs. The case then proceeded in Ecuador against Chevron, which acquired Texaco in 2001. In 2007, Chevron removed all of its assets from the jurisdiction. A spokesman for Chevron announced in 2009: 'We're going to fight this until hell freezes over. And then we'll fight

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120 The enforcement of foreign money judgments in the US is governed by the law of the state in which recognition of the foreign judgment is sought.

121 Christopher A Whytock and Cassandra Burke Robertson, 'Forum Non Conveniens and the Enforcement of Foreign Judgments,' *Columbia Law Review* 111, no. 7 (2011), p.1481.

122 *Aguinda v Texaco Inc* F Supp 2D 534 (SDNY 2001).

it out on the ice'.[123] Chevron lost, with a judgment given against the company for US$18 billion, including punitive damages.[124]

The Ecuadorian judgment was then rendered unenforceable in 2014 by Judge Kaplan Southern District of New York, who accepted that the lead lawyer for the plaintiffs and two of his Ecuadorian clients were guilty of fraudulently procuring the judgment. In August 2016, Judge Kaplan's decision was upheld by the Second Circuit.[125] The claimants continue to try to enforce the judgment in Canada, Argentina, and Brazil, with Chevron retaliating by commencing proceedings against Ecuador under the 1993 US-Ecuador bilateral investment treaty. In July 2016, Ecuador paid US$112 million following an arbitral ruling that it had reneged on its remediation agreement with Chevron.[126] Certainly, the allegations of fraud in this case made it doubtful that the Ecuadorian judgment should have been enforced. Nevertheless, the sequence of events highlights the complexity and inefficiencies that can plague transnational litigation as it is moved across borders in search of a hospitable (and non-corrupt) forum. Furthermore, as noted by Simon Baughen, it is also possible that a public policy exception could render non-corrupt foreign judgments unenforceable if they apply substantive law regarded by a US court as incompatible with US legal principles.[127]

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123 Keefe, 'Reversal of Fortune'.

124 *Aguinda v. Chevron Corp* No. 002-2003 (Super Ct of Nueva Loja, Feb.14 2011).This award was subsequently reduced to US$9.51 million on appeal.

125 *Chevron Corp v. Donziger* 974 F Supp 2d 362 (SDNY 2014); affirmed Chevron v. Donziger, 14-0826, U.S. Court of Appeals for the Second Circuit (Manhattan) 2016. The claimants also tried to enforce the judgment in Argentina, Brazil and Canada: Baughen, *Human Rights and Corporate Wrongs*: pp.113-14.

126 Reuters, 'Ecuador pays $112 million award to Chevron', 29 July 2016 Available at: http://www.reuters.com/article/ecuador-chevron-idUSL1N1A908V (accessed 17 August 2016).

127 Baughen, *Human Rights and Corporate Wrongs*: pp.118-19. For instance, a US court may be reluctant to enforce a foreign judgment based on principles that are contrary to US law regarding the liability of parent corporations.

Canada

Human rights litigation in Canada has not been characterised by the same momentum reflected in the US jurisprudence. One of the principal reasons is that there is no Canadian statute similar to the ATS on which potential claimants can found a cause of action. This means that claims are generally framed as common law torts, and that it is the responsibility of the plaintiffs to establish jurisdiction. Furthermore, the doctrine of FNC has proved a formidable barrier in the absence of a statutory equivalent to the ATS. On a more positive note, one recent Canadian case suggests that it may be possible to prove that a parent company has an independent duty of care to employees based on its commitment to voluntary standards.

Establishing Jurisdiction

To establish jurisdiction in Canada, the plaintiff bears the burden of demonstrating a real and substantial connection between the forum and the litigation brought before the court.[128] The difficulties raised by this requirement are demonstrated in *Anvil Mining Ltd v. Canadian Association Against Impunity (CAAI).*[129] In that case, a Canadian human rights organisation acting on behalf of a group of Congolese plaintiffs initiated litigation against a Canadian mining company with operations in the Democratic Republic of Congo (DRC). The action followed after several failed attempts to convict Anvil employees in the DRC and a failure to find lawyers in Australia (where another Anvil office was located).[130] In Canada, it was alleged that the Congolese Armed Forces (FARDC) had committed serious human rights violations during fighting with rebels near Anvil Mining's Dikulushi copper mine. Anvil was accused of providing

[128] *Club Resorts Ltd v Van Breda* [2012] SCR 572.

[129] *Anvil Mining Ltd. v. Canadian Association Against Impunity* [2012] CA 117.

[130] International Crimes Database, 'Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd', Available at: http://www.internationalcrimesdatabase.org/Case/207/CAAI-v-Anvil-Mining/ (accessed 10 December 2015).

transportation and assistance to the FARDC soldiers.[131] Anvil filed a motion to dismiss the matter, arguing that the Québec Court did not have jurisdiction. Initially, the Superior Court disagreed, stating that there were sufficient links between the facts and Canada for the matter to be heard. Anvil then successfully appealed to the Québec Court of Appeal. In particular, the Court considered the role played by one Anvil employee, based in Quebec, who was in charge of crisis management at the relevant time. The Court found that the employee had no control over the management of the mine and that, in any event, the decision to collaborate (or not to collaborate) with the military was unrelated to the actual management of the mine. There was therefore no real and substantial link between the employee's work activities in Québec and the events that unfolded in the DRC. The claimants applied to the Supreme Court to have the decision reviewed, but this application was denied.[132]

A relevant statutory cause of action that may assist future human rights plaintiffs is the *Justice for Victims of Terrorism Act*, which is similar to the US ATA and was passed in 2012. The first part of the Act creates a cause of action in Canada for damage or loss that occurs anywhere in relation to a terrorist act, subject to certain conditions. If the plaintiff is a Canadian citizen or permanent resident, no further territorial link is required, but even plaintiffs who do not have a nationality or residency link can sue if there is a 'real and substantial' connection to the country. One of the most interesting aspects of the Act is the range of possible respondents, which include any person (real or

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131 Following the investigations of the UN Mission in DRC and international NGOs, DRC military prosecutors charged FARDC soldiers with breaches of international humanitarian law and alleged that three Anvil Mining employees of facilitating the abuses. In late 2006, the Lubumbashi military high court started to hear the case, but the prosecutor indicated that there was insufficient evidence to establish the complicity of Anvil Mining. In June 2007, the Court acquitted 12 defendants, including the three employees of Anvil Mining: Business & Human Rights Resource Centre, 'Anvil Mining lawsuit (re Dem. Rep. of Congo)', Available at: http://business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo (accessed 10 December 2015).

132 The Court of Appeal decided that Anvil's Québec activities had no connection with the allegations of complicity in international crimes during the operation of its mine in the DRC. As the Court did not accept that the case could not proceed in either DRC or Australia, the case could not move forward in Québec under the principle of *forum necessitatis: Anvil Mining Ltd. v. Canadian Association Against Impunity*.

corporeal), 'listed entity' (i.e. groups identified as terrorist groups by the Canadian government), or foreign states whose immunity has been lifted.[133] However, the Act is limited to responsibility for acts of terrorism, and does not cover other violations of international law, such as torture and war crimes.

Challenges to Jurisdiction: *Forum Non Conveniens*

Even if a court decides that there is sufficient connection with Canada to ground jurisdiction, the doctrine of FNC is a formidable hurdle. As applied in Canada, the doctrine has been, in the words of one commentator, 'a staunch ally to Canadian corporations beset by human rights claims launched from abroad'.[134] The test for striking out a claim is whether 'there is another forum that is clearly more appropriate than the domestic forum'.[135] In deciding whether there is another forum that is clearly more appropriate, the courts will consider the advantages and disadvantages for both parties, the connection between the relevant events and the forum, the involvement of any other parties (e.g. the location of witnesses), and issues of judicial comity.

The extent of the challenge presented by the doctrine of FNC is illustrated by *Recherches Internationales Quebec v. Cambior Inc.* [136] In 1997, a public interest group filed a class action lawsuit against Cambior in the Québec Superior Court seeking damages on behalf of 23,000 locals who lived near the Omai Mine in Guyana. In August 1997, the dam near the mine collapsed, spilling cyanide and other pollutants into the river relied on by locals for water, bathing and fishing. The trial judge dismissed the case on the basis that the claimants failed to demonstrate that there was a significant risk that the judiciary in

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133 The *Canadian State Immunity Act* has been modified to lift the immunity of a foreign state that has been listed by the Governor in Council as a sponsor of terrorism. Individuals who have not been designated as connected to terrorism by the Canadian government may still be sued, as the Act allows Canadian courts to determine whether a person or a corporation can be held liable for an act that falls within the definition of 'terrorism'.

134 Rene Provost, 'Canada's Alien Tort Statute', *EJIL: Talk!* 29 March 2012. Available at: http://www.ejiltalk.org/canadas-alien-tort-statute/ (accessed 14 December 2015).

135 *Amchem Products Inc. v. British Columbia Worker's Compensation Board* [1993] 1 S.C.R. 897.

136 *Recherches Internationales Quebec v. Cambior Inc.* [1998] QJ No. 2554 (Que SC).

Guyana would not give a fair hearing. A lawsuit was subsequently filed in Guyana, but was dismissed by the High Court of the Supreme Court of Judicature of Guyana in 2002. A new suit was filed in 2003, but was dismissed by the High Court in October 2006. The plaintiffs were ordered to pay the costs of the defendants.[137]

Bil'in (Village Council) v. Green Park International was also dismissed by the Québec Court of Appeal on FNC grounds.[138] The corporate defendant in this case was Green Park International Ltd., a Québec-registered corporation involved in constructing and developing settlements for Israelis in the West Bank. The claimants were Palestinian villagers who claimed to own part of the land in dispute. They alleged that by transferring members of its civilian population to the West Bank, Israel was violating international law, as well as Canadian and Québec laws, and that Green Park was assisting Israel in the perpetration of war crimes contrary to the provisions of the Fourth Geneva Convention.[139] The Québec Superior Court held that the commission of a war crime constituted a civil wrong that could give rise to liability. Nevertheless, Judge Cullen declined jurisdiction on FNC grounds after finding that the High Court of Jerusalem would be better placed to decide the case.

Similarly, the Supreme Court of British Columbia declined jurisdiction in the 2015 case of *Garcia v. Tahoe Resources Inc*.[140] In that case, it was alleged that Tahoe's private security personnel opened fire on protesters outside the Escobal silver mine in Guatemala. The claimants argued that Tahoe (or its subsidiary, MSR) expressly or implicitly authorised the use of excessive force by the security personnel against the plaintiffs. They also

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137 Business & Human Rights Resource Centre, 'Cambior lawsuit (re Guyana)', Available at: http://business-humanrights.org/en/cambior-lawsuit-re-guyana (accessed 10 December 2015).

138 *Bil'in (Village Council) v. Green Park Int'l Ltd* [2010] CA 1455; [2011] 1 SCR vi (dismissing application with costs).

139 In Canada, these provisions formed part of customary international law (CIL) but not under the law of Israel. In Canada, CIL rules pass into domestic law by adoption in the absence of conflicting legislation: *Bouzari v. Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Ont CA); leave to appeal refused, [2005] 1 SCR vi.

140 *Garcia v. Tahoe Resources Inc.* 2015 BCSC 2045, at [64].

argued that they had no faith in the Guatemalan legal system to hold the company accountable. In November 2015, Justice Gerow of the British Columbia Supreme Court declined jurisdiction, ruling that the plaintiffs could seek justice in Guatemala.

Her Honour raised several factors that illuminate the challenges that domestic courts face when they assume jurisdiction over claims that relate to foreign events. Gerow J expressed concern that: (1) running the matter in British Columbia would result in considerably greater inconvenience and expenses for the parties and witnesses; (2) most of the evidence was located outside of British Columbia in Guatemala and Reno, Nevada; (3) the alleged battery and the injuries and losses of the plaintiffs occurred in Reno, where all of the plaintiffs reside; (4) none of the plaintiffs spoke English, and the records required to assess their claims for damages and loss were in Spanish and located in Guatemala; (5) although Tahoe was incorporated in British Columbia, it did not carry out its operations in the province and most of Tahoe's management and staff lived and worked in Reno; (6) all of MSR's employees were resident in Guatemala or Reno, and MSR carried on business in Guatemala; and (7) most, if not all, of the witnesses would have to travel to Vancouver from Guatemala and Reno, and many would speak only Spanish, meaning that obtaining and translating evidence would be a challenge and significantly lengthen the period of the trial.[141]

A novel duty of care

In one important respect, however, Canada may be setting the scene for an important common law development that will have a fundamental impact on transnational tort litigation for years to come. In *Choc v. Hudbay Minerals*, the claimants are an indigenous group from El Estor, Guatemala.[142] It is alleged that Hudbay and its Guatemalan subsidiaries hired security personnel who committed human rights abuses including a shooting, a killing and rape.

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[141] ibid., at [36]-[106].

[142] *Choc v. Hudbay Minerals Inc.*

Hudbay tried to dismiss the claim on the basis that no duty of care is owed by a parent company to any individuals injured by the actions of its subsidiary. This argument was rejected by the Ontario Superior Court, which found that in this case there was a potential duty owed directly by the parent company to the claimants. Significantly, this finding was not based on piercing the corporate veil. Instead, the Court found that the plaintiffs had pled sufficient material facts to establish that Hudbay had an independent duty to the claimants, distinct from any duty owed by the foreign subsidiary. First, the plaintiffs established that harm was the 'reasonably foreseeable consequence' of Hudbay's conduct in permitting security personnel to use force in suppressing community protests. Second, the court determined that a 'proximate relationship' between Hudbay and the plaintiffs indeed existed, and that the nature of this relationship was such that Hudbay was 'under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs'.[143]

Importantly, the court focused on Hudbay's public representations regarding its commitment to respecting human rights, which the court found affected the plaintiffs' legitimate expectations. In anticipation that a later trial would determine the relevant standard of care to be applied, Amnesty International Canada suggested that a possible standard of care could be based on emerging corporate social responsibility (CSR) standards as set out in a range of voluntary codes of conduct developed in collaboration with TNCs.[144] The court's judgment thus 'lays the foundation for voluntary CSR standards to become legally binding under Canadian law', suggesting that soft law such as the GPs is likely to play an important part in the developing jurisprudence.[145] While

143 ibid., at [54].

144 ibid., at [33].

145 Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies' p.25.

the GPs would not directly form the substantive basis of a claim, they could play a significant role in proving corporate negligence.[146]

Significantly, the plaintiffs were also successful in the next stage of proceedings. In June 2015, the court ordered Hudbay to disclose extensive internal documentation. Obtaining discovery is a significant turning point in a case. If discovery is ordered against a defendant, it is often at that point that the company will seek to settle:

> *Unless [a TNC] is confident of a resounding victory and that no significant evidence damaging to its reputation will emerge at trial, the risk of going to trial usually makes little commercial sense. The primary objective of claimants is usually to obtain the maximum amount of compensation as speedily as possible. Claimants' lawyers, whose resources and cash flow can be stretched to the limit by such cases, may also feel under pressure to settle.*[147]

Although it is early days, the decision is striking as it reflects an increased willingness by Ontario courts to assume jurisdiction over the activities of foreign subsidiaries of Canadian corporations, even when those activities occur out of the jurisdiction.

The United Kingdom

At the same time as the US is taking a step back in its adjudication of extraterritorial matters, the UK and other European states are taking some tentative steps forward. In the UK, this has generally taken the form of tort cases initiated against the parent company in its home state, rather than the local operating subsidiary.

Legal developments in the UK also present an exceptional example of the importance of legalisers – specifically individual lawyers – in generating this line of jurisprudence. One law firm in particular, Leigh Day, has developed specialisation in the area, and invests

146 Provost, 'Canada's Alien Tort Statute'.

147 Aftab, 'The Intersection of Law and Corporate Social Responsibility: Human Rights Strategy and Litigation Readiness for Extractive-Sector Companies' p.10.

substantial time and resources on a pro bono basis to advance matters that its partners consider to have good prospects. Since 1993, Leigh Day has pioneered a particular pattern of litigation against head office parent companies in relation to incidents connected to operations in developing countries. Importantly, judges also appear to be more open to cases against TNCs being brought in UK courts. Leigh Day partner Martyn Day has commented that '[h]istorically, our judiciary used to hate these cases. Now the judges are more internationally aware and interested'.[148]

In order to successfully bring a claim against a UK parent company, plaintiffs must establish jurisdiction, negotiate the separate personality doctrine that applies to UK parent companies and their foreign subsidiaries, and establish the applicable law governing the tort claim.[149] From a practical perspective, it is helpful that plaintiffs are able to structure their cases as class actions (which aggregate claims and allow plaintiffs to spread the costs and the risks) and obtain broad discovery orders. As noted above, if a claimant manages to obtain discovery against a TNC defendant, settlement is far more likely.[150] However, one potentially negative consequence of having such a large proportion of TNC cases settle is that the development of the common law in this area is inevitably slowed, with fewer (much-needed) judicial decisions produced for the purpose of elucidating concepts that relate to corporate accountability.

Establishing Jurisdiction

Article 4 of the Brussels Regulation requires UK courts to exercise jurisdiction over a defendant domiciled within the jurisdiction.[151] A plaintiff is therefore able to

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148 John Vidal, 'Lawyers Leigh Day: troublemakers who are a thorn in the side of multinationals', *The Guardian* 2 August 2015. Available at: http://www.theguardian.com/global-development/2015/aug/02/leigh-day-troublemaker-fight-dispossessed-lawyers (accessed 18 December 2015).

149 Baughen, *Human Rights and Corporate Wrongs*: p.201.

150 Interview with Tim Cooke-Hurle, Barrister, Doughty Street Chambers, 10 June 2015, London.

151 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation).

automatically establish jurisdiction if the corporate defendant is domiciled in the UK.[152] Where there are multiple defendants domiciled in various EC member states, each defendant may be sued in the courts of the state in which any one of them is domiciled.[153]

The case of *Motto & Ors v. Trafigura* illustrates the advantages of this arrangement.[154] *Trafigura* was a negligence case relating to toxic waste dumped in in the Côte d'Ivoire. In August 2006, a ship registered in Panama and chartered by the London branch of Trafigura Beheer BV, a Dutch petroleum trader, unloaded a shipment of waste at open-air sites near Abidjan.[155] Residents subsequently suffered nausea, diarrhoea, headaches, swollen stomachs and skin disorders. Seventeen people died and more than 100,000 sought medical attention. The High Court in London agreed in November 2006 to hear a group action brought by 30,000 claimants against Trafigura. In September 2009, the parties to the UK lawsuit reached a settlement agreement in which Trafigura agreed to pay each of the 30,000 claimants a specific amount, approximately US$1,500.[156]

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152 Article 63.1 provides that a company 'or other legal person or association of natural or legal persons' is domiciled 'at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business'. For the UK and Ireland, 'statutory seat' is defined by Article 63.2 as: 'the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place'.

153 Recast Brussels Regulation, Article 8.1.

154 *Motto & Ors v. Trafigura* [2011] EWHC 90206.

155 The *Probo Koala* had initially attempted to discharge the waste in Amsterdam, but was refused permission to unload when Trafigura chose not to pay the additional charges owed due to the waste's alleged toxicity. The ship subsequently left Amsterdam without discharging its waste, and was turned away by several countries before it sailed to the Ivorian port of Abidjan.

156 The case is also an excellent example of how events such as the Trafigura dumping can give rise to legal action in more than one state. In December 2006, an independent inquiry established in Amsterdam concluded that the city had been negligent in allowing Trafigura to take waste back on board the *Probo Koala* before it sailed to Côte d'Ivoire. In February 2008, Dutch prosecutors announced that they intended to file criminal charges against Trafigura, and in July 2010 a Dutch court fined the company €1 million. The Dutch court also convicted a Trafigura employee and the Ukrainian captain of the ship. Meanwhile, Greenpeace filed a complaint with the Court of Appeal in The Hague trying to compel the public prosecutor to prosecute the company for more than just the exporting of hazardous waste. In April 2011, the appeal court ruled that the public prosecution

A Duty of Care for Parent Companies

In running its cases, Leigh Day has aimed to progress the law in connection to the duty of care of parent companies, a concept that has gained increasing recognition. As Leigh Day partner Richard Meeran argues, '[t]here is no reason in principle why, like any other legal entity or person, a parent company which is responsible for, or in control of, specific functions at overseas subsidiary operations should not be liable for damage arising from those functions or deficiencies in them'.[157] The difficulty inherent in the approach is surmounting the 'corporate veil'. According to the principle of separate corporate personality, a parent company is not liable for the wrongdoings of its subsidiary merely because it is a shareholder.[158] Only in very limited circumstances, such as fraud, is a court likely to use its discretion to 'pierce' the corporate veil. Significantly, courts will not pierce the veil solely because doing so is in the interests of justice. Even where there is impropriety, courts will be reluctant to pierce the veil unless the corporate structure itself was used as a device or façade to conceal or avoid liability.[159] A company may be found liable for the acts of its subsidiary if the latter acted as its agent, but generally a court will find this to be the case only if one company has the power to contract on behalf of the other.[160]

In light of these restrictions, claimants represented by Leigh Day have focused on the direct negligence of the parent company for harm caused by its own acts, rather than (or in addition to) its responsibility for the negligence of its subsidiaries. The main claim, therefore, is that the parent company breached a duty of care which it itself owed to

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department was not required to prosecute Trafigura. In November 2012, the Dutch Public Prosecutor's Office and Trafigura reached an out-of-court settlement, with Trafigura agreeing to pay €300,000 compensation and a €67,000 fine in return for the withdrawal of the case against one of its directors: Business & Human Rights Resource Centre, 'Trafigura lawsuits (re Côte d'Ivoire)', 2015. Available at: https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire (accessed 18 August 2016).

157 Richard Meeran, 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States,' *City UHKL Rev.* 3(2011), p.1.

158 *Salomon v. A Salomon & Co Ltd* UKHL 1(1896).

159 *Adams v Cape Industries plc* [1990] Ch 433 CA.

160 *Okura & Co Ltd v. Forsbacka Jernsverk Aktiebolap* 1 KB 715.

individuals affected by company operations overseas.[161] The first two cases that took this approach were *Ngcobo v. Thor Chemicals*[162] and *Sithole v. Thor Chemicals.*[163] These cases were initiated by South African plaintiffs in respect of injuries that occurred whilst working for the defendant's subsidiary in the province of Natal in South Africa. Another claim was *Connelly v. RTZ Corporation plc and Ritz Overseas Ltd*.[164] In this case, the claimant alleged that parent company RTZ had devised or advised in connection to the health and safety policy adopted by its Namibian subsidiary, Rossing Uranium Ltd (RUL). It was also alleged that employee/s of RTZ had implemented the policy and supervised health and safety at the mine where the plaintiff worked.

Lubbe v. Cape Plc (No 2) adopted a different approach. In that case, the claimants alleged that if a parent company exercises *de facto* control over the operations of its subsidiary, and knows (through its directors) that those operations involve risks to the health of the subsidiary's workers, it follows that the parent company owes a duty of care to those employees.[165] This case demonstrated that it is possible for tortious liability to arise if a negligent act is performed by a subsidiary company on the instructions of a holding company.

A precedent-setting decision implemented this principle in 2012. In *Chandler v. Cape Plc.*, the claimant sued for asbestos-related injuries contracted as a result of exposure to dust during his employment at Cape Products, a Cape Plc subsidiary.[166] He claimed that Cape Plc owed him a duty of care on the basis that it had employed a medical and scientific officer who was responsible for overseeing health and safety across the

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161 Meeran, 'Tort Litigation against Multinational Corporations' p.5.

162 *Ngcobo v. Thor Chemicals Holdings Ltd* TLR 10 November 1995.

163 *Sithole v. Thor Chemicals Holdings Ltd* TLR 15 February 1999.)

164 *Connelly v. RTZ Corporation plc and Ritz Overseas Ltd* [1998] AC 854.

165 *Lubbe v. Cape plc (No.2)* [2000] 1 WLR 1545 (HL). Under the *Caparo Industries* test in UK law, a duty of care will be deemed to have arisen if the facts satisfy a three-stage test: (1) was the harm foreseeable? (b) was there sufficient proximity between the parties?; and (3) is it fair, just and reasonable to impose a duty of care: *Caparo Industries Plc v. Dickman* [1990] UKHL 2

166 *Chandler (David Brian) v. Cape plc* [2012] EWCA Civ 525.

corporate group, including at the subsidiary where the claimant worked. The Court of Appeal found that due to Cape's 'superior knowledge about the nature and management of asbestos risks,' it was 'appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken'.[167] The claimant's injury was found to be a result of that breach of duty. On the basis of this case, a parent company may now be liable to employees of a subsidiary on the basis of a breach of a duty of care owed to them. This is similar to the direct liability analysis applied in Canadian case *Choc v. Hudbay Minerals* and discussed in the section on Canadian jurisprudence.[168] However, one potential negative implication of the ruling is that it may give parent companies an incentive to remain unaware of activities and policies adopted within subsidiaries, given that a certain degree of knowledge may give rise to liability.

Challenges to Jurisdiction

(a) Forum non conveniens

Up to 2005, the English courts interpreted Article 2 of the Brussels Regulation as permitting the dismissal of a case against a UK-domiciled defendant if a non-EU state was considered to be a more appropriate forum.[169] For this reason, FNC was the most crucial battleground in the early Leigh Day matters.[170] Under UK law, the question of whether another forum is more appropriate is a two-stage test: (1) is there a 'clearly and distinctly more appropriate' forum; and (2) if yes, are there nevertheless reasons why justice requires that the UK court should retain jurisdiction?[171]

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167 ibid.at [78]

168 *Choc v. Hudbay Minerals Inc*.

169 *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72 (CA).

170 Baughen, *Human Rights and Corporate Wrongs*: p.203.

171 The general principles to be applied in FNC cases are set out in Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460.

Connelly v. RTZ Corporation in particular advanced the law on this point. Lord Goff stressed that as a general rule, the court would not grant a stay simply because the plaintiff was able to demonstrate that he would have no financial assistance in the alternative forum. However, if nature and complexity of the case are such that the case should not be tried without the benefit of legal and expert assistance, the availability of counsel and financial assistance in the UK may be taken into consideration. The key question, however, is still whether the plaintiff is able to demonstrate that substantial injustice will result if the litigation is moved to the alternative forum:

> [T]he availability of financial assistance in this country coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not […] be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.[172]

The decision in *Connelly v. RTZ Corporation* would permit *Lubbe v. Cape Plc* to proceed. This case was initiated in 1997 by South African claimants who had worked in Cape Plc's asbestos mines and suffered asbestos-related injuries. Cape Plc applied to have the claims stayed on FNC grounds, arguing that the case should be heard in South Africa. In 1999, another 2000 claims were commenced and Cape Plc reapplied to have these stayed, in addition to the earlier claims. The trial court initially granted the stay, and this decision was affirmed by the Court of Appeal. However, the claimants then appealed to the House of Lords and won. Following *Connelly*, the House of Lords held that the complexity of the case required legal representation and a level of medical and technical expertise that could not be funded in South Africa. At the time of this decision, the case had over 3,000 plaintiffs. This number increased to over 7500 claimants by 2001. In the same year, Cape Plc agreed to a £21 million out of court settlement.[173]

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172 *Connelly v. RTZ Corporation plc and Ritz Overseas Ltd*, at [30].

173 However, the company encountered financial problems in August 2002 and did not meet the agreed settlement terms. The case started again in September 2002 and Gencor Ltd (a South African company that took over some of Cape's South African asbestos operations when Cape left in 1979)

In 2005 the European Court of Justice handed down an important decision that drastically reduced the application of FNC. In *Owusu v. Jackson*, the ECJ held that a defendant sued in its place of domicile pursuant to the Brussels Regulation is not entitled to have those proceedings stayed, even where the alternative forum is outside the EC.[174] Consequently, FNC is no longer a barrier where the defendant is a UK parent company, even when the relevant events occurred outside the jurisdiction. [175]

This is qualified by one change under the Brussels Recast Regulation of 2012, which applied from January 2015 and gives Member states a limited discretion to stay proceedings in favour of non-Member state courts.[176] Members may exercise this discretion if: (1) the proceedings in the non-Member state commenced first; (2) the non-Member state judgment is capable of recognition and enforcement in the Member state; (3) and the Member state considers that a stay is necessary for the proper administration of justice.[177] As noted by Simon Baughen, this may lead to defendants quickly seeking to initiate litigation in the alternative forum if they become aware that proceedings will be launched against them in the Member state.

Consider, for example, the case of *Kesabo v. African Barrick Gold Plc.*[178] In March 2013, a group of twelve Tanzanians commenced proceedings in the UK High Court against

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was joined as a defendant. In 2003, the plaintiffs, Cape and Gencor reached a settlement agreement. Gencor established and now administers a £35 million trust in South Africa to compensate those suffering from asbestos-related injuries who were not represented by Leigh Day in the UK cases. Cape settled with the 7500 claimants for £7.5 million, and Gencor for approximately £3 million: Business & Human Rights Resource Centre, 'Cape/Gencor lawsuits (re South Africa)', 2015. Available at: https://business-humanrights.org/en/capegencor-lawsuits-re-so-africa-0 (accessed 20 August 2016).

174 *Owusu v. Jackson* [2005] (Case C-281/02) ECR I-1383.

175 *Guerrero v. Monterrico Metals plc* [2009] EWHC 2475 (QB).

176 Article 33 applies if the two sets of proceedings involve the same cause of action; Article 34 applies if the proceedings are related.

177 The court in the Member state may also lift any stay at any time if it is satisfied that the non-Member state proceedings are stayed or discontinued or will not be concluded in a reasonable time, or if the Member state court considers that the continuation of its proceedings is necessary for the proper administration of justice.

178 *Kesabo v. African Barrick Gold plc* [2013] EWHC 4045 (QB).

African Barrick Gold (ABG) and its subsidiary North Mara Gold Mine Limited (NMGML). The group claimed that these corporations were complicit in the actions of police who killed and injured villagers at the North Mara Mine in Tanzania. Before the claim was served on the defendants, NMGML issued proceedings in Tanzania, requesting that the local court declare that the corporations could not be liable for the actions of the police. Solicitors for the plaintiff subsequently applied in the UK courts for an anti-suit injunction that prohibited ABG and NMGML from taking their case forward in Tanzania. Had the Recast Regulation been applicable in 2013, a defendant in the position of ABG or NMGML would have been able to request the UK court to exercise its discretion to stay proceedings on the basis that it had already commenced proceedings in connection to the same cause of action in a non-Member state.[179]

FNC rules remain relevant where a claimant seeks to bring an action against a non-UK company. If a claimant wishes to proceed against a company that is not domiciled in the UK (for instance, a foreign subsidiary of a UK parent company), Article 4 preserves the domestic rules regarding jurisdiction, including in relation to FNC. A claimant may seek leave from the court to serve an overseas company outside the jurisdiction pursuant to the UK Civil Procedure Rules (CPR).[180] Thus it is certainly possible for a 'foreign cubed' case to proceed in the UK courts, although these proceedings are likely to be stayed on FNC grounds unless the claimant can demonstrate that there would be substantial injustice in being required to proceed in the alternative forum.[181]

(b) Act of State and Political Question

As in the US and Canada, courts in the UK may also decline jurisdiction on several other grounds. First, the act of state doctrine may be applied in circumstances where a UK company is alleged to be a joint tortfeasor with government bodies in another state.

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179 Baughen, *Human Rights and Corporate Wrongs*: p.205.

180 See CPR 6.9, CPR 6.36, and s 1139 of the *Companies Act 2006* (UK).

181 Baughen, *Human Rights and Corporate Wrongs*: pp.205-06.

However, the act of state doctrine will not be applied in cases where the defendants are accused of serious human rights violations or breaches of international law.[182]

Second, a court may decline to exercise jurisdiction on the basis of sovereign immunity.[183] This disqualifies a civil suit being brought against a foreign state or its agent, even for breach of a *jus cogens* norm, such as the prohibition of torture.[184] Immunity will not be applied, however, where a claim is against a non-state defendant and the alleged acts relate to involvement or complicity with the actions of a foreign state or its agent(s).[185]

Choice of law

In the US, one of the advantages of ATS litigation for claimants is that substantive liability is based on breaches of international human rights law. By contrast, when a case is framed as a traditional tort claim, the substantive claim is governed by the law of either the home or host state. In the UK, the applicable law is generally the law of the state where the damage occurred, unless the tort is manifestly more closely connected with another country.[186] Sometimes it will be disadvantageous to the claimant to have the law of the host state applied, and in those circumstances it may seem like the system endorses the application of double standards.[187] On the whole, however, practitioners

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182 See, for instance *Belhaj v. Straw* [2014] EWCA Civ 1394. This case involved claims against a former UK government minister and UK civil servants, who allegedly assisted US officials in the extraordinary rendition of suspected terrorists to interrogation centres in China and Thailand. The Court of Appeal held in this case that the public policy limitation would apply, precluding the application of the foreign act of state doctrine.

183 Section 1 of the *State Immunity Act 1978* (UK) provides that: ‘A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of the Act’.

184 *Al Adsani v. Government of Kuwait* (1995) 100 ILR 465; *Jones v. Government of Saudi Arabia* [2006] UKHL 26.

185 *Belhaj v. Straw*.

186 Section 11(2)(a) of the Private International Law (Miscellaneous Provisions) Act 1995 (UK) and (from 11 July 2007) Article 4 of the Rome II Regulation on the Law Applicable to Non-contractual Obligations, No 864/2007 (Rome II Regulation).

187 Meeran, 'Tort Litigation against Multinational Corporations' p.14.

find that the problem with the law in host states is often more of implementation than of substance, as 'it is usually the lack of enforcement of local laws and regulations, rather than the content of the local laws *per se,* that is unsatisfactory and encourages double standards'.[188]

Furthermore, where the relevant laws of the home and host state are similar, the choice of law rules that apply may be of little importance. For instance, the law on negligence includes comparable elements in both England and South Africa, and so would generate a similar result when applied to the same factual matrix.[189] In other circumstances, the choice of law analysis will have a more significant impact. As the *Foreign Limitation Periods Act 1984* prescribes that limitation periods will be treated as a matter of substantive law in the UK, a shorter limitation period under the law of the host state may knock out the claim even in a local forum.[190] Similarly, where a particular type of claim is barred under the law of the host state (e.g. in South Africa, certain workers are barred from launching claims against their employer), this will create a formidable obstacle for the claimant.

Choice of law will also impact legal questions in relation to the kind of damages available and their quantification. Under common law, the kinds of damages recoverable are considered to be question of substance, and thus governed by the substantive law of the claim. By contrast, the quantification or assessment of damages under common law is treated as a question of procedure, and thus governed by the law

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188 ibid.

189 For instance, under South African law, a delict has the following elements: (1) harm sustained by the plaintiff; (2) wrongful conduct on the part of a defendant; (3) evidence of causation; and (4) fault or blameworthiness on the part of the defendant. Under English law, the elements of a tort include: (1) the plaintiff was owed a duty of care through a special relationship; (2) there was a breach of that duty; (3) the tortfeasor directly caused the injury; and (4) the plaintiff suffered damage as a result of that breach (which was not too remote): JC Van der Walt and JR Midgley, *Principles of Delict* (UK: LexisNexis Butterworths, 2005), Chapters 3,4,5 & 16.

190 The Act does, however, allow the court to disregard a foreign limitation if its application would constitute 'undue hardship' or be 'contrary to public policy': s 2(2).

of the forum (see, for instance, *Harding v Wealands*).[191] This is generally advantageous for plaintiffs, who benefit from the quantification of damages being construed according to UK law rather than, say, the law of South Africa. However, new EU regulations prescribe that damages must now be assessed in accordance with the law and procedure of the state where the harm occurred, which is likely to result in a considerably lower award for many plaintiffs. [192]

Legal Representation and Legal Funding

Legal developments in the UK also highlight the importance of legal representation and litigation funding. The first generation of cases described above, such as *Connelly v. RTZ* and *Lubbe v. Cape,* were publicly funded by the UK Legal Services Commission on the basis that they were 'of high public importance'.[193] Lawyers for the claimants in these matters received regular payments for these cases, albeit at reduced rates. Richard Meeran notes that had UK legal aid assistance not been available for funding the *Lubbe* litigation, it might have been impossible for the plaintiffs to complete the FNC application due to the number of interlocutory applications and appeals that were required.[194]

Currently, cases in the UK are generally run on a contingency (no win, no fee) basis. Prior to recent reforms, one benefit of the UK system was that any success fee payable was paid by the unsuccessful defendant, rather than deducted from the compensation awarded to the claimant. However, this has changed following the introduction of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO) in April 2013. This legislation amends the relevant provisions so that success fees will no longer be recoverable from the losing party. Instead, success fees must be paid out of the

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191 *Harding v. Wealands* [2006] UKHL 32.

192 Articles 4 and 15, Rome II Regulation.

193 Richard Meeran, 'Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, ed. Surya Deva and David Bilchitz (Cambridge: CUB, 2013), p.385.

194 ibid.

claimant's compensation damages and cannot exceed 25% of the damages (excluding damages for future care and loss). In addition, lawyers for the claimant will receive only a proportion of their costs if such costs exceed the amount recovered from the TNC defendant. This change attempts to incentivise lawyers to pursue only cases with very strong prospects of success, but makes it more unlikely that claimants with less valuable or more risky claims will be able to pursue them in court.

Europe

Under civil law systems, the development of transnational litigation has been much slower for a variety of reasons. First, civil law systems do not traditionally provide for collective class actions (although class actions are likely to become more common in the future).[195] Second, European countries have fewer rules relating to discovery that require corporate defendants to disclose information.[196] Third, the progression of matters framed as criminal complaints is necessarily subject to prosecutorial discretion. Nevertheless, these obstacles have not discouraged European NGOs devoting vast resources and creative energy to pursuing TNCs allegedly involved in human rights abuses. As there are fewer relevant cases in these jurisdictions, this section collectively discusses legal developments in Germany, France, the Netherlands, and Belgium.

Establishing Jurisdiction

In most European countries it is relatively straightforward to establish jurisdiction if there is a relevant connection to the forum state. As noted in the UK section above, the Brussels I Regulation compels national courts of Members to accept jurisdiction in civil

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195 In Germany, for instance, there is no mechanism for general collective redress under the German Code. Although the Code provides for multiparty disputes, these rules are not designed to handle mass actions for large number of claimants. In France, legislation to introduce class actions was passed in March 2014, but this is aimed at consumer protection rather than human rights. The Netherlands currently permits consumer organisations and other interest groups to seek (only) declaratory and injunctive relief on behalf of a group of injured parties, but does not permit members of a group to claim damages on behalf of an entire class of injured parties (although it does permit court certification of damages in class settlements). In March 2014, Belgium enacted a law to introduce class actions, but its application is restricted to the violation of specific legislative acts.

196 Skinner et al., 'The Third Pillar', p.52.

liability cases filed against corporate defendants domiciled in the forum state.[197] Furthermore, many European courts will also assume jurisdiction on other bases. In Germany, for instance, Section 23 of the Code of Civil Procedure provides civil courts with jurisdiction over any monetary claims (e.g. claims in damages) if assets of the defendant are located within Germany. Notably, if the foreign defendant has a claim for payment against a Germany debtor, section 23 regards that claim as an asset located in Germany.

In France, based on Articles 14 and 15 of the *Code Civil*, French courts are able to hear any civil action brought against a French national, even if there are no other grounds for jurisdiction. One recent case suggests that France may be open in the future to hearing cases filed against TNCs alleged to have violated international legal norms. In October 2007, the Association for France-Palestine Solidarity (AFPS) and the Palestinian Liberation Organisation (PLO) commenced an action in the Tribunal de Grande Instance (Nanterre) against two corporations allegedly involved in a consortium that contracted with the Israeli Government to construct and operate a light rail project in Jerusalem. This consortium comprised Alstom, Alstom Transport, Veolia, and four Israeli companies. It was claimed that the rail project contravened international law by aiding and abetting Israel's occupation and commission of war crimes in West Jerusalem. The claimants eventually lost on the basis that the corporations did not violate international law in undertaking contract work for the construction of the Jerusalem Light Rail. Nevertheless, it is significant that the court considered it had jurisdiction over the case.[198]

In the Netherlands, courts may assume jurisdiction over a non-EU business where the claims against this entity are so closely linked with claims against another corporation (over which the Dutch courts do have jurisdiction) that joint adjudication is considered

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197 Article 4, Recast Brussels Regulation.

198 BDS Movement, 'French Appeals Court Confirms Jurisdiction over Alstom Case', 22 December 2009. Available at: https://bdsmovement.net/news/french-appeals-court-confirms-jurisdiction-over-alstom-case (accessed 16 December 2015).

justified on efficiency grounds.[199] Furthermore, Dutch courts may generously exercise international civil jurisdiction over claims that do not fall within another jurisdictional category if opportunities to initiate those claims in foreign fora are non-existent.[200]

Belgium is similarly interesting from a jurisdictional perspective. In 1993, Belgium famously passed a universal jurisdiction law that provided courts with jurisdiction to hear cases for specific serious crimes, including crimes against humanity and war crimes, even if they were committed outside Belgium. This permitted four Myanmar refugees to commence an action in Brussels Magistrates' Tribunal against the French oil group Total (and two of its managers) in April 2002. The claimants alleged that Total and its managers were complicit in crimes against humanity, including as torture and forced labour, committed by the Myanmar military junta in the course of the construction and operation of the Yadana Gas Pipeline.

This represented the first time that the universal jurisdiction law had been used to bring a claim against a corporation rather than an individual. Early on, a question was raised regarding the standing of the plaintiffs, given that they were not Belgian citizens. This seemed to be resolved in April 2005, when the Court of Arbitration (now the Constitutional Court) determined that it would be discriminatory to exclude refugees from accessing justice under the relevant law. However, this decision was successfully appealed in June 2005. Further complications ensued when, in June 2006, the Constitutional Court struck down the universal jurisdiction law that prevented non-citizens from commencing actions under the law. This paved the way for the Court of Appeal to dismiss the entire proceeding, as it determined that it could only continue if the law as modified by the Constitutional Court benefited the defendants. In October

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199 See, for instance, *Four Niger Delta Farmers v. Royal Dutch Shell*, which was a case brought against Royal Dutch Shell and its Nigerian subsidiary. In this matter, the Dutch court decided that the claims against the Dutch domiciled parent and its Nigerian subsidiary were so closely connected that they should not be separated: Skinner et al., 'The Third Pillar', p.22.

200 This is the doctrine of *forum necessitatis:* ibid., p.23.

2007, the Belgian prosecutor opened a new investigation into the case but this was subsequently closed in March 2008.[201]

The Importance of Discovery

In common law systems, judges generally possess a broad discretion to order defendants to disclose any and all documentation in connection to a legal claim. In most continental European states, by contrast, the absence of laws that give plaintiffs access to documents is a major barrier. The information deficit is compounded by the fact that many private companies in Europe are subject to few disclosure requirements. In the Netherlands, for instance, the Code of Civil Procedure specifies that the burden to prove the alleged facts falls on the claimant. The claimant may request that the corporate defendant provide relevant documentation, but these demands are restricted by the fact that the requesting party must have a legitimate interest, and must also specify the documents required.[202]

This problem proved to be particularly difficult in the matter of *Four Niger Delta Farmers v. Royal Dutch Shell.* These lawsuits concerned oil spills that had allegedly flowed into plaintiffs' farmland and fishponds. The claimants requested documents concerning the condition of the oil pipelines and the internal and operational practices of the company. The court determined, however, that the claimants lacked a legitimate interest, and had not successfully demonstrated that the parent company could be held liable for the damage caused by the subsidiary. Without access to documents, it proved almost impossible for the claimants to prove the facts required to illustrate their 'legitimate interest'. On 16 June 2010, Shell denied plaintiffs' request for disclosure of internal documents, on the basis that it could not be forced to and was not able to provide

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[201] Business & Human Rights Resource Centre, 'Total lawsuit in Belgium (re Myanmar)', 18 February 2014. Available at: https://business-humanrights.org/en/total-lawsuit-in-belgium-re-myanmar#c9336 (accessed 16 December 2015).

[202] Skinner et al., 'The Third Pillar', p.53.

them.[203] On 30 January 2013, the Dutch court issued a decision ordering Shell to pay compensation to one of the farmers, but it dismissed the balance of the claims.[204] However, the plaintiffs' case was reinvigorated in December 2015, when a Dutch appeals court reversed the judgment of the lower court and permitted most of the claims to proceed. Significantly, the appeals court also ruled that Shell must grant the claimants access to specific internal company documents essential to the case.[205]

Another relevant German case involves the Danzer Group, a well-known German-owned, Swiss-based timber manufacturer.[206] On 25 April 2013, the European Centre for Constitutional and Human Rights and Global Witness filed a case with the State Prosecutor's office in Tubingen, Germany. The parties alleged that Olof Von Gagern, a German-based senior manager of the firm, was guilty under the German Criminal Code of aiding and abetting rape, bodily harm, false imprisonment and arson.[207] These human rights abuses were allegedly committed by Congolese police and military during an attack on the village of Bongulu in northern DRC in May 2011.[208] Due to Danzer's status as a private, family-owned business, little information was available publicly and

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203 ibid., p.46.

204 *Four Niger Delta Farmers v. Royal Dutch Shell* District Court, The Hague, ECLI:NL:RBDHA:2013:BY9854(30 January 2013).

205 Business & Human Rights Resource Centre, 'Shell lawsuit (re oil pollution in Nigeria)', 18 December 2015. Available at: https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria (accessed 1 January 2016); *Four Niger Delta Farmers v. Royal Dutch Shell* Court of Appeal, The Hague, ECLI:NL:GDHDA:2015:3587

(18 December 2015).

206 Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (Oxford: OUP, 2008).

207 Under German law, criminality is intrinsically linked with the concept of individual responsibility. This means that corporate accountability cases are likely to be framed so that senior managers are held responsible for harm caused to employees in the course of work.

208 In March 2012, a group of Bongulu villagers filed a complaint in the DRC against 60 Congolese military and police officers allegedly involved in the same 2011 event. They were assisted by *Avocats san Frontières* (ASF). In 2013, the DRC Military Prosecutor's office conducted investigations, assisted by the UN. In July 2012, ASF filed a complaint in the local court in DRC against Danzer subsidiary Siforco for civil responsibility and against two Siforco employees on criminal charges for alleged complicity in the incident: Business & Human Rights Resource Centre, 'Danzer Group lawsuit (re Dem. Rep. Congo)', 8 July 2013. Available at: http://business-humanrights.org/en/danzer-group-siforco-lawsuits-re-dem-rep-congo#c86298 (accessed 19 December 2015).

the applicants faced serious challenges in obtaining relevant documentation in both the DRC and in Europe.[209] The prosecutor's office consequently ended the investigations in March 2015.

Disclosure of information may be less relevant in misrepresentation cases. In Germany, for instance, a complaint was initiated against discount retailer Lidl in April 2010. In an interesting example of creative advocacy, the Hamburg Consumer Protection Agency (CPA) commenced a lawsuit in Heilbronn district court demanding that Lidl stop deceiving customers about fair working conditions in its supply chain. The CPA maintained that working conditions in Lidl's supply chain (specifically, in Bangladeshi textile factories) failed to comply with international labour standards. In particular, the claim focused on an advertising campaign in which Lidl claimed that it promoted fair working conditions, objected to child labour, and opposed human and labour rights violations in its supply chain. Consequently, in April 2013, Lidl agreed to withdraw the public claims that its goods were being produced under fair and decent working conditions.[210]

Prosecutorial Discretion

One of the most challenging obstacles in the European context is prosecutorial discretion. When matters are initiated as criminal complaints rather than as civil suits, the success of the complaint depends on the willingness and resources of prosecutors to

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209 However, Skinner also suggests that it is possible that in the future French courts may impute liability to those companies that voluntarily commit to certain obligations such as code of conduct. Skinner et al., 'The Third Pillar', p.99.

210 Some matters have also been brought on a misrepresentation basis in France. In April 2014, three NGOs filed a complaint in Lille against the supermarket Auchan for allegedly using advertisements that misled consumers regarding working conditions in its supply chain. The NGOs also noted that labels from Auchan's 'In Extenso' clothing range were identified within the ruins of the Rana Plaza factory in Bangladesh. The Lille prosecutor's office began a preliminary investigation in May 2014, but dismissed the case in January 2015. A new complaint was brought by the three NGOs in June 2015 for deceptive commercial practices: Business & Human Rights Resource Centre, 'Auchan lawsuit (re garment factories in Bangladesh)', June 2015. Available at: https://business-humanrights.org/en/auchan-lawsuit-re-garment-factories-in-bangladesh (accessed 1 September 2016).

see the claims through to their logical conclusion. A case in point is a French matter that involved Danish timber giant Dalhoff Larsen and Homeman (DLH). In November 2009, a group of NGOs – including Global Witness, Greenpeace France and *Amis de la Terre* – and Alfred Brownell, a Liberian activist, lodged a legal complaint before the Public Prosecutor at the Court of Nantes. The complainants alleged that 2001 to 2003, DLH was a significant buyer of logs from Liberian timber businesses that had been cited by the UN as having engaged in serious criminal activities, including corruption, tax evasion, environmental degradation, UN arms sanctions violations and illicit business with then-Liberian President and warlord Charles Taylor.

As there were many barriers to bringing the case in Denmark, France was identified as an alternative forum for a legal case against DLH (over 25% of Liberian timber exports were transported through the French ports of Sète and Nantes).[211] It was alleged that two DLH subsidiaries were guilty of '*recel*', or the handling of and profiting from goods obtained illegally, which is a crime under French law. Certain obstacles – including the difficulties of obtaining hardcopy evidence in the aftermath of a civil war, the high costs of conducting investigations in Liberia, and the substantial translation costs – all hindered progress in the case. After the official complaint was filed with the Prosecutor in Nantes in 2009, it was accepted and opened for investigation in 2010. However, the matter was transferred to Montpellier in 2011, and in 2013 the Montpellier Prosecutor informed the complainants that he would not make a preliminary inquiry. No successful legal case has been brought against DLH nor any other timber corporation for claims relating to the illegal activities and human right violations that unfolded in the midst of Liberia's devastating civil wars.[212]

Another French case that is illustrative of the reluctance of public prosecutors to proceed was a complaint against Amesys that concerned the exporting of surveillance software to Libya. On 19 October 2011, the NGOs *Fédération Internationale des Ligues des*

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211 Skinner et al., 'The Third Pillar', p.101.

212 ibid., pp.101-02.

Droits de l'Homme and the *Ligue des Droits de l'Homme* filed a criminal complaint against Amesys on the basis that the business was complicit in human rights violations committed by the Gaddafi regime in Libya. It was alleged that equipment provided by Amesys was used to intercept private internet communications and identify the opponents of Gaddafi, who were subsequently detained and tortured. On 26 March 2012, the State Prosecutor issued an order not to open an investigation. A judge reviewed this decision and in May 2012 ordered an investigation into whether Amesys or its managers could be held criminally responsible. The State Prosecutor appealed this decision, but the decision to open a criminal investigation was upheld. The case was later transferred to the Specialised War Crimes Unit and is still ongoing.[213]

Litigants in the Netherlands face similar issues. On 14 May 2013, the Dutch public prosecutor published its decision not to prosecute Lima Holdings in relation to the activities of its subsidiary, Riwal, in the provision of building equipment used to construct the wall built by Israel in the occupied Palestinian territories. The complaint filed in 2010 alleged that the corporations had aided and abetted Israel's violations of international law. However, the public prosecutor found that Riwal's business in connection to the wall was minor compared to that of other businesses. It therefore did

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213 'Timber giant Dalhoff Larsen and Horneman caught importing more than $300,000 of illegal Liberian timber', 10 October 2013. Available at: http://www.globalwitness.org/library/timber-giant-dalhoff-larsen-and-horneman-caught-importing-more-300000-illegal-liberian (accessed 10 December 2015). Similar problems have also been encountered in Switzerland. On 1 November 2013, the Swiss NGO TRIAL filed a criminal complaint with the Swiss federal prosecutor's office against Argor-Heraeus SA, a Swiss gold refinery, for alleged money laundering. TRIAL claimed that Argor-Heraeus had refined gold that had been pillaged by an illegal armed group from the north-eastern region of the DRC. FNI allegedly used the proceeds from the sale of the gold to finance its operations and purchase arms. The Swiss Prosecutor's Office opened a criminal investigation into TRIAL's complaint, but closed it on 10 March 2015 after concluding that there was not enough evidence that the company was aware of the criminal origin of the gold to prosecute it: Business & Human Rights Resource Centre, 'Argor-Heraeus investigation (re Dem. Rep. of Congo)', 10 March 2015. Available at: http://business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo (accessed 1 September 2016).

not fulfil the requirements set out in Dutch 'war crimes' legislation, which stated that accomplices must contribute substantially to such actions.[214]

[214] Al-Haq, 'Prosecutor Dismisses War Crimes Case against Riwal', 14 May 2013. Available at: http://www.alhaq.org/advocacy/targets/accountability/71-riwal/704-prosecutor-dismisses-war-crimes-case-against-riwal (accessed 16 December 2015).

Conclusion

Table 5: Summary of Chapter 3 Findings

Institutional Factor	US	Canada	UK	Germany	France	Netherlands	Belgium
Statutory Cause of Action	Yes	No	No	No	No	No	No
Tort Claim + Class Action	Yes	Yes	Yes	No	No	No	No
Criminal Complaint More Frequent	No	No	No	Yes	Yes	Yes	Yes
Potential Parent Duty of Care	Yes	Yes	Yes	No	No	No	No
Application of FNC and other jurisdictional challenges	Yes	Yes	No	No	No	No	No
Availability of Discovery	Yes	Yes	Yes	No	No	No	No
Pro Bono Legal Representation/ Legal Aid/NGO Representation	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Implement'n	Moderate	Low	Moderate	Low	Low	Low	Low

Green = helpful to potential claimants

Yellow = neutral for potential claimants

Red = hindrance to potential claimants

The trends in transnational litigation demonstrate that pursuing TNCs in national courts is often an uphill battle, plagued by uncertainties in both substantive and procedural laws. This chapter has made several findings. First, the US has been the centre for most transnational litigation against TNCs, chiefly aided through a legal framework that provides several unique causes of action and other plaintiff-friendly characteristics. However, following the Supreme Court's decisions in *Kiobel* and *Bauman v DaimlerChrysler*, plaintiffs will face a more challenging legal landscape in the future and are more likely to consider actions based on state law.

Second, in Canada, the common law doctrine of FNC has proved a formidable barrier in the absence of a statutory equivalent to the ATS. However, the decision in one Canadian case that held a parent corporation's duty of care might depend on its voluntary commitments suggests more cases may flow to Canada in the future. Third, in the UK, the doctrine of FNC no longer presents a serious obstacle to transnational litigants, yet statutory reforms in the areas of legal aid and costs represent two serious setbacks. Plaintiffs suing in the UK also face the prospect of smaller rewards following the implementation of new European regulations on damages. Fourth, in continental Europe, the most serious obstacles to corporate accountability include the absence of class actions for human rights cases, the overriding discretion of public prosecutors, and the absence of binding documentary disclosure rules.

In developed states, all judgments made by courts are binding and enforceable. Unquestionably, statutory and judge-made law embodies the highest levels of obligation, delegation and precision. Yet despite this, corporate accountability for TNCs remains illusory, even in the legal systems of developed countries. As Zerk writes, the system as it stands 'distorts patterns and distribution of domestic remedial mechanisms, adding uncertainty to victims and companies, making state-state cooperation more challenging'.[215] Overall, the picture is not one of a coherent legal system that addresses the needs of victims or provides certainty to business. While the pioneering efforts of lawyers and judges in some of these cases should be recognised, the system as it stands is far from sufficient. Zerk once again agrees: 'the fact that so few of the cases reviewed for the purpose of this study have resulted in prosecution or financial settlements for

[215] Zerk, 'Corporate Liability for Gross Human Rights Abuse', p.63.

claimants provides some indication of the difficulties involved in successfully pursuing a claim or criminal complaint'.[216]

This chapter has sought to demonstrate that the characteristic absent from this discussion is that of implementation. Before the merits of a case are considered, a case is susceptible to collapse at any one of many hurdles. It is in the implementation of laws relating to corporate accountability, in the laws relating to jurisdiction, FNC, costs, legal aid and so on and so forth, that barriers are constructed and justice denied. In this important sense – in the sense of implementation – the norm of corporate accountability therefore remains incompletely legalised in these domestic legal systems. As can be seen from the table above, implementation is higher in both the US and the UK, and so it makes sense that we see more legalisation in domestic legal systems.

This leads to several conclusions. First, states, IOs, and NGOs should encourage the development of robust domestic justice systems in all states where TNCs operate. Second, states should work towards developing more consistent rules regarding jurisdiction. Discussions on this topic should consider the normative desirability of states assuming extraterritorial jurisdiction, the circumstances in which this may be appropriate (e.g. the defendant is a corporate national of the state assuming jurisdiction), and the impact of potential solutions on victims and access to remedy.

Fortunately the UN Office of the High Commissioner of Human Rights (OHCHR) has made a start on this task by recently launching a programme that aims to give workable guidance to states in the area of access to remedy. Obtaining more information on the way corporate accountability works across jurisdictions, from obtaining clarity on legal tests for corporate accountability to overcoming financial obstacles for remedial mechanisms, is the first step in securing broader global access to remedy for individuals affected by corporate human rights violations.

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[216] ibid.

Chapter 4: Processes of Legalisation in the United Nations

What seems certain is that the movement towards greater corporate responsibility is one of the most deep-rooted developments in the human rights story of the first decade of the twenty-first century. John Ruggie's efforts to forge a consensus, combined with growing public calls for greater accountability and a developing body of good practice and experience in the field could together lead to a major contribution to the cause of human rights in the years to come.[1]

Scott Jerbi, IHRB Senior Advisor (2009)

This chapter discusses legalisation in the context of international organisations, in particular the United Nations (UN). How have legalisers in IOs attempted to draft rules related to business and human rights, and to what extent do those rules generate obligation, precision and delegation? How does an analysis of these factors inform our understanding of the processes of legalisation and whether we expect that legalisation to be effective? Do these rules suggest that 'implementation' should be considered an essential characteristic of legalisation?

International organisations are among the most prolific promulgators of rules directed towards transnational corporations (TNCs), and so constitute an ideal setting in which to address these questions. The UN, the Organisation for Economic Cooperation and Development (OECD), and the International Labour Organisation (ILO), amongst others, have at various points actively pushed the agenda for increased corporate accountability by creating space for governments, expert committees, NGOs, and corporate representatives to discuss the extent to which corporations should be regulated by rules created at the international level.

1 Scott Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?,' *Human Rights Quarterly* 31, no. 2 (2009), p.301.

These attempts have taken various forms. In the UN, legalisers have generally adopted relatively traditional tactics by requesting that states negotiate and agree on a particular set of guidelines, with a binding treaty being the ultimate goal. However, as exemplified by the UN Guiding Principles on Business & Human Rights (GPs), which were endorsed by the UN Human Rights Council (UNHRC) in 2011, new approaches are emerging which challenge conventional methods of legalisation. The evolution of the GPs suggests that focusing on the practical implementation of rules by states and other relevant actors is just as crucial over the long term as the extent to which a new rule initially embodies obligation, precision, and delegation. Furthermore, legalisation in this area is not only about securing the agreement and compliance of states. Corporations are also essential actors that must be engaged and actively brought under any legal regime for it to be effective.

This chapter is divided into five parts. The first section discusses initial UN efforts in the 1970s to draft a code of conduct for TNCs. After a discouraging two decades, this project was disbanded in 1993. A second attempt, which is the subject of the second section, gained momentum in 1999 after Kofi Annan launched the idea of the Global Compact (GC) during a pivotal speech at Davos, Switzerland. The GC was subsequently established within the office of the UN Secretary-General, and continues to operate today. Although criticised by some due to its voluntary nature and alleged potential to be used by companies to 'blue-wash' their image, supporters of the GC note that its objective was not to create enforceable principles (which would never have been supported by the international community in any case), but to start a productive discussion on the question of what makes a good corporate citizen.

The third section considers the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms), which were conceived in 2003 by a Subcommittee working under the UN Commission on Human Rights (UNCHR). The Draft Norms sought to impose obligatory standards on corporations and treated them as independent actors under international law for this purpose. This was a departure from the classical international law model that viewed states (and not corporations) as true subjects under international law. Under pressure from their respective corporate citizens, governments were reluctant to support the Draft Norms and the UNCHR consequently refused to endorse them.

It was against this contentious background that the Office of the High Commissioner of Human Rights (OHCHR) recommended that a Special Representative to the Secretary-General on the issue of human rights and business be appointed. The efforts of Professor John Ruggie in this role are the subject of the fourth section of the chapter. Ruggie approached the issue from a completely different position. Rather than attempting to draft a text with the purpose of transforming that text into a treaty, Ruggie approached the puzzle like a constructivist. After extensive consultation with stakeholders, Ruggie developed a general Protect, Respect, and Remedy Framework (the Framework) around which he could build normative supportive and momentum. Once he had done this, he developed the GPs in order to practically implement the Framework. Ruggie also set up structures to support and reinforce the Framework and the GPs, particularly by creating linkages with the codes of other international organisations and encouraging industry-specific networks to develop. The chapter concludes by reflecting on the various models of legalisation launched in the context of the UN and foreshadows potential future developments.

This examination of past attempts to draft rules relating to corporate accountability is important for several reasons. By reviewing the political dynamics at play during different stages of law-making within the UN and other international organisations, we begin to understand the difficulties inherent in drafting international legislation binding on companies, particularly in the area of human rights. It is regularly overlooked that historically, companies have been structured precisely to take advantage of global disparities in wages and various forms of regulation. Demanding that human rights become central to how international companies are organised therefore represents a direct challenge to certain aspects of the fundamental global corporate structure. Only by recognising this can we begin to understand the institutional resistance exhibited by some of the most important stakeholders in this area.

It is also important to consider that, corporations – especially large corporations – take time to change. It is easy to emphasise the nimbleness and flexibility of corporations, which, unlike governments, appear able to transfer capital here, close factories there, and organise formidable production lines encircling the globe. However, the size of these corporations means that a change in standards can be difficult and expensive to institutionalise. These are important considerations to keep at the back of one's mind when considering the role of international institutions in legalising standards related to business and human rights.

And like corporations, international organisations also suffer from institutional characteristics that can make supporting new initiatives difficult. The UN, for instance, was established in 1945 with a structure based on the administrative bureaucracies of colonial powers. Georg Kell, who worked extensively on the Global Compact, has lamented that despite 'successive waves of reforms…[the Organisation] remains, above all, a hierarchical bureaucracy poorly equipped to facilitate and support new initiatives'.[2] Yet despite Kell's understandable frustrations, this chapter demonstrates that in some respects international organisations are showing themselves open to change.

The UN Code of Conduct for Transnational Corporations

TNCs have featured prominently on the UN agenda since the 1970s. As discussed in the introduction, the 1960s saw major growth in TNC activity as more companies elected to establish manufacturing subsidiaries based in the developing world to overcome high

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2 Kell, 'The Global Compact: Selected Experiences and Reflections' pp.74-75.

trade barriers and low labour costs.[3] The post-war Bretton Woods institutional architecture, which had been constructed to drive the world economy towards global prosperity as quickly as possible, also proved to be an ideal environment for corporations to expand globally at an unprecedented rate.[4]

For a variety of reasons, developing countries were eager to engage with TNCs, which were hailed by international organisations as an efficient means of transferring capital and technology to less developed states. At the time, some scholars and politicians expressed concern that increased TNC activity could affect the political independence and economic growth of developing states. Hans Singer and Raul Prebisch, for instance, advanced arguments that economic integration disproportionately benefited richer 'core' countries at the expense of the poorer 'periphery' states. These authors emphasised that development in rich countries depended upon developing states maintaining their peripheral status as commodity exporters and value-added importers.[5]

From this perspective, TNCs could be construed as representing colonialism in a newer modern form. Like former colonial masters, TNCs were in an advantageous position to take advantage of cheap labour, export raw materials, and dump surplus imports manufactured in developed states. These arguments were supported by the fact that patterns of trade proved strongest along historic colonial lines,[6] and that the economic

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3 Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' p.301.

4 After World War II, the prevailing policy consensus was that trade and investment were prerequisites to political and social development, and would enhance a country's foreign relations with other states. Under the auspices of the newly created World Bank, International Monetary Fund (IMF) and the General Agreement on Tariffs and Trade (GATT), governments were encouraged to dismantle trade barriers, liberalise investment regulations, and adopt free-market reform: Kell, 'The Global Compact: Selected Experiences and Reflections' p.70.

5 Hans W Singer, 'Economic Progress in Underdeveloped Countries,' *Social Research* (1949); Raul Prebisch, *The Economic Development of Latin America and its Principal Problems* (New York: United Nations, 1949). Prebisch was appointed executive director of the Economic Commission for Latin America in 1950, and later became the first Secretary-General of the United Nations Conference on Trade and Development (UNCTAD) after its creation in 1964.

6 David Coleman, 'The United Nations and Transnational Corporations: from an Inter-Nation to a "Beyond-State" Model of Engagement,' *Global society* 17, no. 4 (2003), p.342.

interests of TNCs regularly overlapped with those of their home states.[7] In response, some developing countries advocated banding together against the power of TNCs.[8] This resulted in several intergovernmental agreements intended to address the perceived pernicious effects of foreign investment, including the Andean Foreign Investment Code in 1971.[9] During the same period, the publication of books such as *Global Reach,* by Richard Barnet and Ronald Muller, popularised the idea that TNCs were the most potent force in the global economy and potential harbingers of unemployment, pollution and inequality.[10] Noting this change in mood, the UN Director of the Centre on Transnational Corporations Nian Tzu Wang wrote in 1975 that:

> *This phase of unquestioned acceptance of the transnational corporations has given way, in rapid succession to serious doubts and in some cases vigorous protests […] Indeed, some of the most vociferous attacks on transnational corporations are grounded on purely nationalistic and autarchic arguments that appear to condemn virtually all international flow of capital or goods. Others seem to be directed against the entire socio-economic system, of which the transnational corporation is regarded as an organic part and hence responsible for all the ills that have been manifested, whether they be mass poverty, unemployment, inflation, injustice, corruption or deterioration of the human environment.*

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7 Werner J Feld, *Multinational Corporations and UN politics: The Quest for Codes of Conduct* (Oxford: Pergamon, 1980), p.39.

8 Robert Grosse, 'The Andean Foreign Investment Code's Impact on Multinational Enterprises,' *Journal of International Business Studies* 14, no. 3 (1983), p.121.

9 On 26 May 1969, Bolivia, Chile, Columbia, Ecuador, and Peru established the Andean Pact (Venezuela joined in 1973), chiefly as a response to perceived shortcomings of the Latin American Free Trade area, which some believed mostly benefited the larger, more industrialised states including Argentina, Brazil and Mexico. In 1976, the Andean Pact adopted Decision No. 24, which prohibited foreign investment in areas controlled by Andean states and prohibited the sale of stock in Andean corporations to foreigners. By the early 1980s, however, the general divestment approach was discredited as new, export-led policies were adopted by many of the member states: Thomas Andrew O'Keefe, 'How the Andean Pact transformed itself into a friend of foreign enterprise,' *The International Lawyer* 30, no. 4 (1996); Frances Armstrong, 'Political Components and Practical Effects of the Andean Foreign Investment Code,' *Stanford Law Review* (1975); Grosse, 'The Andean Foreign Investment Code's Impact on Multinational Enterprises'..

10 Richard J Barnet and Ronald E Muller, *Global Reach: The Power of the International Corporations* (New York: Simon and Schuster, 1974).

Frequently, the reaction against this is an equally sweeping defence of the virtues of internationalism, the market system, or the social and even the cultural heritage of the developed world.[11]

Such reflections sparked debate in the UN regarding the extent to which TNCs should be constrained in their operations, and if so, who should be in charge of drafting and imposing such constraints.[12] After 1960, the UN demographics changed rapidly as the full impact of decolonisation, higher rates of nation-building, and an increased emphasis on self-determination created more seats for developing states in important institutions, including the General Assembly.[13] Some suggested that developing states should collectively act more like the OPEC petroleum states, which had together forced developed states to adopt a different set of rules. Cold War dynamics also regularly hampered the day-to-day productivity of the organisation. Georg Kell writes that the UN became 'a prisoner of conflicting ideologies…the ideals of reconstruction and development were replaced with harsh ideological realities and colourful but wasteful debates.'[14]

The first UN debates regarding the role and responsibilities of TNCs unfolded against this tumultuous background. The regulation of TNCs was first formally discussed in 1972 following Chile's complaint to the Economic and Social Council (ECOSOC) that the International Telephone and Telegraph Corporation (ITT) had offered funds to the US government to prevent the democratically-elected, socialist government of Salvador

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11 Nian Tzu Wang, 'Design of an International Code of Conduct for Transnational Corporations,' *The Journal of International Law and Economics* 10(1975), p.320.

12 At the time, the UN was also examining two other areas related to TNCs. The United Nations Conference on Trade and Development (UNCTAD) was focused on creating model laws to facilitate the transfer of technology and prevent restrictive business practices (perceived as detrimental to international trade and damaging to the economies of developing countries). Robin Broad and Zahara Heckscher, 'Before Seattle: The Historical Roots of the Current Movement Against Corporate-led Globalisation,' *Third world quarterly* 24, no. 4 (2003), p.718.

13 Following the post-war period of decolonisation and nation-building, numbers in the GA had increased from 83 to 147 between 1960 and 1976.

14 Kell, 'The Global Compact: Selected Experiences and Reflections' p.70.

Allende from taking power in Chile in 1970.[15] In May 1974, the UN General Assembly proclaimed a 'Declaration on the Establishment of a New International Economic Order'. This stated that every state was entitled to control its own natural resources and that 'a just and equitable relationship between the prices of raw materials, primary products, manufactured and semi-manufactured goods' should be established to improve the terms of trade of developing countries.[16] Finally, in December 1975, the General Assembly adopted (without a vote) Resolution 3514 condemning the corrupt practices of TNCs, and encouraging governments to prosecute TNCs engaging in corrupt activities.[17]

Following Chile's complaint in 1972, ECOSOC requested that the Secretary-General appoint a 'Group of Eminent Persons' to undertake a study of TNCs and consult with government representatives, trade unions, and public interest groups. In May 1974, the Group reported back to ECOSOC with several observations. First, the Group provided a definition of multinational corporations as those enterprises which 'own or control production or service facilities outside the country in which they are based'.[18] Second, it noted that TNCs could significantly impact on equality. For this reason, TNC activity

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15 Tagi Sagafi-Nejad and John H Dunning, *The UN and Transnational Corporations: from Code of Conduct to Global Compact* (Bloomington: Indiana University Press, 2008), p.45.

16 UN General Assembly, 'Resolution 3201: Declaration on the Establishment of a New International Economic Order', UN Doc No.: A/RES/S-6/3201 (1 May 1974).

17 UN General Assembly, 'Resolution 3514: Measures against corrupt practices of transnational and other corporations, their intermediaries and others involved', UN Doc No.: A/RES/3514 (15 December 1975).

18 The report of the Group is also useful for its articulation of the interests of home states and corporations, stating that '[h]ome countries are concerned about the undesirable effects that foreign investment by multinational corporations may have on domestic employment and the balance of payments, and about the capacity of such corporations to alter the normal play of competition. Host countries are concerned about the ownership and control of key economic sectors by foreign enterprises, the excessive cost to the domestic economy which their operations may entail, the extent to which they may encroach upon political sovereignty and their possible adverse influence on sociocultural values'. In addition, the Group states that 'multinational corporations themselves are concerned about the possible nationalisation or expropriation of their assets without adequate compensation and about restrictive, unclear and frequently changing government policies': United Nations, 'Report on the Impact of Multinational Corporations on the Development Process and on International Relations: The Report of the Secretary-General to the Economic and Social Council,' *International Legal Materials* 13, no. 4 (1974), pp.25-26.

should not be considered as a substitute for targeted international development efforts because 'private foreign investment is not a substitute for aid'.[19] Third, the Group implicitly acknowledged that a governance gap existed and could be used by TNCs to their advantage. The gap arose due to the fact that a 'lack of harmonisation of policies among countries, in monetary or tax fields for example, allows multinational corporations on occasion to use their transnational mobility to circumvent national policies or render them ineffective'.[20] Finally, the Group recommended the creation of a Commission on Transnational Corporations (UNCTC) for the purpose of developing a Code of Conduct that would impose obligations on governments and TNCs.[21]

In March 1976, the UNCTC established as its highest priority the task of formulating a code of conduct for TNCs. A draft timetable prepared at this time suggested that a final draft code would be presented to UNCTC by 1978. At the very least it seemed that the opportunity to discuss issues related to TNCs was a positive development. In the Harvard International Law Journal, Stéphan Coonrod foreshadowed that 'by providing a forum for discussions as to the TNC, the efforts to draft a code will inevitably compel agreements on various questions heretofore undiscussed on the international level'.[22]

From the beginning, however, there were serious signs of disharmony, which were exacerbated by the design of the Commission.[23] On substantive issues, parties were split

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19 ibid., p.29.

20 ibid., p.30.

21 Coleman, 'The United Nations and Transnational Corporations: from an Inter-Nation to a "Beyond-State" Model of Engagement' p.344.

22 Stephan Coonrod, 'The United Nations Code of Conduct for Transnational Corporations,' *Harvard International Law Journal* 18(1977), p.303.

23 It was originally envisioned that the Commission would be comprised of 'experts' who were nominated by states but would serve in their individual capacities. It was later decided, however, that states would be members and that the geographic distribution would be Africa (12 members), Asia (11 members), Latin America (10 members), the Socialist states of Eastern Europe (5 members), and Western Europe and Other (10 members). Seymour Rubin queries whether geography should have been the only stated criterion for selection, and notes that the large size of the Commission was not conducive to discussion and agreement: Seymour J Rubin, 'Reflections Concerning the United Nations Commission on Transnational Corporations,' *Am. J. int'l L.* 70(1976), p.74.

as to whether the code should be developed as a voluntary instrument or a set of binding legal obligations, a violation of which would constitute a breach of international law. Developing countries in general were supportive of the latter option, whilst developed countries supported a voluntary code.[24] A further divide existed over the extent to which corporations should be represented in the UNCTC discussions, with several states expressing reluctance to involve TNC executives in case this implied an equivalence between corporations and sovereign states.[25]

Eventually the UNCTC failed in two crucial respects. After two decades, it proved unable to agree on both the proposed Code of Conduct and a definition of 'transnational corporation'. The factors responsible for this outcome included the unrealistic scale of the project, the absence of consensus amongst the parties (even in connection to the most basic of issues), and the political nature of voting in this period, which was coloured by Cold War dynamics, post-colonial divisions, and underlying division over the New International Economic Order.[26] The negotiations had unfolded over such a long period that the starting positions and interests of some countries had effectively changed – Brazil, India and Russia, for instance, were in a very different economic position in the 1990s than they were in 1974.

It was also relevant the UN itself had transformed over this time. By 1992, the proposal for a Code of Conduct seemed out of date, and no longer aligned with the objectives of an institution trying to develop new and productive linkages with business. In Sandrine Tesner's view, the draft code's historical association with the New International Economic Order made it preferable to abandon the entire enterprise.[27] It is perhaps not surprising, then, that in the 1993 *Yearbook of the United Nations*, the Secretary-General is

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24 Coonrod, 'The United Nations Code of Conduct for Transnational Corporations' p.297.

25 ibid., p.298.

26 Coleman, 'The United Nations and Transnational Corporations: from an Inter-Nation to a "Beyond-State" Model of Engagement' p.339.

27 Sandrine Tesner, *The United Nations and Business: A Partnership Recovered* (Basingstoke: Macmillan, 2000), p.23.

noted as saying that 'informal consultations…had concluded that no consensus was currently possible on the draft code of conduct'.[28]

It should be noted, however, that during these years other initiatives related to TNCs did advance in other international institutions. In 1976, the OECD adopted Guidelines for Multinational Enterprises (the OECD Guidelines). These were enacted as part of the Declaration on International Investment and Multinational Enterprises, designed to 'improve the international investment climate and to strengthen the basis for mutual confidence between enterprises and the society in which they operate'.[29] The OECD Guidelines have since been reviewed five times with the purpose of ensuring 'that they remain a leading tool to promote responsible business conduct in the changing landscape of the global economy'.[30] In addition to the OECD member states, 12 other states have subscribed to the Declaration.[31] In 1974, the European Economic Communities (EEC) also adopted a Code of Conduct for Companies Operating in South Africa in response to concern over corporations working under the apartheid system. The ILO issued its own corporate code of conduct in 1977, which was updated in 2000 and 2006. Nevertheless, although these documents provided 'important precedents in terms of language and reach', Broad and Heckscher note that the codes 'were basically non-enforceable documents that most observers agree did little to effect change in corporate behaviour or public opinion'.[32]

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28 United Nations, 'Yearbook of the UN', 1993, p.772.

29 Elisa Morgera, 'OECD Guidelines for Multinational Enterprises,' in *Handbook of transnational governance*, ed. Thomas Hale and David Held (Basingstoke: Polity, 2011), p.315.

30 OECD, 'Guidelines for Multinational Enterprises' (Paris: OECD Publishing.

31 These states include: Argentina (22 April 1997), Brazil (14 November 1997), Colombia (8 December 2011), Costa Rica (30 September 2013), Egypt (11 July 2007), Jordan (28 November 2013), Latvia (9 January 2004), Lithuania (20 September 2001), Morocco (23 November 2009), Peru (25 July 2008), Romania (20 April 2005) and Tunisia (23 May 2012).

32 Broad and Heckscher, 'Before Seattle: The Historical Roots of the Current Movement Against Corporate-led Globalisation' p.720.

The Global Compact

At the beginning of the 1990s, UN officials began to re-evaluate the organisation's relationship with business. Democracy and the free market model had gained a renewed legitimacy at the end of the Cold War, and technological change and foreign direct investment were increasingly viewed as fundamental tools in tackling poverty.[33] Companies were also incentivised to invest in a more productive relationship with the UN and other international organisations (IOs). Globalization – manifested through lightening-speed telecommunications, ever-increasing capital transfers, as well as falling tariffs – highlighted to business that IOs would be increasingly essential to maintaining an international regulatory framework previously upheld by sovereign states. Maria Livanos Cattaui of the International Chamber of Commerce expressed this sentiment in 1998 speech in Paris:

> *The market economy system…cannot operate at a maximum potential without an efficient regulatory framework to set the rules of the game. Those rules once came almost exclusively from national governments, but that is changing fast. As economies become ever more closely enmeshed, the need for strong multilateral rules becomes even more pressing. The emphasis has to shift from national or regional legislation to rules that can be applied globally. For these, business must look to the United Nations and its agencies as well as to other key intergovernmental organisations like the World Trade Organization.*[34]

It was implicit in Cattaui's words that business had a crucial role to play in assisting IOs to create and maintain the global rule of law.[35]

The appointment of Kofi Annan as UN Secretary-General (UNSG) in 1996 further boosted the relationship between the UN and the broader business community. Annan

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33 Kell, 'The Global Compact: Selected Experiences and Reflections' pp.70-71.

34 Maria Livanos Cattaui, 'UN-Business Partnership Forged on Global Economy', Paris, 6 February 1998 quoted in Coleman, 'The United Nations and Transnational Corporations: from an Inter-Nation to a "Beyond-State" Model of Engagement' p.351.

35 ibid.

was the first UNSG to hold a business management degree, and professed that 'markets themselves were not an ideology, but rather a tool in the hands of societies'.[36] As recounted by Georg Kell, who was executive head of the Global Compact from its inception until 2015, this perspective enabled Annan to move beyond ideological debates and focus on 'practical, real-world issues'.[37]

In a landmark speech on 31 January 1999, Annan addressed business directly during a plenary session of the Davos World Economic Forum. Annan emphasised his hopes for 'a creative partnership' between the UN and the private sector, and stressed the vital role of business within UN operations: 'without your know-how and your resources, many of the objectives of the United Nations would remain elusive'. The UNSG then went on to outline what he saw as the principal problem of globalization:

> *The problem is this. The spread of markets outpaces the ability of societies and their political systems to adjust to them, let alone to guide the course they take. History teaches us that such an imbalance between the economic, social, and political realms can never been sustained for very long.*

Annan also perceived that the fragility of globalization had been underestimated:

> *National markets are held together by shared values. In the face of economic transition and insecurity, people know that if the world comes to the worst, they can rely on the expectation that certain minimum standards will prevail. But in the global market, people do not yet have that confidence. Until they do have it, the global economy will be fragile and vulnerable – vulnerable to backlash from all the 'isms' of our post-cold-war world: 'protectionism, nationalism, ethnic chauvinism, fanaticism and terrorism. What all these 'isms' have in common is that they exploit the insecurity and misery of people who feel threatened or victimised by the global market. The more wretched and insecure people there*

36 Kell, 'The Global Compact: Selected Experiences and Reflections' p.71.

37 ibid.

are, the more those 'isms' will continue to gain ground. What we have to do is find a way of embedding the global market in a network of shared values.

He proposed that business leaders and the UN 'initiate a global compact of shared values and principles, which will give a human face to the global market'. In particular, Annan called on firms and business associations 'to embrace, support, and enact a set of core values in the area of human rights, labour standards, and environmental practices'. These measures, said Annan, would act as a way to stabilise political and economic systems in the face of great uncertainty:

Indeed, you can use these universal values as the cement binding together your global corporations, since they are values people all over the world will recognise as their own. You can make sure that in your own corporate practices you uphold and respect human rights; and that you are not yourselves complicit in human rights abuses.

Annan also urged corporations not to wait for states to adopt certain policies, signalling that the private sector would be encouraged to self-regulate best practice even if this was superior to what was required by national standards:

Don't wait for every country to introduce laws protecting freedom of association and the right to collective bargaining. You can at least make sure that your own employees, and those of your subcontractors, enjoy those rights. You can at least make sure that you yourselves are not employing under-age children or forced labour, either directly or indirectly. And you can make sure that, in your own hiring and firing policies, you do not discriminate on grounds of race, creed, gender or ethnic origin. [38]

Annan's words proved to be more powerful than he had anticipated. Kell writes that Annan had neither 'planned nor imagined' that this speech would herald the beginning

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[38] United Nations, 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos', 1 February 1999. Available at: http://www.un.org/press/en/1999/19990201.sgsm6881.html (accessed 29 June 2016).

of a global corporate citizenship initiative.[39] But by July 2000, the Global Compact (GC) had been launched as an operational initiative at UN Headquarters (UNHQ) involving corporations, trade unions, and civil society organisations. In the absence of substantial funding and internal expertise, the early challenges faced by the team were intense. It originally consisted of a network of four UN agencies – the Office of the High Commissioner of Human Rights, the ILO, the UN Environmental Programme, and the UN Development Programme. Later, the UN Industrial Development Organization joined as one of the 'core agencies' and many other UN organisations were affiliated on an ad hoc basis.

The initiative was endorsed by the General Assembly in January 2002.[40] From 40 companies that were present at the inception of the initiative in 2000, the GC has grown to include 8,000 business participants from 140 countries. These participants have submitted in excess of 28,000 disclosure reports since 2000. Four thousand non-business entities are also participants, and several sister initiatives have been established including the Global Compact Cities Programme, the Principles for Responsible Investment (PRI), the Principles for Responsible Management Education (PRME), and the Sustainable Stock Exchanges (SSE).[41]

The Principles of the Global Compact

The ten principles of the GC focus on human rights, labour rights, the environment and corruption. They are directly derived from commitments made by governments at the UN and draw on the Universal Declaration of Human Rights (1948), the Rio Declaration on Environmental and Development (1992), the ILO's Fundamental Principles and Rights at Work (1998), and the UN Convention against Corruption

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39 Kell, 'The Global Compact: Selected Experiences and Reflections' p.69.

40 UN General Assembly, 'Resolution 56/76: 'Toward Global Partnerships'', UN Doc No.: A/RES/56/76 (24 January 2002).

41 John Ruggie, 'UCL Centre for Ethics & Law Annual Lecture: Embedding Global Markets: Lessons from Business & Human Rights', 2 March 2015. Available at: https://www.ucl.ac.uk/global-governance/ggi-comments-pub/commentary-2 (accessed 8 Jan 20).

(2003). In addition to emphasising these principles, the GC aims to catalyse actions in support of broader UN objectives, including the Millennium Development Goals.[42]

Summary 1: The Global Compact

The Global Compact

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence; and

Principle 2: Businesses should make sure that they are not complicit in human rights abuses.

Labour

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: Businesses should uphold the elimination of all forms of forced and compulsory labour;

Principle 5: Businesses should uphold the effective abolition of child labour; and

Principle 6: Businesses should uphold the limitation of discrimination in respect of employment and occupation.

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: Businesses should undertake initiatives to promote greater environmental responsibility, and

Principle 9: Businesses should encourage the development and diffusion of environmentally friendly technologies.

Corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

A new type of law-making?

In several important respects, the GC signalled the advent of a new type of rule-making process. Its evolution illuminates several of the most important trends in transnational legalisation, including the importance of implementation.

42 ibid.

(a) Combination of Private and Public Authority

First, it attempted to create new rules based on the authority and capabilities of companies, rather than states, the traditional rule-makers in international law. It thus embodied a unique combination of public and private authority. NGOs and labour organisations were also involved in the GC from the outset, despite the fact that this prompted questions from those who considered national governments (and only national governments) should be responsible for collectively creating international rules. From the perspective of the UNSG, however, it would never have been possible for a binding code encompassing the GC principles to be agreed by state governments alone. Kell notes that the fact Annan 'side-stepped' the states was illustrative of the deep reluctance amongst certain governments, especially in developing countries, to adopt the GC principles. In particular, there was concern that the GC would effectively act as a disguised form of protectionism with the potential to impose unrealistic human rights standards, enforceable through economic transactions.[43]

(b) Experimenting with Norm Cascades

Second, the GC was an experiment in whether a UN-run initiative could kick-start a norm cascade reflecting responsible business principles. With an emphasis on inclusion and consensus rather than exclusion and enforcement, the GC promoters bet that the 'catalytic effects of critical masses, collective action, transparency and front-runner behaviour' would sustain the initiative.[44] The GC thus derives its legitimacy from social – rather than legal – expectations, but is based on an underlying assumption that reputation and group sentiment matter in both the broader corporate environment and ultimately to clients and customers.

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[43] Kell recounts that this resistance was manifested by the G77's call for an intergovernmental oversight of the GC in a Ministerial Declaration of 2000. In response, European governments lobbied hard to negotiate UN Resolution 56/57, which secured a mandate for the Secretariat to continue working on the GC: Kell, 'The Global Compact: Selected Experiences and Reflections' p.76.

[44] ibid., p.72.

(c) Network-Based Governance

A third distinctive characteristic of the GC was the extent to which it was premised on the assumed effectiveness of network-based governance. In 2014, Kell wrote that 'networks serve an essential role in rooting global norms, issue platforms and campaigns within a national context, and provide an important base to jump-start local action and awareness'.[45] The GC therefore encourages companies, NGOs, and other actors in specific regions, countries or industrial sectors to group together and collaborate.[46] In individual countries, local networks have been launched to make the GC relevant across various economic, political and cultural circumstances, and to support engagement with signatories. These may be structured differently in various countries. The most active directly engage with corporate stakeholders to promote the GC Principles, effectively acting as members' organizations that run initiatives including CSR seminars, reporting training, and policy roundtables.[47]

Today, many GC initiatives are successfully run by business across numerous countries. In Australia, for instance, the Global Compact Network Australia (GCNA) is a completely business-run initiative. The purpose of GCNA is to 'assist members to integrate and operationalize the ten principles into their core business practices and to support United Nations goals'.[48] It is a busy and dynamic organisation that provides a range of services and organises numerous forums and knowledge-sharing activities

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45 Georg Kell, 'Opinion: Building a Sustainable Future – The Compact Between Business and Society', *Interpress Service News Agency* 2014. Available at: http://www.ipsnews.net/2014/08/opinion-building-a-sustainable-future-the-compact-between-business-and-society/ (accessed 7 February 2015).

46 Oliver F Williams, 'The UN Global Compact: The Challenge and the Promise,' in *Corporate Ethics and Corporate Governance* (New York: Springer, 2007), p.757.

47 UN Global Compact, 'Why Join a Global Compact Local Network?,' Available at: https://www.unglobalcompact.org/engage-locally/about-local-networks (accessed 21 December 2015).

48 Interview with Alice Cope, Executive Manager at UN Global Compact Network Australia, 3 November 2015, Sydney. See also https://www.unglobalcompact.org/engage-locally/oceania/australia (accessed 21 December 2015).

across industries and interest groups.[49] Corporate sustainability leaders representing business heavyweights including Westpac, Rio Tinto, KPMG and law firm Allens-Linklaters all have seats on the GCNA Board, and GCNA corporate members pay a compulsory fee to contribute to the funding of the organisation.[50]

(d) A Continued Evolution

Finally, the GC is a governance mechanism that continues to evolve. Since its inception in 2000, the GC Office has published increasingly sophisticated guidance on how the GC principles should be interpreted and applied. Some guidance now references the newer GPs, which are discussed later in this chapter. For instance, Principle 1, which prescribes that businesses have a moral obligation to refrain from having a negative impact on the enjoyment of human rights, now references the UN Protect, Respect and Remedy Framework (also discussed later in this chapter). This means that the content of Principle 1 is now more developed: businesses are encouraged to 'consider their potential impact on all rights', but also to apply particular consideration in situations where 'the actual or potential impacts are very serious and/or there is a strong connection between the company and the abuse'.[51]

Furthermore, the GC website now sets out a number of factors which may assist businesses to identify the scope of their responsibility. This includes consideration of the state and local context in which they are operating, the actual or potential impact of the business on human rights, and the relationship of the business with other actors, including governments, trade unions, and other non-state actors. The website also advises that companies seeking to determine the content of their obligations should refer to the International Bill of Rights and the ILO core conventions. Finally, businesses are

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49 ibid.

50 ibid. See also https://www.unglobalcompact.org/engage-locally/oceania/australia (accessed 21 December 2015).

51 UN Global Compact, 'Principle One: Human Rights,' Available at: https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1 (accessed 7 April 2016).

encouraged to engage in human rights due diligence, which is understood as 'an ongoing process taken to identify, prevent and mitigate negative human rights impacts' and lists the principal components of 'a comprehensive management approach to human rights'.[52] The GC also provides increasingly detailed guidance in relation to specific concepts that are included in the text of the principles but are difficult to interpret in isolation, such as 'complicity'.[53]

Applying the Legalisation Framework

The following section sets out whether the GC is best categorised as high or low in respect of each of the OPD dimensions, and explains the reasons behind those designations. The introduction hypothesised that efforts in implementation would often be undertaken for the purpose of strengthening one or more other legalisation characteristics over time. In these instances, legalisers are playing a long game. They may accept lower levels of obligation, delegation, and/or precision in the belief that over time these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance. We therefore turn now to assessing the degree of obligation, precision, and delegation inherent in the GC to ascertain whether the hypothesis appears to be true. A similar assessment will be carried out in relation to each of the legalisation initiatives analysed in the current and the subsequent chapter.

Obligation

As previously discussed, the concept of 'obligation' indicates that states (or, in this case, corporations) are legally bound by a rule or commitment. On this basis, the GC is

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52 ibid.

53 Principle 2 of the GC states that businesses should make sure that they are not 'complicit' in human rights abuses. Defining 'complicity', however, is complex and open to interpretation, particular where a company is operating in states where governance is weak. The explanatory note provided for Principle 2 defines complicity as:

1. An act or omission (failure to act) by a company or individual representing a company that 'helps' (facilitates, legitimizes, assists, encourages etc) another, in some way, to carry out a human rights abuse, and;

2. The knowledge by the company that its act or omission could provide such help.

certainly low obligation – it is a completely voluntary initiative. Although corporations that subscribe to the GC are invited to make a clear statement of support, and must include in their annual reports a statement on how the company is internalizing the GC principles within the organization, no corporation can be compelled to sign the GC.[54] Even today the voluntary nature of the GC (and of similar voluntary codes) raises questions regarding the value of the GC as a governance mechanism. To a certain extent, these complaints reflect a broader debate over the virtues and vices of voluntary codes of conduct in addressing the problem of TNCs and serious human rights violations. Critics of voluntary codes argue that they are ineffective and allow unscrupulous companies to claim the public relations benefits of ostensible compliance, even when their behaviour leaves much to be desired. Some critics also add that the GC undermines pressure for binding standards, as it gives legitimacy to a vague initiative when energy would be better invested in developing a mandatory legal framework.

However, advocates for voluntary codes counter that companies are simply unlikely to sign up for codes that include binding legal obligations. Kell recounts that during preparatory meetings with business, trade unions and civil society in 2000, business representatives accepted the 'learning', 'dialogue' and 'partnership project' aspects of the GC, but were adamant that they would only engage with the UN on a voluntary basis.[55] In the case of the GC, the low level of obligation reflects its unique structure in that it directly draws on the (more limited) authority and capabilities of companies rather than states, which are traditionally the most instrumental actors in the design and execution of international laws and regulations.

Second, GC supporters stress that its principles are not intended to replace harder standards, but are meant to act as a complement to other regulatory measures. Kell and

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54 Furthermore, each corporation is obliged to submit a brief description of their report to the GC website. Failing to submit such a report within two years of signing the GC (and subsequently every two years) will result in the company being removed from the list of GC participants: UN Global Compact, 'Global Compact Integrity Measures Policy & FAQ,' Available at: https://www.unglobalcompact.org/library/1831 (accessed 7 April 2016).

55 Kell, 'The Global Compact: Selected Experiences and Reflections' p.71.

Ruggie have been straightforward in their claim that the GC was not designed to be a code of conduct against which corporate performance or compliance should be measured. On the contrary, the GC is a 'framework of reference and dialogue to stimulate best practices and to bring about convergence in corporate practices around universally shared values'.[56]

Third, the adoption of the voluntary model allowed the concept to be taken further faster, especially when compared to the slow-moving process of developing harder law. This is particularly relevant to the issue of implementation. Kell notes that 'the rapid evolution of the Compact stands in stark contrast to the cumbersome task of establishing regulation, and highlights the advantage of voluntary initiatives' flexibility'.[57] Kell also writes that the voluntary nature of the initiative gives the GC a particular quality when compared to other approaches backed by regulation:

> *The OECD Guidelines for Multinational Enterprises, for example, are backed by governments and offer many entry points. Yet in some of the most important economies of the world, the Guidelines are barely known or applied. Similarly, although the ILO has produced nearly 200 conventions, a superficial review of ratifications and implementation reveals the need to improve the effectiveness of those regulations. It is in this context that the Global Compact has been positioned as a complementary tool to explore effective ways of implementing existing norms legitimized by the international community. The real challenge is not designing new regulations, but finding ways to make existing ones effective. The catchword is implementation.*[58]

Ordinarily, it is assumed that a low level of obligation is adopted in order to facilitate agreement amongst states.[59] The GC demonstrates that where corporations are

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56 Georg Kell and John Gerard Ruggie, 'Global Markets and Social Legitimacy: The Case of the 'Global Compact',' *Transnational corporations* 8, no. 3 (1999), p.104.

57 Kell, 'The Global Compact: Selected Experiences and Reflections' p.73.

58 ibid., p.74.

59 Abbott and Snidal, 'Hard and Soft Law in International Governance'.

concerned, the low level of obligation reflects that companies similarly prefer not to be legally bound, and second, that they do not have the authority in any case to make binding international law. This has important implications for how we understand processes of negotiation and agreement unfolding in the context of transnational legalisation. Whether an actor prefers hard or soft regulation may depend not just on the type of obligation they seek, it may also depend on the type of actor they are.

Fourth, the low level of obligation imposed by the GC means that it has 'no official gatekeeper'. Several academics and multiple NGOs complain that the GC is too easy for companies to join.[60] Penelope Simons and Audrey Maklin, for instance, state that 'almost any company can sign on to it and claim whatever reputational benefit accrues from being a member'.[61] It is argued that without external monitoring and established enforcement mechanisms, the GC is 'inadequate at best and, at worst, a "blue washing" mechanism for companies'.[62] Detractors lament that UN symbols should not be co-opted by Nike, Shell, or Rio Tinto: 'the UN logo and the Nike swoosh do not belong together'.[63]

Supporters, however, counter that this is precisely the point: barriers to entry should be kept low in order to encourage as broad participation as possible. According to the GC Office, it does screen participants using a specialised database tailored to identify any concerns in relation to the conduct of those companies. It also makes enquiries of local Global Compact networks.[64] More importantly, however, the emphasis is on being inclusive. This philosophy is perfectly encapsulated in a now well-known incident involving Kofi Annan and Phil Knight, co-founder of Nike Inc. When the two appeared

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60 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.117.

61 ibid.

62 Kell, 'The Global Compact: Selected Experiences and Reflections' p.72.

63 CorpWatch, 'Letters to Kofi Annan Blasting the Global Compact Corporations,' Available at: http://www.corpwatch.org/article.php?id=961 (accessed 6 April 2016).

64 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.117.

together at a Global Compact event, one journalist asked Annan whether he was not 'supping with the devil' by appearing with Knight. With scarcely a moment's hesitation, Annan replied that: 'The angels don't need our help'.[65]

Precision

Precision refers to the degree to which a rule specifies unambiguously what is expected of an actor to whom the rule applies. On one view, the GC principles are disconcertingly vague: each is short and non-specific (although companies are directed to act at least consistently with the International Bill of Rights and the core ILO conventions in interpreting the content of their obligations). Simons and Macklin justifiably protest that the principles are 'couched in permissive language'.[66] Evaristus Oshienobo similarly stresses that the GC does not set 'specific standards to be met by its participants. Rather, it consists of broadly couched criteria and benchmarks, the fine print of which is left to the machinations of participating corporations'.[67]

However, the GC provides more specificity in some areas than others. It does, for instance, provide some guidance to participants with respect to business activity in areas of weak governance. A practice note on the subject states that the corporate obligation to respect human rights is separate from a host state's international obligations, and therefore does not change even when a company operates in a state where the rule of law is weak and human rights obligations are rarely enforced (or perhaps even violated) by the relevant national government.[68] Business entities operating in such locations run

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65 Ruggie, *Just Business*: p.5.

66 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.114.

67 Evaristus Oshionebo, 'The UN Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities,' *Florida Journal of International Law* 19, no. 1 (2007), p.23.

68 United Nations Global Compact Human Rights Working Group, 'Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements: A Good Practice Note', 13 June 2011. Available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/Conflict_of_Laws_GPN.pdf (accessed 6 April 2016).

a higher risk of becoming engaged in human rights abuses, and the GC refers corporations to a UN publication on the responsible conduct of business in such areas.[69]

Although such information is obviously not binding, this publication is a good example of what is becoming an increasingly comprehensive library of guidance available to those corporations that are serious about implementing the principles across company operations. On the GC website, companies can find reports on leadership designed to facilitate advanced performers to reach the next level of sustainability performance;[70] the role of sustainability collaborations and company directors in guiding companies' sustainability efforts;[71] and a Guide for Anti-Corruption Risk Assessment.[72]

This leads to several observations. The diverse nature of business is such that human rights obligations may take on various forms depending on the industry, geographical location, and size and impact of a particular company. It seems unlikely that any rules could be developed at the international level that have a high level of precision if 'precise' means embodying a high level of specificity and clarity applicable to all situations. In these circumstances, the nature of what a 'precise' rule looks like changes – 'precise' may mean that comprehensive guidance is given to assist businesses to implement their human rights obligations as is appropriate to their particular industry. This emphasises one of the main arguments of this chapter: that rule-making in the context of business and human rights might be more successful if the focus is on laying down an achievable framework for implementation rather than agreeing on rules that

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69 UN Global Compact, 'Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors' (New York), 2010.

70 UN Global Compact, 'Blueprint for Corporate Sustainability Leadership within the Global Compact', 2010. Available at: https://www.unglobalcompact.org/docs/issues_doc/lead/Blueprint_english.pdf (accessed 6 April 2016).

71 MIT Sloan Management Review, The Boston Consulting Group, and UN Global Compact, 'Joining Forces: Collaboration and Leadership for Sustainability', January 2015. Available at: (accessed 6 April 2015).

72 UN Global Compact, 'A Guide for Anti-Corruption Risk Assessment', 2013. Available at: https://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/RiskAssessmentGuide.pdf (accessed 7 April 2016).

are clear, precise and detailed from their conception. This is one reason why including an assessment of the characteristic of implementation in any analysis of legalisation is so crucial.

Delegation

Delegation refers to the extent to which states or relevant actors give authority to third parties, including courts, arbitrators and administrative bodies, to implement, administer, and enforce the relevant rules. Certainly, the GC has a very low level of delegation as traditionally conceptualised. No company can be held accountable by an international or domestic court (or similar institution) for violating a principle of the GC. For this reason, critics see the GC as 'another code without accountability, a public relations document without substance',[73] that would benefit from an independent group of monitors with quantifiable and objective measures ready to hand.[74]

Other mechanisms, however, attempt to impose some accountability on GC participants. First, participants are asked to submit a Communication on Progress (COP) within 12 months of signing onto the GC, and then repeat this process each year. Although there is no established form for the COP (which means that there is wide disparity in the comprehensiveness and quality of information available), it must include a statement from the CEO confirming the company's support for the GC, and outline the company's plan of practical steps for implementing the GC principles. Furthermore, the COP may provide an explanation as to why the company has failed to report on particular issues, and the outcomes that the company has achieved.

Where a participant does not submit a COP that meets the minimal requirements, the company is allowed a one-time 12-month grace period to resubmit a conforming COP. If the company fails to do this, it will be designated as non-communicating on the GC website. If the company does not submit a conforming COP within 12 months of being

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73 Williams, 'The UN Global Compact: The Challenge and the Promise,' p.757.

74 S. Prakash Sethi and Donald H Schepers, 'United Nations Global Compact: The Promise–Performance Gap,' *Journal of Business Ethics* 122, no. 2 (2014), p.194.

designated non-communicating, it is expelled from the GC and must reapply to join the initiative.[75] Yet although the GC website provides examples of best practice and reporting templates, the system is not perfect. Simons and Macklin note that:

> *While the reporting requirements and sanctions have increased corporate reporting and transparency, with a large number of COPs now being publicly available on the website, the GC does not have the mandate nor the capacity to review the substance of the COPs. Thus the sanctions regarding the reporting requirements deal with procedural rather than substantive failure.*[76]

Furthermore, it is possible for a company with a poor record in one area – such as labour conditions or environmental impact – to avoid disclosure in relation to those issues by highlighting other areas of corporate citizenship where its performance is exceptional.[77]

A second, albeit weaker, form of accountability was arguably derived from NGOs that made public announcements when they believed GC participants had failed to adhere to its principles. A case in point is a letter written by one group in 2000 criticising the following GC signatories:

- Nike, on the basis that it is 'an international symbol of sweatshops and corporate greed [and] the target of one of the most active global campaigns for corporate accountability' and 'a leader in the race to the bottom';

- Shell, on the basis of its history of complicity in human rights abuses, most prominently in Nigeria;

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75 UN Global Compact, 'Global Compact Integrity Measures Policy & FAQ'.

76 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.117.

77 Williams, 'The UN Global Compact: The Challenge and the Promise,' p.762.

- BP Amoco, on the basis that it continues to search for oil and gas 'even in remote and pristine regions';
- Rio Tinto Plc, on the basis that it is accused of complicity in or direct violations of environmental, labour and human rights in Indonesia, Papua New Guinea, Philippines, Namibia, Madagascar, the United States, and Australia; and
- Novartis, on the basis that it campaigned to force consumers and farmers to accept genetically engineered food, without full testing for potential harms and without full access to information.[78]

The fact that the GC has at times acted as a lightning rod for this type of feedback should be seen as a positive development. If the GC precipitates this kind of public discussion, there is no doubt real value in that function. Notably, despite his frustration with criticisms directed by NGOs against the GC, Kell agrees that civil society has been instrumental in fostering governance mechanisms that protect the integrity of the initiative. In some cases, the actions of NGOs have precipitated the delisting of non-compliant companies from the website and the referral of disputes to alternative resolution mechanisms, including the ILO.[79]

On the other hand, such commentary, even when made public, does not promote – let alone ensure – accountability in any systematic way. Few official investigations automatically follow from complaints made by NGOs. Furthermore, the substance of the complaints highlights one of the most prominent criticisms of the GC: that less-than-stellar participants can and do join it, and that there is little in the way of systematic response possible from the GC Office itself.

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78 CorpWatch, 'Letters to Kofi Annan Blasting the Global Compact Corporations'.

79 Kell, 'The Global Compact: Selected Experiences and Reflections' p.72.

Implementation

For all the reasons discussed above, the GC initiative was innovative from a legalisation perspective. Given that the GC invited such extensive involvement from non-state actors, and was based on principles of consensus-building, networks and norm promotion, it is not surprising that it scores so low in relation to each of the legalisation criteria of obligation, precision, and delegation. However, the GC and its associated local networks continue to flesh out the GC principles by offering increasingly detailed guidance to companies and industry bodies working in particular regions. This suggests that newer legalisation initiatives such as the GC demonstrate that another dimension – other than obligation, delegation, and precision – is required in the legalisation analysis. As argued throughout the thesis, that characteristic is implementation. The GC is an exemplary example of this: inclusion and participation are prioritised, non-state actors are included in a substantive way, and links with neighbouring and supporting regimes are encouraged. Without assessing the successes and failures of the GC in encouraging corporations to implement the principles across business operations, we miss an important aspect of the legalisation story, particularly in the context of non-binding, network-based frameworks that naturally score low on traditional scales in respect of obligation, delegation, and precision. Examining the quality of implementation in the context of initiatives such as the GC generates a far more nuanced analysis of how rules – even imprecise and unenforced ones – are transforming the transnational legal context.

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

The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms) were conceived in 2003 by a Subcommittee working under the UN Commission on Human Rights

(UNCHR). They were the direct result of momentum that had started to build within the UN for a new framework of principles directed towards TNCs following the launch of the GC. Despite new developments in the form of the GC, the OECD Guidelines and ILO Guidelines, many considered that these instruments were insufficient. This group worried that the business-human rights debate had been reduced to a discussion on the advantages and disadvantages of establishing and monitoring codes of conduct.[80] They argued that efforts to stop the human rights abuses, environmental degradation, and intolerable labour conditions caused by corporations would ultimately be compromised without a common, enforceable set of international standards with the capacity to legally bind TNCs.

According to David Kinley and Rachel Chambers, the prospect of the UN approving the first international regulatory framework under which companies could be held liable for human rights abuses sent 'shockwaves' through business communities in Europe, the US, and the rest of the world.[81] Opponents argued that the positive contributions made by corporations in developing states had been overlooked, that industry had not been adequately consulted, and that the framework included provisions that went far beyond existing international human rights standards.

At first glance, the seven-page draft document outlining the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (the Draft Norms) seems rather innocuous.[82] The document was the product of six years' work by the UN Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission), a group of 26 independent experts

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80 David Kinley, Justine Nolan, and Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations,' *Company and Securities Law Journal* 25, no. 1 (2007), pp.30-31.

81 David Kinley and Rachel Chambers, 'The UN Human Rights Norms for corporations: The private implications of public international law,' *Human Rights Law Review* 6, no. 3 (2006), p.448.

82 Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc No.: E/CN.4/Sub.2/2003/12/Rev.2 (2003).

nominated by 26 different governments to contribute in their own personal capacity. Until its last meeting in 2006, the Sub-Commission reported to the UNCHR and was regularly assisted in its work by the Office of the United Nations High Commissioner for Human Rights (OHCHR).[83] In many respects, the Sub-Commission acted as a type of think-tank operating under the more politically-driven UNCHR.

The idea of the Draft Norms was conceived when the Sub-Commission assembled a working group to examine the activities of TNCs.[84] David Weissbrodt, an American legal academic and member of the working group, was entrusted with preparing a draft code of conduct that would apply to TNCs. The first draft was produced in 2000 and formed the basis for public hearings and additional meetings held between 2000 and 2003 that included business representatives, unions, NGOs and academics.[85] Drafts were also published online and in UN publications, so that stakeholders and interested parties could submit comments for consideration by the working party in the re-drafting process.[86]

Even in their preliminary form, the Draft Norms sparked enormous debate when they were approved by the Sub-Commission in August 2003. The International Organisation of Employers (IOE) and the International Chamber of Commerce (ICC) published a joint submission in April 2004 strongly opposed to the Draft Norms (the

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83 UNCHR was comprised of 53 government representatives and was a subsidiary body of the UN Economic and Social Council (ECOSOC) from 1946 to 2006. In March 2006, the UN General Assembly voted to replace UNCHR with the UN Human Rights Council. The final session of the Sub-Commission was held in August 2006, but its work has been continued by UNHRC Advisory Committee: see United Nations, 'Dag Hammarskjöld Library Research Guides,' Available at: http://research.un.org/en/docs/humanrights/charter (accessed 7 April 2016).

84 Sub-Commission on the Promotion and Protection of Human Rights, 'The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations', UN Doc No.: UN Doc. E/CN.4/Sub.2/RES/1998/8 (1998).

85 Sub-Commission on the Promotion and Protection of Human Rights, 'Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN 4/Sub 2/2000/WG 2/WP 1 (2000).

86 David Weissbrodt, 'Business and Human Rights,' *University of Cincinnati Law Review* 74, no. 1 (2005), p.67.

ICC later would later leave the negotiations on the basis that 'the topic of discussion became the shape of the table in the tribunal chamber where companies would be tried'.)[87] Some businesses, however, were more supportive. The Business Leaders Initiative on Human Rights (BLIHR) chaired by Mary Robinson, the former Human Rights Commissioner, launched a project to 'road-test' the Draft Norms involving Novartis, Transco Grid, Body Shop, Barclay's Bank, MTV Europe, Novo Nordisk, ABB, and Hewlett Packard. [88]

Many government representatives expressed concern about opposition from trade unions, a lack of support and involvement from states during the drafting process, and confusion in relation to some of the key concepts set out in the Draft Norms (such as the meaning of a company's 'sphere of influence'). [89] Human rights organisations, on the other hand, were unsurprisingly enthusiastic. Amnesty International and *Forum Menschenrechte* presented a combined list of 84 NGOs that supported the Draft Norms.[90]

As the time for the UNCHR to consider the Draft Norms approached, tensions intensified. Ultimately, the UNCHR resolved that whilst the Draft Norms contained 'useful elements and ideas,' the document had not been requested by the Commission and should have no legal standing.[91] However, the UNCHR also requested that the OHCHR consult with all relevant stakeholders and put together a report analysing the

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87 John Ruggie, 'Remarks delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics', 14 June 2006. Available at: http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf (accessed 7 April 2016).

88 The 12 participating companies were ABB Ltd, Alcan Inc, AREVA, Barclays PLC, Gap Inc, Hewlett Packard Co, MTV Europe Networks, National Grid PLC, Novartis Foundation for Sustainable Development, Novo Nordisk A/S, Statoil ASA and The Body Shop Int PLC.

89 Weissbrodt, 'Business and Human Rights' pp.906-07.

90 Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' p.306.

91 UN Commission on Human Rights, 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights', UN Doc No.: E/CN.4/Dec/2004/116 (20 April 2004).

Draft Norms in the context of existing initiatives and standards on business and human rights. The OHCHR report was released in February 2005.[92]

Soon after, the OHCHR recommended that the UNSG appoint a Special Representative on the issue of human rights and business.[93] This Special Representative was international relations scholar Professor John Ruggie of Harvard University's Kennedy School. As we shall see, Ruggie emerged as one of the Draft Norms' most consistent critics and was eventually responsible for the development of the GPs adopted by UNHRC in 2011. Before discussing the development of the GPs, however, it is important to turn our attention to how the development of the Draft Norms in particular illuminates certain developments in transnational legalization. To do this, we once again assess the extent to which the Draft Norms embody the legalisation characteristics of obligation, precision, delegation, and implementation.

Application of the Legalisation Framework

Obligation

(a) Corporations as direct subjects of international law

First, we turn to obligation. Article 1 of the Draft Norms articulates that states retain the overarching responsibility for human rights protection: '[s]tates have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights'. Crucially, that same paragraph states that human rights obligations also apply directly to TNCs and other business enterprises:

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92 UN Commission on Human Rights, 'Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights', UN Doc No.: E/CN.4/2005/91 (15 February 2005).

93 UN Commission on Human Rights, 'Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises', UN Doc No.: (20 April 2005).

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.[94]

The fact that the Draft Norms were addressed directly to corporations – non-state entities – proved hugely controversial.[95] International law can speak directly to corporations, but only if and when states consent to such law. As John Ruggie pointed out, 'there are no inherent conceptual barriers to States deciding to hold corporations directly responsible [for violations of international law]… by establishing some form of international jurisdiction'.[96] In the absence of state support, endeavouring to make corporations the subject of international law was viewed as highly provocative. Furthermore, many business representatives perceived the move as an attempt to privatise human rights, and an ill-founded and unfair attempt to shift the human rights obligations of states onto entities that are 'neither democratically elected nor qualified to make the sorts of difficult decisions regarding human rights that are required by international law'.[97] Supporters, however, claimed that the Draft Norms principally reflected and restated rights that already existed in UN treaties and the multitude of international instruments listed in the preamble. The right not to be tortured, to be subject to slavery, or to be discriminated against on the basis of race, were familiar and

94 Draft Norms at para.1.

95 The Draft Norms use the duty-bearer (i.e. corporations) as the central organising theme, and this is significant. Most comparable human rights instruments focus instead on a particular set of rights (such as civil or political rights) or a specific type of right violation (such as torture or genocide). The starting point of the Draft Norms is quite different – they identify TNCs and other business enterprises as duty-bearers and then specify a series of particular rights that they should protect: Kinley and Chambers, 'The UN Human Rights Norms for corporations: The private implications of public international law' p.452.

96 John Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

97 Kinley, Nolan, and Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' p.36.

legitimate principles that had gained wide acceptance. Certainly, the Universal Declaration of Human Rights was addressed to all organs of society.

The Sub-Commission also considered that it was important that companies were powerful. With this power, contended some members, must come responsibility.[98] Furthermore, trends in international human rights and humanitarian law suggested that international law would, in the future, be increasingly applied to non-state entities, including individuals and armed opposition groups. As Weissbrodt himself argued:

> *Even the ILO, OECD, and Global Compact guidelines, whilst voluntary, speak directly to business. The Norms take a clear and important step towards applying international standards to all business, and that step seems fully justified. Businesses should not be exempted from human rights responsibilities.*[99]

Finally, supporters argued that when states are unwilling or unable to ensure that corporations do protect fundamental human rights, international law must expand to fill that gap and impose obligations not only on states, but on corporations directly.

(b) Extensive range of human rights obligations

The range of rights covered by the Draft Norms was also a sticking point. In formulating the Draft Norms, the Sub-Commission's working group aimed to identify and set out the human rights obligations considered to be most relevant to companies. The Norms commence with a preamble that directly invokes a range of human rights obligations by reference to long list of international treaties and international instruments.[100] The main body then sets out a series of human rights obligations,

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98 David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights,' *American Journal of International Law* (2003), p.901.

99 Weissbrodt, 'Business and Human Rights' p.70.

100 The instruments listed in the preamble include (but are not limited to) the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and

including equality of opportunity and non-discriminatory treatment; the right to security of persons; labour rights; respect for national sovereignty and human rights, including the prevention of bribery and corruption, and the protection of economic, social, and cultural rights; consumer protection; and environmental protection.[101]

In particular, it was perceived by some as problematic that the Norms articulated responsibilities not yet recognised at the international level by states themselves, including the 'living wage', consumer protection, and broad environmental rights.[102] John Ruggie would later comment that the Draft Norms assumed that not all internationally recognised rights pertained to business but provided 'no principled basis for determining what was in and what was out'.[103] This was not a problem that could be remedied, in Ruggie's view, merely by setting out a more limited list of rights without a theoretical basis for making such a distinction. A shortened list 'in what purports to be a comprehensive and foundational framework' would provide inadequate guidance in practice, particularly as this would have sat uncomfortably with the UN's official position that human rights are indivisible and equal rather than hierarchical.[104]

(c) Definition of TNCs and 'other business entities'

Finally, the scope of the Draft Norms was an issue. Not only did the Draft Norms include one of the most comprehensive definitions of transnational corporation,[105] but

Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the Convention on the Rights of the Child.

101 Draft Norms at paras. 2-14.

102 Draft Norms at paras. 8,13 and 14.

103 Ruggie, *Just Business*: p.49.

104 ibid.

105 Paragraph 20 of the Draft Norms defined a TNC as 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and either taken individually or collectively'. Weissbrodt in fact argued that even this definition was inadequate. For instance, a company may employ only 200 persons in one country, but also own a popular trademark put on shirts by Chinese manufacturers that are distributed to Europe and the US by separate wholesalers.

they purported to apply to TNCs 'and other business entities' to avoid discrimination between national and international enterprises.[106] Given that they directly addressed corporations, engaged an extensive range of rights, and potentially covered an enormous class of actors (including states as well as international and national companies), the Draft Norms rate high on obligation.

Precision

By contrast, the Draft Norms rate low on the precision dimension, with certain specific phrases standing out as particularly vague. For instance, one of the most troublesome concepts in the Draft Norms was the term 'sphere of influence',[107] which was meant to refer to the extent of a company's responsibilities in relation to activities undertaken by third parties in a company's supply chain. Due to its imprecision, using 'sphere of influence' to attribute legal duties to companies was viewed by many as extremely problematic. Although the GC had introduced the concept of 'corporate spheres of influence' as a spatial metaphor to help companies to think about their effects on human rights beyond the workplace, the GC – unlike the Draft Norms – did not aim to impose

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For this reason, argued Weissbrodt, the Norms should apply not only to TNCs but also to national companies and local businesses to the extent that each is responsible for their 'respective spheres of activity and influence'. In Weissbrodt's view, this should ensure that the burden is not overly large on smaller companies and in proportion to their power and responsibilities: Weissbrodt, 'Business and Human Rights' p.66.

106 Article 21 states that 'other business enterprise' includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. That the Draft Norms were deemed to cover non-TNC business entities is interesting in itself. Initially, the working group intended only to develop a code of conduct for TNCs. However, some participants saw the need for the Draft Norms to cover powerful national companies as well. It was emphasised that the Draft Norms would not be focused on small family businesses: Weissbrodt and Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights' p.910.

107 Article 1 states that 'within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law'.

standards on corporations that could result in legal liability.[108] Lawyers noted that in order to be workable, concepts such as ‘sphere of influence’ required further definition and elaboration by reference to legal tests for causation and duty of care as well as general tort, criminal and contract legal principles.[109]

Overall, the absence of precision in the Draft Norms combined with high obligation ultimately proved a serious obstacle to further legalisation. This provides an interesting comparison to the GC. Because the GC rated low on the obligation dimension, the imprecision of the GC actually assisted in the process of legalisation because companies could afford adopt them without fear of legal repercussions. After adoption, participants could then work out how to best implement them in specific industry and national contexts. Conversely, because the Draft Norms rated high on the obligation dimension and imposed strict legal duties, they presented a much higher risk for companies if approved in such a vague form. Consequently, the fact that the Draft Norms were imprecise made them less likely to be further legalised over time.

Delegation

The Draft Norms included a number of potential delegation options, ranging from weak to strong. First, the Draft Norms envisaged that businesses should review their own activities in light of their obligations under the initiative. Second, the Draft Norms anticipated that corporations should incorporate their own internal rules that would be consistent with the Draft Norms. Third, the Draft Norms prescribed that TNCs and other business enterprises would be subject to periodic monitoring and verification ‘by the United Nations, other international and national mechanisms already in existence or yet to be created’. Such monitoring would be ‘transparent, independent, and take

108 Ruggie, *Just Business*: p.49.

109 Kinley, Nolan, and Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' p.37.

into account input from stakeholders (including nongovernmental organizations) and as a result of complaints of violations of these Norms'.[110]

Fourth, the Draft Norms set out that states 'should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises'.[111] Fifth, the Draft Norms envisaged that TNCs and other businesses would 'provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken'.[112] Finally, the Draft Norms stated that in connection with determining damages related to criminal sanctions and in other respects, the Draft Norms should be applied by national courts and/or international tribunals, pursuant to national and international law.[113]

From a delegation perspective, the Draft Norms were therefore highly ambitious. They assumed the existence of sufficient political will for states to agree on international monitoring mechanisms and also anticipated that national governments would construct robust statutory frameworks able to constrain TNCs. Similarly, the Draft Norms directed corporations to provide comprehensive remedies far beyond those already provided for in national or international law. Yet none of these provisions were set out with sufficient specificity to create any meaningful delegation under the Draft Norms. It is significant that the Draft Norms state that monitoring will be carried out by international or national mechanisms 'already in existence or yet to be created'. This illustrates that it was not even clear to the drafters what type of institution would be equipped or should be developed to carry out this role – and this is even before raising

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110 Draft Norms at para. 16.

111 Draft Norms at para. 17.

112 Draft Norms at para. 18.

113 Draft Norms at para. 18.

the question of whether there existed sufficient consensus amongst states to create such institutions. For these reasons, the effective delegation provided in the Draft Norms was low, even though from an aspirational perspective the Draft Norms clearly entailed high delegation embodied in robust legal enforcement measures to be implemented at the national and international levels.

Implementation

The failure of the Draft Norms stemmed at least in part from its lack of emphasis on implementation. The Draft Norms set very high standards, and prescribed that they should be robustly enforced, yet failed to provide any roadmap for how corporations could implement and operationalise the standards in their own company activities. This is a crucial point. It demonstrates that when discussing legalised responses to complex global challenges, there must be a firm focus on the question of implementation. Where governments (or corporations) are not able to see how proposed standards can be made to work – or are of the view that they do not have the time, expertise, or resources to make the rules work – they will be reluctant to support proposed rules, especially if there is a risk of sanctions. The Draft Norms suggest, therefore, that high obligation, low precision, low delegation and low implementation is not conducive to further legalisation.

The UN Guiding Principles

The failure of the Draft Norms compelled those working in the field to think about new ways to move processes of legalisation forward, and perhaps even to consider how implementation could be placed at the heart of such processes. In April 2005, the UN Commission on Human Rights (UNCHR) adopted a resolution requesting that the UNSG appoint an expert on the issue of human rights and TNCs and other business enterprises.[114] The campaign for this resolution was led by the UK and supported by

114 UN Commission on Human UN Commission on Human Rights, 'Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises', UN Doc No.: (20 April 2005).

Argentina, India, Nigeria and the Russian Federation. The involvement of sponsoring states across a range of regions, in addition to the fact that the expert was to be given the status of Special Representative to the Secretary General (SRSG), were deliberate measures adopted to enhance the visibility and legitimacy of the process.[115] The SRSG's original mandate set out five principal tasks:

- Identify and clarify standards of corporate responsibility and accountability for TNCs and other business enterprises with regard to human rights;
- Elaborate on the role of states in effectively regulating and adjudicating the role of TNCs and other business enterprises with regard to human rights, including through international cooperation;
- Research and clarify the implications for TNCs and other business enterprises of concepts such as 'complicity' and 'sphere of influence';
- Develop materials and methodologies for undertaking human rights impact assessments of the activities of TNCs and other business enterprises; and
- Compile a compendium of best practices of states and TNCs and other business enterprises.

Kofi Annan asked Professor John Ruggie of Harvard University to take on the assignment. Annan specifically sought someone with expertise in the area, but who was not a representative of any of the main stakeholder groups.[116] In particular, Ruggie's background as an international relations academic and UN advisor – as opposed to a lawyer – was considered a plus following the criticism the Norms had received for being too legalistic. Ruggie's IR expertise also encouraged him to think 'beyond the legal sphere' and consider the problem from a more systemic perspective:

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115 Norway assumed leadership of the process when UNHRC replaced the UNCHR in 2006. Emphasising the 'importance of working across north-south and east-west political divides', each of the five regional groups (African, Asian, Eastern European, Latin American and Caribbean, Western European and Others) was represented amongst the sponsoring states: Ruggie, *Just Business*: p.xlvii.

116 ibid., p.xix.

[M]any elements of an overall strategy lie beyond the legal sphere altogether. Consequently, the interplay between systems of legal compliance and the broader social dynamics that can contribute to positive change needs to be carefully calibrated. No less of a human rights authority than Amartya Sen warns against viewing rights primarily as 'proto commands' or 'laws in waiting'. Doing so, he argues, would unduly constrict – he actually uses the term 'incarcerate' – the social logics and processes other than law that drive the evolving public recognition of rights.[117]

Ruggie agreed to take on the assignment, but initially had little idea how extensive and consuming the role would become. In his monograph *Just Business,* one senses that Ruggie felt himself to be in unchartered territory with no clear blueprint on how to advance his mandate:

But who was I to be? Was I advocate or diplomat? The independent scholar I had been before or a mediator between companies and people with grievances against them? Who were my allies, and who might the adversaries be? By what means could I overcome the predictable obstacles and perhaps even turn one or two into an advantage? There was no road map or user's manual to guide me.[118]

Ruggie soon found himself in the midst of a storm dominated by stakeholders so polarised over the Draft Norms that 'discussion had come to a virtual halt'.[119] Human rights organizations refused to accept that the Draft Norms initiative had fizzled out, and business groups continued to try to persuade Ruggie that there was no need for a new international framework.[120] Some were suspicious of Ruggie because of his central role in shaping the GC, and they expressed concern that his critique of the Draft Norms was further evidence that he could not exercise his human rights mandate in a way that

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117 John Ruggie, 'Business and Human Rights: the Evolving International Agenda,' *American Journal of International Law* (2007), p.29.

118 Ruggie, *Just Business*: p.xlx.

119 Nicola Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?,' *Netherlands Quarterly of Human Rights* 2(2011), p.159.

120 Ruggie, *Just Business*: pp.xix-xx.

strengthened the work of other UN human rights actors.[121] Another obstacle faced by Ruggie (which is rarely acknowledged in the literature) was the lack of resources allocated to the role at the beginning of the project. At least in the initial phases, Ruggie writes that he had 'no power but persuasion, and virtually no material resources to conduct that mandate other than those I was able to raise myself. To borrow my Kennedy School colleague Joseph Nye's celebrated term, this was "soft power" in its softest form'.[122]

Ruggie started the process by assembling a team of professionals including dozens of volunteers from several countries and the pro bono services of more than two dozen law firms. Funding for this team and the multiple consultations conducted by Ruggie came from governments donating funds as research grants to the Harvard Kennedy School of Government, which was placed in charge of administering the project as a whole.

Drawing on these resources, Ruggie was able to return to the UNHRC in February 2006 with an extensive report that discussed globalization and trends in relation to corporate human rights abuses and responses to those abuses. It also mapped out the legal landscape then governing TNCs, with reference to organisations such as the OECD, the ILO, and the Fair Labour Association, and initiatives such as the Kimberley Process and Voluntary Principles on Security and Human Rights.[123] The Council commended that work, and requested that Ruggie take an extra year to

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121 Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' p.308.

122 The 'special procedures' of UNHRC are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. As of 1 October 2014 there were 39 thematic and 14 country mandates. Thematic mandates address 'major phenomena of human rights violations worldwide'. Special procedures serve in their personal capacity. They are not UN staff members and do not receive financial remuneration for their work. John Ruggie has commented that what is not said 'is that, beyond limited staff support and minimal allowances for travel, these mandates are provided with no resources for their implementation': Ruggie, *Just Business*: p.xlvi.

123 Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

develop concrete recommendations. In his second report, released in February 2007, Ruggie suggested the potential for broad legal and political consensus around issues such as state duties to address corporate involvement in human rights abuses, but remarked that very few states had policies or programs in place to deal with corporate human rights challenges. This report also considered developments in international criminal law, rules governing extraterritorial jurisdiction, the strengths and weaknesses of soft law mechanisms, and self-regulation by corporations.[124]

Reimagining Legalisation?

The only way forward, in Ruggie's view, was to re-frame the debate by starting from the beginning. Crucial to Ruggie's approach was his determination that neither the treaty route nor the voluntary corporate social responsibility approach was likely to address the governance gap on its own. Ruggie's objections to the pursuit of a human rights treaty were largely pragmatic. First, Ruggie argued then (and still argues now) that the foundations for any treaty negotiations simply did not exist for even a simple (let alone comprehensive) legal framework. For Ruggie, the lesson of the Draft Norms was that pressing for too much legalisation too fast might be at best non-effective and at worst counter-productive. While it may seem compelling to argue that there ought to be 'a law, one international law, that binds all business enterprises everywhere under a common set of standards protecting all human rights', for Ruggie it seemed inescapable that efforts to create such a law – both in the 1970s with the Code of Conduct and the 2000s with the Draft Norms – had been complete failures.[125] Scholars including Anita Ramasastry support Ruggie on this point. By drawing a comparison with the adoption

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124 Human Rights Council, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts (Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises)', UN Doc No.: A/HRC/4/035 (9 February 2007).

125 In Ruggie's words, 'not much of a shared knowledge base existed, let alone consensus on desirable international responses. In the past, political coalitions might have formed around the north-south or east-west axis […] But even that possibility no longer existed, thanks to the rapidly rising number of multinationals based in emerging market countries […] which are at least as protective of "their" multinationals as Western home states are of theirs': Ruggie, *Just Business*: p.58.

of the UN Convention Against Corruption (UNCAC), which culminated after thirty years of discussion, Ramasastry shows that treaties have more promise if they are supported by the existence of strong practice and regulation. Ramasastry also says that emerging practice in the business and human rights field suggests that it may be better to develop a series of concrete treaties in particular areas rather than one comprehensive human rights instrument that attempts to cover an enormous range of issues.[126]

Second, Ruggie doubted the practical value of pursuing a human rights treaty as 'such a device is most needed in the countries where it is least likely to be respected'.[127] Imposing additional obligations on governments that only poorly understood their current international obligations therefore did not make much sense.[128] Third, Ruggie expressed concern that when governments are reluctant to be proactive, they might invoke ongoing treaty negotiations as a reason for not taking stronger action.[129] Finally, the amount of time likely to be consumed by treaty negotiations raised a serious ethical issue: how much harm would victims suffer in the meantime? Of preeminent importance to Ruggie was avoiding the mandate becoming 'entrapped in or sidetracked by lengthy intergovernmental negotiations over a legal text'.[130]

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126 Anita Ramasastry, 'Closing the Governance Gap in the Business and Human Rights arena: Lessons from the Anti-Corruption Movement,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, ed. Surya Deva and David Bilchitz (Cambridge: CUP, 2013).

127 'Statistically, the positive effects of treaty ratification tend to be associated with one or more of the following country attributes: it is at least partly democratic; has strong civil society institutions; is relatively secular; has an existing commitment to the rule of law and reasonably well-functioning domestic legal institutions; and the protection of a particular right…is promoted by some external incentive mechanism, such as development assistance or a preferential trade agreement to which the country is a party': Ruggie, *Just Business*: p.61.

128 Ruggie's research also highlighted the imbalance in the energy invested by governments in promoting business as opposed to human rights: 'the responsibility for this issue type is typically lodged in small, mid-level units, usually in foreign offices, occasionally in economic ministries. In contrast, the numerous government entities whose job it is to promote and protect business interests invariably are larger and have considerably greater institutional clout. Typically the two exist in isolation from one another': ibid., pp.59-61.

129 ibid., p.59.

130 ibid.

With these issues in mind, Ruggie sought to rethink how progress could best be made. At the heart of his approach lay the idea of 'principled pragmatism'. In Ruggie's words, this was 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people'.[131]

Constructivism in Action

In certain respects, the story of the development of the Framework and the GPs has been well documented. Nevertheless, Ruggie's background as a constructivist scholar, and the role this played in his thinking remains largely unexplored. Authors are quick to note Ruggie's previous involvement in the UN, his commitment to a positive relationship with business, and his pragmatic resistance to legalism for the sake of legalism. Although his status as a Professor of International Relations at Harvard University is regularly noted, few academics pause to consider the type of international relations scholarship that has captured Ruggie's attention over the years. This is perhaps attributable to the fact that most of the scholarship on the GPs is written from a legal (rather than an IR) perspective. It represents an important omission because Ruggie's response to his mandates is unquestionably coloured by his belief in the value of the constructivist perspective.[132]

Ruggie is widely considered to be one of the most influential political scientists working today. He first came to prominence in the 1980s for his work on 'embedded liberalism', which considered the evolution of the international economic order after World War II.

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131 Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

132 One exception to this general oversight in the literature is a chapter by Tara Melish and Errol Meidinger that reflects on the theoretical underpinnings of the Framework: Tara J Melish and Errol Meidinger, 'Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework,' in *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, ed. Radu Mares (Leiden: Martinus Nijhoff Publishers, 2011).

Importantly, in this work, Ruggie argued that the post-war international economic order rested on a 'grand domestic bargain' that demanded states embrace the change and dislocation associated with international liberalisation in return for taking on new social and economic roles designed to cushion those effects.[133] Seen in this light, Ruggie's promotion of new rules related to business can be perceived as an attempt to forge new understandings that inform and develop the grand domestic bargain established in the post-WWII era.[134]

Ruggie is also strongly associated with the constructivist school of international relations, which promotes the idea that agents and structures are mutually constitutive, that social understandings can be diffused across time and place, and that agents can initiate processes that change social realities. Importantly, constructivism focuses on how communication in the form of debate and persuasion can change social understandings. Viewed from this perspective, it is clear that Ruggie's promotion of the GPs is literally constructivism in action. By applying principles derived from constructivist research regarding how ideational change occurs, Ruggie was able to pursue the task of rule-making in a highly original way.

One constructivist concept that is crucial to understanding the development of the Framework and the GPs is the norm life cycle. Popularised by Martha Finnemore and Kathryn Sikkink, the concept of the norm cycle has been used by a wide range of IR scholars to explain change in various circumstances.[135] The norm life cycle is a three-part process involving norm emergence, a norm cascade, and norm internalization. The first stage starts with a 'norm entrepreneur' who campaigns to change particular norms

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133 John Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order,' *International Organization* 36(1982).

134 John Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection,' in *Taming globalization: frontiers of governance*, ed. David Held and Mathias Koenig-Archibugi (Cambridge: Polity Press, 2003).

135 See, for instance Nina Tannenwald, *The Nuclear Taboo: the United States and the Non-Use of Nuclear Weapons since 1945* (Cambridge: CUP, 2007); Richard MacKay Price, *The Chemical Weapons Taboo* (New York: Cornell University Press, 1997).

from a specific organizational platform (e.g. in the case of the GPs, the relevant platform is the UN). Norm entrepreneurs may be individuals, states or other societal actors. As Finnemore and Sikkink argue '[n]orms do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behaviour in their community'.[136] Successful norm entrepreneurs must frame the relevant issue in a way that it appeals to its audience of individuals, states, international organisations, and other non-state institutions. If a norm entrepreneur is effective in presenting the case to the broader public, states may begin to adopt these norms for domestic political reasons or due to international pressure (or a combination of the two).

Once a critical mass of states adopts the norm, a 'tipping point' is reached, which represents the transition into the second stage of the 'norm cascade'. At this stage, the norm is often clarified in international law, defined within international organizations, and reflected within foreign/domestic policies. States will adopt the norm for three main reasons: (1) to enhance domestic legitimacy; (2) in order to conform; and (3) to promote esteem and avoid being shamed in the international community. At the same time, professionals aim to codify the norms and continue to press for increased compliance. Eventually the norms become so ingrained that they are not even noticed. This third stage represents the process of internalization, when the norm is no longer seen as new and has become widely accepted. At this point, the norm may have a 'taken for granted' quality.

One point of contestation in the constructivist literature concerns why particular norms resonate more than others. Successful norms must 'rise to the top' in a competitive normative environment. Identifying what makes some norms resonate more than others is one of the most important tasks on the constructivist agenda. There are a number of purported reasons why norms succeed including:

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136 Finnemore and Sikkink, 'International Norm Dynamics and Political Change'.

- Legitimacy – states may be more likely to adopt norms if their domestic legitimacy is fragile;[137]

- Power – norms held by prominent states (e.g. powerful states, war victors) may be more likely to spread (e.g. liberalism, capitalism in the post-Cold War era);[138]

- Inherent values – norms may prove more resonant if they embody values that appeal cross-culturally, such as individualism, universality, or equality of opportunity. Norms may also be more likely to be internalised if they promote the prevention of bodily harm or injury to vulnerable groups;[139] or

- Adjacency – norms may be more likely to 'stick' if they are similar to an existing norm (or are somehow derivable from it).[140]

Although it is beyond the scope of this thesis to systematically examine these claims, these characteristics suggest why strong norms that support corporate accountability for human rights violations have been slow to emerge. Two of the proposed factors listed above – power and inherent values – are most relevant in this context. The strongest actors in the system (which traditionally include developed states and their corporate nationals) have consistently fought to inhibit the development of such principles. On the other side, civil society activists and victims' groups (in earlier days, the governments of developing countries would have joined this side as well) have regularly, if with varying degrees of effectiveness, reminded the global community that a norm against corporate human rights violations is consistent with inherent values of individualism, universality, legal equality of opportunity and opposition to bodily harm (particularly where vulnerable groups are involved).

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137 ibid., p.903.

138 G John Ikenberry and Charles A Kupchan, 'Socialization and hegemonic power,' *International Organization* 44, no. 03 (1990).

139 Margaret E Keck and Kathryn Sikkink, *Activists beyond borders: Advocacy networks in international politics* (Cambridge: CUP, 1998).

140 Robert Sugden, 'Spontaneous order,' *The Journal of Economic Perspectives* 3, no. 4 (1989), p.93.

In the absence of other factors, norms forcefully opposed by powerful actors are unlikely to succeed. However, discussions around TNCs and human rights violations have never completely dropped off the agenda since the 1970s. This is because despite opposition from powerful actors, and notwithstanding the complexities of taking practical action, many individuals are inherently sceptical about accepting corporate impunity as a necessary if uncomfortable aspect of participating in the global marketplace. Furthermore, and as this chapter demonstrates, it is not simply the content of the norm that makes it more or less likely to succeed. The *process* of how one argues for normative change matters just as much as the characteristics or content of the norm in question. Ruggie hoped that by embedding constitutive rules in corporate culture, 'a rule-based "logic of appropriateness" may […] come to supplant a rational interest-based "logic of consequences" as the direct driver of policy action'.[141] In Ruggie's view, progress would rely on finding ways to 'make respecting human rights an integral part of business – that is, just making it standard business practice'. When he refers to 'just making it standard business practice', Ruggie is in fact referring to the endpoint of the norm life cycle, or norm internalisation.

Committing 'Normicide'

In his own words, Ruggie's first official act was to 'commit Normicide'.[142] The purpose of this move was clear: norm promotion occurs in a competitive normative space, and Ruggie knew that his principles would be more likely to succeed if they were not competing with the Draft Norms. In his first report to the UNCHR, Ruggie stated that the Draft Norms initiative had become 'engulfed by its own doctrinal excesses' and complained that 'its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other

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141 Melish and Meidinger, 'Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework,' p.307.

142 Ruggie, *Just Business*: p.158.

impartial observers'.[143] In no uncertain terms, Ruggie described the Draft Norms as a 'train wreck':

> *The creation of the Special Representative post came about as a result of a train wreck in Geneva. It was an outgrowth of an effort by the Sub-Commission for Human Rights to draft what was intended ultimately as a legal code, called the Norms, regulating the human rights impact of multinational corporations…This endeavor produced a train wreck because much of the business community was vehemently opposed to it, as were many governments.*[144]

Ruggie believed that the Draft Norms suffered from a fundamental problem in that they purported to merely restate international legal principles as they might apply to business, and then attempted to make them binding on corporations under international law. Ruggie correctly argued that these two positions were inconsistent because, with the possible exceptions of some internationally recognised crimes attributable to non-state entities (such as war crimes and crimes against humanity), it is not generally accepted that international legal principles can bind corporations. As Ruggie states, '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'. Although Ruggie acknowledges the potential desirability of corporations bearing direct responsibility under international law (especially where host governments fail to fulfil their own obligations), he correctly argues that the absence of consensus and positive action from states demonstrates that international law has not arrived yet at this point. Ruggie states that there are no 'inherent conceptual barriers' to states deciding that corporations should be held directly liable for violations, either by the extraterritorial application of domestic law to their corporate citizens, or through the

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[143] Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

[144] Ruggie, 'Remarks delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics'.

establishment of some kind of international jurisdiction that would apply to relevant cases. However, says Ruggie, 'these are not propositions about established law; they are normative commitments and policy preferences about what the law should become and that require State action for them to take effect'.[145]

Ruggie also drew attention to what he called the Draft Norms' 'imprecision' in allocating human rights responsibilities between states and corporations.[146] According to Ruggie, the Draft Norms allowed no principled basis for differentiation based on the distinct social roles played by governments and business. In particular, Ruggie objected to the fact that in some cases, the Draft Norms effectively imposed higher obligations on corporations than on states by incorporating international instruments that not all states had ratified (or had ratified only to a limited extent).[147] Furthermore, the Draft Norms purported to create binding obligations, but then included the 'sphere of influence' test (originally used in the non-binding GC), which was insufficiently specific to pass a legal liability test.[148]

In practice, had the Draft Norms been approved, their application would have completely depended on the respective capacities of states and corporations in specific situations. Where states had no capacity to fulfil their responsibilities, these would be transferred to corporations. This prospect was, according to Ruggie, 'deeply troubling':

> *The issue is not simply one of fairness to companies or of inviting endless strategic gaming by States and companies alike. Far more profound is the fact that corporations are not democratic public interest institutions and that making them, in effect, co-equal duty*

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145 Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

146 Ruggie argues that the Norms effectively mischaracterised corporations by not taking account the specialised role that corporations play in society: 'By their very nature…corporations do not have a general role in relation to human rights as do States; they have a specialised one': ibid., para.66.

147 ibid.

148 ibid., para.67.

bearers for the broad spectrum of human rights – and for 'the obligation to promote, secure the fulfilment of, respect, ensure respect and protect' those rights, as the General Obligations of the Norms put it – may undermine efforts to build indigenous social capacity and to make Governments more responsible to their own citizenry.[149]

As we shall see, Ruggie's approach and his perception of the Norms directly impacted upon the subsequent Framework and GPs. Ruggie sought clarity regarding how the responsibilities of states and corporations should be divided, and rejected the position that the best way to achieve change was through the imposition of rules from above.

A New Framing Device: The Protect, Respect and Remedy Framework

Invoking imagery reminiscent of a norm cascade, Ruggie has spoken of how he sought a 'model of widely distributed efforts and cumulative change'.[150] However, he also felt that 'for such efforts to cohere and become mutually reinforcing they require[d] an authoritative focal point that the relevant actors can rally around'.[151] Providing that focal point therefore became Ruggie's objective. Ruggie envisaged that new rules needed to leverage what he perceived as the three governance spheres affecting corporations:

- Public governance (this includes legislation and regulation, judicial and non-judicial redress, international law and institutions);
- Civil governance (social compliance mechanisms, civil campaigns and law suits); and

149 ibid., para.68.

150 Ruggie, *Just Business*: p.xliii.

151 ibid.

- Corporate governance (which acknowledges the existence of separate legal personality and limited liability, and integrates operations and risk management systems).[152]

Ruggie sought to develop a framing device that would align these interests. His 2008 Report submitted to UNHRC put forward only one recommendation – that the Council support a new Protect, Respect, and Remedy framework (the Framework). The structure of the Framework reflected the fact that Ruggie believed what was required did not include ‘a shopping list of items’ but instead ‘a foundation on which thinking and action could build’.[153]

The Framework consisted of three core pillars:

- The state duty to protect against human rights abuses by third parties (including businesses) through appropriate policies, regulation, and adjudication;

- An independent corporate responsibility to protect human rights, meaning that business enterprises should act with due diligence to avoid infringing upon the rights of others and address adverse impacts with which they are involved; and

- Greater access by victims to effective remedy, including judicial and non-judicial remedies.[154]

On 18 June 2008, UNHRC unanimously ‘welcomed’ the Framework proposed by Ruggie. Stakeholders also voiced their support. The IOE, the ICC, and the Business and Industry Advisory Committee to the OECD (BIAC) jointly acknowledged that Ruggie’s report had ‘significantly advanced the debate on business and human

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152 Ruggie, 'UCL Centre for Ethics & Law Annual Lecture: Embedding Global Markets: Lessons from Business & Human Rights'.

153 Ruggie, *Just Business*: p.xlviii.

154 Human Rights Council, 'Protect, respect and remedy: A framework for business and human rights (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie)', UN Doc No.: A/HRC/8/5 (7 April 2008).

rights'.[155] NGOs including Amnesty International, Human Rights Watch, and Oxfam International issued a statement that recognised the value of the Framework but also insisted that more should be done to identify appropriate solutions.[156]

The Council renewed Ruggie's mandate for a period of three years (until June 2011) to allow him to return with practical recommendations for operationalizing the Framework.[157] This new resolution requested that Ruggie:

- Provide views and recommendations on ways to strengthen the fulfillment of the duty of the state to protect all human rights from abuses by TNCs and other business enterprises, including through international cooperation;
- Elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;
- Explore options and make recommendations, at the national, regional and international levels, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;
- Integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;
- Liaise closely with the efforts of the human rights working group of the GC in order to identify, exchange and promote best practices and lessons learned on the issue of TNCs and other business enterprises;

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155 'Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third report of the Special Representative of the UN Secretary-General on Business and Human Rights', Available at: http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf (accessed 7 April 2016).

156 Human Rights Watch, 'Joint NGO Statement to the Eighth Session of the Human Rights Council', 19 May 2009. Available at: https://www.hrw.org/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council (accessed 6 April 2016).

157 Human Rights Council, 'Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', UN Doc No.: A/HRC/RES/8/7 (18 June 2008).

- Work in close coordination with the UN and other relevant international bodies, offices, departments and specialized agencies, and in particular with other special procedures of the Council;
- Continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including states, national human rights institutions, international and regional organizations, TNCs and other business enterprises, and civil society, including academics, employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations, including through joint meetings; and
- Report annually to the Council and the UN General Assembly.[158]

The UN Guiding Principles

Ruggie subsequently produced the 31 Guiding Principles on Business and Human Rights (GPs), which were unanimously endorsed by UNHRC on 16 June 2011.[159] The purpose of the GPs was to provide practical advice to governments, corporations and other institutions on how individuals and communities could be protected from the potentially adverse effects of business.

Reflecting on the failures of the treaty process, Ruggie decided that he and his team would draft the GPs, rather than making them the subject of government negotiations. Presenting the GPs to UNHRC was a high-risk moment:

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158 In discussion, several countries identified issues of particular interest. Malaysia sought a clearer definition at the international level of what is considered responsible corporate behaviour, Pakistan highlighted the need for more detailed studies of the impact of foreign and national direct investments on poverty reduction efforts, and the importance of ensuring that NGOs did not compromise the competitiveness of small and medium size enterprises, whilst France encouraged the SRSG to take measures that would assist with the identification of grievous human rights violations and ensure voices of the victims were heard: Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' p.309.

159 Human Rights Council, 'Human rights and transnational corporations and other business enterprises ', UN Doc No.: A/HRC/RES/17/4 (6 July 2011).

When I formally presented the Guiding Principles to the Human Rights Council and asked for its endorsement, the Algerian ambassador took the floor to say that governments could not endorse a normative text that they did not negotiate themselves. Instead, he proposed submitting the Guiding Principles to an intergovernmental process for 'further examination and enrichment' – diplomat-speak for killing the initiative. I responded, with uncharacteristic passion, that I was old enough to have witnessed the collapse of repeated efforts by governments to negotiate UN codes of conduct for multinational corporations going back to the 1970s, some of which I knew the ambassador had been involved in earlier in his career. All had failed, I reminded the Council, because governments could not reach consensus. Here, I said, you have an instrument that you could never have negotiated yourselves, given the diverse and conflicting interests at stake. All stakeholder groups support it. So seize the opportunity, I urged. Endorse it, and then move on. They did.[160]

For Ruggie, this incident highlighted the extent to which states, with all of their attendant political obligations to respective lobby groups at home, face significant obstacles in arriving at realistic compromises. The passage of the GPs marked the first time that either the UNHRC or its predecessor endorsed a normative text on any subject that governments had not negotiated themselves.

Summary 2: The UN Guiding Principles

In order to understand the range of areas and issues affected by the GPs, it is important to present a brief summary of them. The GPs are based on the Framework delivered in 2008, which is, as noted above, constituted by three pillars including the state duty to protect against human rights abuses, the corporate responsibility to protect human rights, and access by victims to effective remedy.

A Summary of the UN Guiding Principles

The State Duty to Protect Human Rights

[160] Ruggie, *Just Business*: p.xlix.

According to the GPs, states are obliged under international law to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises (GP1). States should also clearly set out the expectation that businesses domiciled in their territory should respect human rights throughout their operations, even when working overseas (GP2).[161] States are similarly urged to enforce domestic human rights laws, to periodically to assess the adequacy of such laws and address any gaps, to ensure that related law and policy (such as corporate law) develops in a way that enables business to respect human rights, and to provide effective guidance to business on how to respect human rights throughout their operations and communicate their human rights impact (GP3). States are encouraged to take additional steps to protect against human rights abuses by business enterprises that are owned, controlled, or receive substantial support from the state (GP4), should exercise oversight when they contract with businesses that impact upon the enjoyment of human rights (GP5), and should promote respect for human rights through the business enterprises with which they have commercial transactions (GP6). In conflict-afflicted areas, where the risk of gross human rights abuses is higher, states should engage with and assist businesses to identify, address, and prevent human rights abuses. States should also deny state support to corporations involved in gross violations of human rights (GP7). Policy coherence is also stressed – states should ensure that all government departments and agencies are aware of and observe the state's human rights obligations (GP8). States should also maintain sufficient domestic 'policy space' in contracting and treaty negotiations with other businesses and states (GP9).[162] Acting as members of multilateral institutions, states are urged to draw on the GPs to advance international cooperation in the area of business and human rights, to ensure that the institutions do not

[161] The GPs have been criticised by some for 'side-stepping' the issue of extraterritoriality by avoiding legal language that would compel states to take a more active role in regulating the overseas conduct of their corporate nationals: Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' become 'Duties': the Extraterritorial Obligations of States that Bind Corporations,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, ed. Surya Deva and David Bilchitz (Cambridge: CUB, 2013).

[162] This attempts to address the situation where economic agreements – including bilateral investment treaties, free trade agreements or contracts for investment projects – affect the domestic policy space of governments. For instance, the terms of international investment agreements may constrain states from fully implementing new human rights legislation or put them at risk of binding international arbitration if they do so. GP9 therefore urges states to retain the regulatory ability to protect human rights under the terms of such agreements at the same time as they provide adequate protection for investors.

restrain the ability of states to protect or corporations to respect human rights, and encourage institutions to assist states and corporations to fulfill their respective duties to protect and respect human rights (GP10).

The Corporate Responsibility to Respect Human Rights

Businesses enterprises should respect human rights, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved (GP11). This responsibility refers to internationally recognised human rights, understood at a minimum as those expressed in the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work (GP12). The commentary to GP12 highlights that because 'business enterprises can have an impact on virtually the entire spectrum of internationally recognised rights, their responsibility to respect applies to all such rights'.[163] Businesses should also avoid causing or contributing to adverse human rights impacts through their own activities (and address such impacts where they occur). In addition, businesses should seek to prevent and mitigate adverse human rights impacts that are directly linked to their operations by their business relationships (GP13). Notably, the responsibility to respect applies to all enterprises regardless of their size, sector, operational context, ownership and structure, although the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impact (GP14). Appropriate to their size and circumstances, businesses should have in place policies including a policy commitment to respect human rights, a human rights due diligence process, and processes that enable remediation of any adverse human rights impacts caused or contributed to by the business (GP15). The policy commitment should be approved at the most senior level of the business, publicly available and communicated internally and externally, and reflected in operational policies and procedures (GP16). Human rights due diligence should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how those impacts are addressed (GP17). Businesses should also identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships (GP18), and should integrate the findings

[163] GP12, Commentary.

from their impact assessments across relevant internal functions and processes, and take appropriate action (GP19). The effectiveness of responses to adverse human rights impacts should also be tracked (GP20) and communicated externally (GP21). Where businesses identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes (GP22). Wherever they operate, businesses should seek to comply with all applicable laws and respect internationally recognised human rights, seek ways to honour the principles of internationally recognised human rights when faced with conflicting requirements, and treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue (GP 23). Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where a delayed response would make them irremediable (GP24).

Access to Remedy

As part of their duty to protect against business-related human rights abuse, states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy (GP25). States should also take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy (GP26). States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive state-based system for the remedy of business-related human rights abuse (GP27). States should consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms (GP28). Businesses should establish or participate in effective operational-level grievance mechanisms for individuals and communities that may be adversely impacted (GP29). Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available (GP30). Non-judicial mechanisms, both state-based and non-state-based, should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning. Operational-level mechanisms should also be based on engagement and dialogue (GP31).

Application of the Legalisation Framework

Obligation

In determining whether the GPs rank high or low in respect of each of the legalisation characteristics, we turn first to obligation. As the GPs impose different obligations on states and corporations, these are examined separately. Ruggie explicitly created a framework in which states and corporations have independent roles to play. The language used is significant: under the first pillar, states have a 'duty to protect' (where 'duty' implies a legal obligation); under the second, companies have a 'responsibility to respect' (where 'responsibility implies a social obligation).

(a) On states

States are urged to establish an appropriate human rights law framework and means of judicial remedy, but are also encouraged to thoroughly examine a range of policies from corporate law to bilateral investment treaties. In particular, the GPs urge states to play a practical role guiding and assisting corporate nationals with overseas operations. Home states should, according to the GPs, 'set out clearly the expectation' that national business enterprises 'respect human rights throughout their operations'.[164]

There is a real emphasis by Ruggie on implementation here; one senses that underlying the GPs is an awareness that the difficulties associated with regulating corporate nationals do not always reflect problems with the law, but are often related to resources and focus. Whereas most governments have a range of departments dedicated to promoting the business activities of their corporate nationals overseas, few have specific institutions or groups focused on assisting those corporate nationals to be human rights compliant in their overseas operations. This is a good illustration of the genuine practicality that imbues the GPs in a way that is uncommon in many UN-drafted documents.

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164 GP2.

However, Ruggie has faced strong criticism for not pushing his concept of state duty far enough. Nicola Jagers, for instance, complains that the language of obligation under the first pillar is weakened by the frequent use of soft and non-legal terms, such as 'encourage' and 'where appropriate' (except where the GPs relate to gross human rights violations in conflict-affected areas).[165] Furthermore, questions still remain in relation to the scope of the state's duties in a range of circumstances: where, for instance, an enterprise is owned by the state, traditionally-public services are privatised, or the state is involved in public-private initiatives. Similarly, the precise nature of the state's duty when involved in international arbitration or the negotiation of investment agreements remains unclear.

In particular, Ruggie's treatment of the extraterritorial regulation of corporate nationals working overseas comes under fire. The GPs adopt the more conservative legal position that 'at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory/jurisdiction'.[166] Jagers contends that this position is legally incorrect, and that a solid argument can be made that states have a legal duty to regulate their corporate nationals overseas when it comes to serious violations of human rights.[167] However, it remains a fact that however normatively desirable this position, it is not one that is presently adopted by most states. If it were, it would be reflected in custom or be the subject of a treaty amongst states (and governments could certainly agree to such a treaty if they chose to do so).

Ruggie's treatment of extraterritoriality is therefore a good example of how he chose to keep obligation low by adopting a more conservative position in order to ensure widespread support. This clearly illustrates how Ruggie imagines legalisation is best

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165 Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?' p.161.

166 GP2, Commentary.

167 See, for instance, McCorquodale and Simmons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law'.

pushed forward. Rather than raising the bar by creating new or expanded legal obligations, Ruggie decided to clearly elucidate the existing principles and, in doing so, secured increased buy-in from potentially reluctant stakeholders. He assumed that by creating consensus and momentum around general and non-controversial standards, a firm foundation would be created that is conducive to further and more specific legalisation down the track.

(b) On corporations

A social (not legal) obligation

One of the most interesting aspects of the GPs is the corporate responsibility to respect (R2R). As noted above, the language used by the SRSG is significant. Companies do not have any binding obligations; instead they have 'responsibilities' that derive from social expectations. Once again, Ruggie's constructivist credentials are clearly evident in his construction of the corporate responsibility as a product of social norms.

This approach as been fairly criticised by some scholars as a rather minimalist take on the issue of corporate responsibility for human rights. The SRSG is accused of having chosen language that is weak, non-authoritative, and dilutes the human rights obligations of business through the employment of terms such as 'responsibility' rather than 'duty,' and human rights 'impact' rather than 'violation'.[168] It is allegedly language that 'closes the door to developments that can be detected trending towards more direct applicability of human rights obligations to corporations'.[169]

Second, the concept of 'social expectations' is a potentially fragile and nebulous, making it challenging to ground the corporate responsibility to respect in a shifting legal landscape. Bilchitz, for instance, argues that the SRSG's decision to reject law as a

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168 Surya Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, ed. Surya Deva and David Bilchitz (2013), p.80.

169 Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?' p.161.

source of binding normativity was an error: firstly, because binding obligations for corporations can be derived by implication from international human rights law; and second, because in basing the corporate responsibility to respect on social expectations, the SRSG fails to engage with the moral normative foundation of human rights.[170] Ruggie would counter that he didn't invent the law on this point: under international law, corporations do not have direct duties that legally oblige them to respect human rights. The obligation of corporations is a social one, and is conceptualised in the GPs to represent what people expect from companies in the course of their business activities.[171]

Finally, Justine Nolan criticises the weakness of the obligation in her argument that the SRSG prized 'dialogue and consensus over ambition'.[172] In circumstances where Ruggie could have pushed for stronger obligation for corporations, the SRSG opted to keep the bar lower in order to secure the support of corporate stakeholders. However, this is a point that perhaps Ruggie would be happy to concede, or at least he might argue that the ambition lay in the achievement of consensus, rather than setting the legal bar as high as possible (arguably a failure of the Draft Norms). Certainly, one of the reasons that the SRSG was successful in achieving the level of support that he did was because he strategically used language that would appeal to the business community. As opposed to emphasizing duties based in international human rights law, Ruggie linked corporate non-compliance with economic risk and possible disgrace in the eyes of the public. As discussed further below, due diligence was deliberately construed as a method of fulfilling the corporate responsibility because it is a concept familiar to companies. Even critics have conceded that Ruggie's approach was 'perhaps understandable in light of the deadlock that followed' the rejection of the Draft Norms,

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170 David Bilchitz, 'A Chasm between "is" and "ought"?: A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, ed. Surya Deva and David Bilchitz (Cambridge: CUP, 2013).

171 Interview with John Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, HKS, 24 February 2015, London.

172 Justine Nolan, 'The Corporate Responsibility to Respect Rights: Soft Law or Not Law?,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, ed. Surya Deva and David Bilchitz (Cambridge: CUP, 2013), p.161.

even as they lament that 'the outright dismissal of the notion of corporate duties is regrettable'.[173]

A negative responsibility

To discharge their responsibility to respect, corporations are required to complete a number of steps. First, they should adopt a 'policy commitment to meet their responsibility to respect human rights', conduct a due diligence enquiry 'to identify, prevent, mitigate and account for how they address their impacts on human rights,' and have in place processes 'to enable the remediation of any adverse human rights impacts they cause or to which they contribute'.[174]

These steps reflect the fact that R2R embodies the do-no-harm principle: companies have the responsibility to, first, become aware of, and second, to prevent or remedy adverse human rights impacts. But although companies are urged not to infringe human rights, they do not have any positive responsibility to assist in the realization of human rights. Companies have a responsibility to 'know and show' that they are aware of potential human rights violations, and that they have taken steps to prevent or remedy adverse human rights impacts.

The 'knowing and showing' principle is operationalised through the performance of human rights due diligence.[175] The R2R covers both direct and indirect impacts, including impacts that are linked to an enterprise's operations, products, services or through their business relationships 'even if they have not contributed to those impacts'.[176] According to some, there is a lack of clarity regarding the extent to which companies have a duty to conduct due diligence in connection to activities within the supply chain or under the control of subsidiaries. This ambiguity has been criticised as

173 ibid., p.160.

174 GP15.

175 Ruggie, *Just Business*: p.113.

176 GP13.

being 'consistent with the general approach adopted by the SRSG to bypass contentious issues'.[177] Some warn that in light of the centrality of the principle of limited liability, R2R is 'likely to be reduced to an entirely voluntary notion, the implementation of which will utterly depend on the willingness of the company involved'.[178]

On the other hand, Michael Addo argues that the responsibility to respect does indeed oblige parent companies to become aware of human rights impacts caused by the operations of their subsidiaries and undertake action to prevent or remedy abuses. This is consistent with the emerging position under UK law.[179] Furthermore, it is promising that the UK has recently passed the *Modern Slavery Act 2015*, which requires certain businesses to produce a statement setting out the steps they have taken to ensure there is no modern slavery in their business and supply chains.[180]

Importantly, corporations are not able to compensate for human rights in one area through philanthropy in others: 'because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere'.[181] Furthermore, R2R applies to all business enterprises, with the responsibility for a particular corporation commensurate with the size of the business and its ability to impact upon human rights.

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177 David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: a Critical Framework for the Future,' in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, ed. David Bilchitz and Surya Deva (Cambridge: CUP, 2013), p.16.

178 Jägers, 'UN Guiding Principles on Business and Human Rights: Making Headway towards Real Corporate Accountability?' p.162.

179 See discussion of developments in UK law in Chapter 3.

180 Under this legislation, every organisation conducting a business in the UK with a total annual turnover of £36 million or more is required to produce a slavery and human trafficking statement for each financial year of the organisation: UK Home Office, 'Transparency in Supply Chains: A practical guide' (London), 2015.

181 Human Rights Council, 'Protect, respect and remedy: A framework for business and human rights (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie)', UN Doc No.: A/HRC/8/5 (7 April 2008).

In summary, the degree of obligation exerted by the GPs on companies is low. However, what is inventive about the GPs is that they encourage stronger obligation not by setting higher standards, but by specifying precisely *how* companies can comply. Once again, practicality and implementation are key. Placing human rights due diligence at the heart of the GPs, for instance, is a revolutionary innovation. Companies that can demonstrate that they have systematically carried out procedures to check all aspects of their operations for human rights violations will generally be able to demonstrate that they have complied with the GPs. Similarly, this represents an excellent example of the extent to which Ruggie considers implementation is crucial: companies obviously want to know what their legal obligations are, but they also want to be instructed in the steps that they can take to discharge those obligations.

This represents a crucial benefit to corporations for two reasons. First, it clearly delimits the extent of corporate responsibility, and shows corporations how they can discharge their responsibilities. Second, it means that complying with the GPs becomes a matter of 'risk management' rather than an issue of human rights compliance or corporate social responsibility. The importance of this shift cannot be overstated – boards that might eschew spending the company's resources investing in nebulous human rights issues are much more likely to be supportive if the issue is framed as one of risk management. Company managers are familiar with the concept of risk management and the due diligence tools regularly used by companies and their legal advisors in this context.

In addition, these legal advisors are well-practised in carrying out due diligence designed to provide a detailed profile on specific corporate entities involved in their clients' affairs. Adding a human rights dimension to these due diligence processes is therefore achievable. Furthermore, as previously mentioned, the fact that corporate lawyers are involved adds an additional networking effect: law firms keen to pick up human rights due diligence work (a potentially lucrative area with high prospects for growth) are likely to inform corporate clients about the existence of the GPs and the steps required to achieve compliance.

Precision

In terms of precision, the GPs are drafted broadly but also aim to provide recommendations that are as concrete as possible. Several concepts, however, remain ambiguous. One potentially problematic point, for example, concerns the scope of the corporate responsibility to respect. In defining the R2R, Ruggie refers to international instruments including the International Bill of Rights and the ILO's Declaration on Fundamental Principles and Rights at Work, which were originally drafted to delineate the duties of states. Although it is possible to interpret the general obligations contained within these instruments and apply these to corporations, this requires a level of interpretation that sits oddly with the purpose of drafting principles sufficiently concrete to guide the actions of TNCs.[182]

Nevertheless, despite some conceptual ambiguities, the GPs are similar to the GC in that they continue to be elaborated in real time as relevant UN bodies and Shift (a non-government body designed to roll out the GPs and provide advisory services to governments and corporations) publish more detail in the form of additional reports and guidance. For instance, Shift has recently released publications entitled: 'Embedding the Corporate Responsibility to Respect Human Rights within Company Culture', 'Human Rights Due Diligence in High Risk Circumstances: Practical Strategies for Business', and 'Evidence of Corporate Disclosure relevant to the UN Guiding Principles'.[183] Shift has also worked with relevant professional organisations to encourage them to publish industry-specific information. Most recently, the International Bar Association (with Shift's assistance) published guidance for bar associations and business lawyers on the

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182 Bilchitz and Deva, 'The Human Rights Obligations of Business: a Critical Framework for the Future,' p.17.

183 Shift, 'Human Rights Due Diligence in High Risk Circumstances' (New York: Shift), March 2015; Shift, 'Evidence of Corporate Disclosure relevant to the UN Guiding Principles on Business and Human Rights' (New York: Shift), May 2014; Shift, 'Respecting Human Rights Through Global Supply Chains'.

implementation of the GPs.[184] These developments reflect the dynamic and progressive nature of transnational legalisation, reinforce the importance of non-state actors, and illustrate that precision may increase over time as legalisation progresses.

Delegation

In the area of remedy, the GPs reinforce the importance of state-based institutions. Governments must take appropriate steps to ensure that those affected by abuses within their territory/jurisdiction have access to remedy through 'judicial, administrative, legislative or other appropriate means'.[185] However, the GPs obviously cannot compel states to do this; nor do they promote the creation of special courts (national or international) to enforce the GPs (which are unenforceable). In addition, and as already discussed above, the GPs fall short of insisting that states assume jurisdiction in respect of violations allegedly committed by corporate nationals in the course of their extraterritorial business activities. Therefore on the delegation scale, the GPs must rank low.

However, one of the most notable innovations in the GPs is the promotion of non-judicial mechanisms. Industry and multi-stakeholder groups are urged to 'ensure that effective grievance mechanisms are available'.[186] Such institutions should be accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.[187] Examples of such mechanisms can range from the simple – such as telephone hotlines – to more complex dispute resolution instruments.

Ruggie's decision to emphasise non-judicial remedies reflects two points. First, Ruggie observed that many instances of what eventually become major corporate human rights

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184 International Bar Association, 'IBA Practical Guide on Business and Human Rights for Business Lawyers' (London: IBA), May 2016.

185 GP25.

186 GP30.

187 GP31.

issues germinated as minor grievances that were ignored by companies and then escalated. Putting in place accessible solution-oriented programs was seen as one way of potentially ameliorating these claims. Second, Ruggie was aware that companies and multi-stakeholder groups could build non-judicial mechanisms more rapidly than states could (or would) reform judicial systems in light of financial and political restraints.[188] The SRSG's solution reflected the fact that many companies operate in areas where government is weak, corrupt, or non-existent. As previously discussed, many states do have laws that could be used to prosecute corporate actors involved in human rights violations, but fail to consistently enforce these laws.

Arguably, however, it is not ideal to propose that corporate human rights violations should be processed through mechanisms established by corporations themselves. NGOs fear that highlighting non-judicial remedies may obscure the need to ensure that court-based systems are also made available, particularly in circumstances of exceptionally egregious corporate conduct.

On balance, Ruggie's promotion of non-judicial remedies is pragmatic, and certainly encompasses a broader range of potential institutions to which delegation is possible. It is suggestive of a reconceptualization of the concept of delegation that goes beyond courts or tribunals established to enforce prescribed rules. However, it also raises difficult issues as to whether quasi-judicial powers should be exercised without proper oversight of the state or another suitable authority.

Implementation

From the very first stages of the Framework and the GPs, Ruggie focused on the quality of implementation. This section highlights, first, that implementation is itself part of the law-making process, and second, that the law-making process may be just as important for its success as the law's content. Ruggie adopted four strategies in particular to gain support for the Framework and progress legalisation of the GPs. These included

188 Ruggie, *Just Business*: p.xiv.

consultation, research and reporting, alignment with international standards, and engagement with law firms. After the GPs were adopted, other implementation-focused strategies have been put in place. These include the creation of a UN Working Group for business and TNCs, the ongoing development of GPs-related standards through groups such as Shift, national human rights institutes, and national bar associations, and the introduction and promotion of National Action Plans (NAPs).

(a) Consultation

Once UNHRC had unanimously approved the GPs, Ruggie and his team worked tirelessly to promote the new principles. The SRSG and his team consulted with a range of corporations, business associations, NGOs and international organisations with the joint objectives of achieving consensus and enhancing the legitimacy of the GPs.[189] This reflected Ruggie's appreciation for 'input legitimacy,' which refers to the belief that involvement in the creation of law by potential duty-holders generates acceptance by those subjected to the resulting norms.[190] This approach is also consistent with recent studies in new governance and global administrative law, which suggest that there is a need for more extensive and formal recognition and integration of non-state actors in new forms of law and modes of regulation.[191]

From this starting point, Ruggie 'engaged with countless individuals, critics and supporters alike',[192] and arranged seminars, conferences, field studies and other

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189 Bilchitz and Deva, 'The Human Rights Obligations of Business: a Critical Framework for the Future,' p.10.

190 Karin Buhmann, 'The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output',' in *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation,*, ed. Radu Mares (Leiden: Martinus Nijhoff, 2012), p.93.

191 Benedict Kingsbury, Nico Krisch, and Richard B Stewart, 'The Emergence of Global Administrative Law,' *Law and contemporary problems* 68, no. 3/4 (2005), pp.15-61.

192 Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress,' in *The UN Guiding Principles on Business and Human Rights–Foundations and Implementation* (Boston: Martinus Nijhoff, 2012), p.7.

exercises to bring together views and speak about the process.[193] Karin Bahrmann focuses on the broad geographical reach of Ruggie's consultations, noting that multi-stakeholder consultations were held in Africa (Johannesburg), Asia (Bangkok), and Latin America (Columbia). She also argues that the staggered process facilitated the gradual publication of findings and recommendations so that stakeholders were able to comment at various stages of the process. This approach also gave the SRSG the chance to test ideas and proposals and apply these ideas at later stages.[194] Notably, the UNHRC commended Ruggie for 'the broad range of activities undertaken…including in particular the comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions'.[195] The EU added that 'there is no doubt that the success results from the inclusive approach of a process where states, business actors and civil society were fully associated'.[196]

In particular, Ruggie made a concerted effort to keep business engaged and involved. For instance, in December 2005, Ruggie invited the IOE to develop guidelines for companies dealing with challenging situations in weak governance zones. In undertaking this work, the IOE consulted with its own members and other business organisations, including the ICC and BIAC of the OECD.[197] This proved to be a creative way of engaging stakeholders who had previously opposed the Draft Norms, and carved out for them a distinct role that facilitated their contribution and consequent

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193 ibid., p.6.

194 Buhmann, 'The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output',' p.102.

195 Human Rights Council, 'Human rights and transnational corporations and other business enterprises ', UN Doc No.: A/HRC/RES/17/4 (6 July 2011).

196 EU Permanent Delegation to the United Nations (Geneva), 'EU comments on the draft Guiding Principles for the implementation of the UN 'Protect, Respect, Remedy Framework' D(2011) 702 246', 31 January 2011. Available at: http://business-humanrights.org/sites/default/files/media/documents/ruggie/eu-comments-on-draft-guiding-principles-31-jan-2011.pdf (accessed 13 April 2016).

197 'Statement by John Ruggie', January 2007. Available at: http://business-humanrights.org/sites/default/files/media/bhr/files/Ruggie-statement-Jan-2007.pdf (accessed 13 April 2016).

support of the GPs. Buhmann argues that this unofficial approach to business was successful in that it allowed informal participation by parties that may have otherwise resorted to lobbying through states and employing negative media strategies. [198]

However, it should be noted that Ruggie was criticised in some quarters for having failed to sufficiently engage with victims of corporate human rights violations. Surya Deva, for instance, argues that the SRSG's conscious decision not to directly engage with victims of corporate human rights violations denied those individuals an opportunity to raise their concerns.[199] As stated by Deva and David Bilchitz:

> *A black spot in relation to this legitimacy, however, was the SRSG's reluctance to engage in any direct consultation with victims of corporate human rights abuses. Despite many calls by civil society for him to meet victims, the SRSG took a strategic decision at the outset to keep a distance from the victims of corporate human rights abuses. This allowed him to avoid the process becoming an adversarial battle between NGOs and MNCs.*[200]

These critics also allege that this ultimately affected the quality of the consensus that the SRSG was able to achieve. Deva compares the text of the draft GPs and the final GPs to argue that the core of the Ruggie project was never really available for change, suggesting that the extensive consulting process counted for little. [201]

(b) Research and Reporting

Another important element of the SRSG's approach was his integration of more than two dozen research projects, which involved the input of international law firms, NGOs,

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198 Buhmann, 'The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output',' p.103.

199 Deva, 'Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles,' pp.83-84.

200 Bilchitz and Deva, 'The Human Rights Obligations of Business: a Critical Framework for the Future,' p.10.

201 ibid.

international institutions and academics.[202] Ruggie presented this research in a number of high-quality reports, signalling the SRSG's efforts to be both transparent and provide evidence of public deliberation. Most stakeholders agree that this approach was a success. Scott Jerbi, for instance, credits Ruggie with being largely responsible for moving 'a stalled and divisive debate' to a new level of dialogue and activity. Jerbi notes that Ruggie's reports, regional and expert consultations, surveys, and commissioning of expert studies on key topics 'have helped to generate significant interest in the subject within the business community and, increasingly, among governments'.[203]

(c) Alignment with other International Standards

There is no doubt that the uptake of the GPs has been relatively quick and widespread due to Ruggie's strategy of implementing the GPs through a wide range of networks. This included extensive communication with national and international standard-setting institutions and other stakeholder groups with the purpose of achieving maximum coherence and alignment with the GPs. On this point, Ruggie said in an interview that:

> *At the same time as I've been working through the UN, I've also been working with a number of other international institutions to make sure that their policies become aligned with the UN Framework and Guiding Principles…It is important for such convergence to take place, and because it makes it more likely that there will be a level playing field for all.*[204]

Since the GPs were endorsed by UNHRC, a range of international organisations have followed suit. The EU adopted new mandatory non-financial reporting requirements,[205]

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202 Buhmann, 'The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output',' p.102.

203 Jerbi, 'Business and Human Rights at the UN: What Might Happen Next?' p.301.

204 John Ruggie, 'Business and Human Rights: Together at Last?,' *Fletcher Forum of World Affairs* 35, no. 2 (2011), pp.121-22.

205 European Commission, 'Non-Financial Reporting,' Available at: http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm#news (accessed 15 May 2016).

and the IFC reviewed its sustainability framework and performance standards in the IFC Sustainability Framework.[206] The ASEAN Intergovernmental Commission on Human Rights (AICHR) is currently performing a baseline analysis on corporate social responsibility and human rights in the ASEAN region,[207] and the African Union is applying the GPs in the context of its Africa Mining Vision.[208] The International Organization for Standardization has adopted the GPs through the new ISO 26000.[209] Finally, the International Bar Association, UK Law Society, and American Bar Association are promoting the GPs within the legal profession, including through law firms' client advisory work.[210]

Ruggie collaborated especially closely with the OECD, which was revising its own Guidelines for Multinational Enterprises (MNE Guidelines) at the same time as Ruggie was developing the GPs. The collaboration resulted in relevant parts of the updated OECD Guidelines (released in May 2011) being amended so that they were fully consistent with the GPs. The MNE Guidelines added a human rights chapter and set out the systems that companies should establish in order to meet their responsibilities. This section specifically references human rights due diligence, and emphasises that businesses must focus not only on their internal operations but also their relationships

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206 International Finance Corporation, 'IFC Sustainability Framework: Policy and Performance Standards on Environmental and Social Sustainability ' (Washington DC: IFC), 1 January 2012.

207 Thomas Thomas and Alexandra Chandra, 'Thematic Study on CSR and Human Rights in ASEAN' (Jakarta: ASEAN Intergovernmental Commission on Human Rights), 2014.

208 John Ruggie, 'A UN Business and Human Rights Treaty?' (Cambridge, Massachusetts: Harvard Kennedy School), 28 January 2014.

209 International Organization for Standardization, 'ISO 26000: Guidance on Social Responsibility' (Geneva: ISO), 1 November 2010.

210 International Bar Association, 'IBA Practical Guide on Business and Human Rights for Business Lawyers'; The Law Society of England and Wales, 'Business and Human Rights Advisory Group Recommendations' (London: Law Society), January 2014; American Bar Association, 'ABA Policy on the United Nations Framework and Guiding Principles and the OECD Guidelines' (Washington DC: ABA), September 2011.

with other businesses.[211] The OECD also adopted due diligence recommendations relating to the trade in conflict minerals in 2011.[212]

The MNE Guidelines are particularly interesting from a legalisation perspective because they are supported by quasi-judicial enforcement procedures in the form of National Contact Points (NCPs). NCPs are agencies set up by participating governments to promote and implement the MNE Guidelines. Such agencies take various forms that range from a discrete individual sitting in a government department to completely independent institutions.[213] The purpose of NCPs is to assist enterprises and their stakeholders to implement systems that support observance of the MNE Guidelines. Governments, through the NCPs, purport to support a mediation and conciliation platform able to resolve practical issues that may arise with the implementation of the MNE Guidelines. In general, these processes are perceived as a way of resolving disputes before litigation.

In theory, the NCP system is a potential venue for any human right complaint connected to internationally recognised rights (including workplace standards) to be brought against TNCs operating in or from any of the forty-six participating countries. Certainly, in some instances, NCPs panels have responded to complaints with thoughtful written decisions that have caught the attention of both governments and TNCs.[214] However, critics complain that the system is vulnerable to procedural

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211 OECD, 'Guidelines for Multinational Enterprises'.

212 OECD, 'Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (Paris: OECD Publishing), 2011.

213 See Kathryn Dovey's remarks at the UN Forum on Business and Human Rights, 'State-based mechanisms for access to remedy', 16 November 2015 (notes on file with author).

214 For instance, highly significant decisions include: (1) 'Statement by the UK NCP for OECD Guidelines for MNEs (NCP): DAS Air'. This decision considered a complaint alleging that DAS Air failed to complete due diligence when transporting minerals that had a reasonable probability of being sourced from the conflict zone in the Democratic Republic of Congo ('DRC')(coinciding with a period of illegal occupation of the area by the Ugandan military). The NCP concluded in this matter that the lack of due diligence on the supply chain meant that DAS Air did not comply with several

problems and delay, that the costs associated with the process advantage business, and that the enforcement of decisions is inherently weak.[215] Overall, NCPs require more support from state governments and raise questions regarding how transnational norms can be effectively integrated into domestic legal frameworks. Admittedly, the OECD has indicated that it is aware of these problems and is working to strengthen the performance of NCPs through new innovations such as peer review.[216]

The NCP system is significant because it has the potential to have a major impact on the operationalization of soft law standards that relate to corporate accountability. As Larry Catá Backer describes, the NCP system may potentially constitute 'an effective process of operationalizing soft law to produce the effects of hard law beyond the state, but without challenging state authority directly'.[217] Backer has noted that the NCP cases may illustrate how transnational governance is being advanced 'step-by-step, from out

paragraphs of the Guidelines. It is notable that this decision was issued one month after the reception of the Framework in UNHRC, and that the NCP explicitly endorsed the concept of human rights due diligence that was clearly set out in the Framework. See OECD, 'Statement by the United Kingdom National Contact Point (NCP) for OECD Guidelines for Multinational Enterprises (NCP): Das Air', 17 July 2008. Available at: http://www.oecd.org/corporate/mne/44479531.pdf (accessed 16 January 2016). (2) 'Final Statement by the UK National Contact Point for the OECD Guidelines for MNEs (NCP): Afrimex (UK) Ltd'. This decision considered a complaint alleging that Afrimex paid taxes to rebel forces in the DRC and practiced insufficient due diligence on the supply chain, sourcing minerals from mines that used child and forced labour. The NCP upheld that majority of allegations submitted by Global Witness. See: OECD, 'Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd', 28 August 2008. Available at: https://www.oecd.org/corporate/mne/43750590.pdf (accessed 16 January 2016).

215 In November 2015, Joseph Wilde of OECD Watch reported that the institution had analysed 250 OECD complaints filed with the NCPs over the last 15 years. The analysts considered whether the NCP proceedings in each case resulted in: (a) change on the ground; (b) a statement of wrongdoing on behalf of the relevant corporation; or (c) a change in corporate policy with a view to preventing future harms. Wilde reported that on the basis of these criteria, the NCP system was not providing access to remedy. See Joseph Wilde's remarks at the UN Forum on Business and Human Rights, 'State-based mechanisms for access to remedy', 16 November 2015 (notes on file with author).

216 See Kathryn Dovey's remarks at the UN Forum on Business and Human Rights, 'State-based mechanisms for access to remedy', 16 November 2015 (notes on file with author).

217 Larry Catá Backer, 'The OECD Guidelines for Multinational Corporations: Using Soft Law to Operationalize a Transnational System of Corporate Governance', 5 March 2009. Available at: http://lcbackerblog.blogspot.co.uk/2009/03/oecd-guidelines-for-multinational.html (accessed 31 March 2015).

of a system that, while formally non-binding, is increasingly developing the characteristics of a binding governance system'. [218]

(d) Ongoing standards development through Shift

Even today, Ruggie and the organisation Shift continue to develop guiding materials that assist corporations to implement the GPs. Shift runs corporate accountability workshops in conjunction with the Harvard Kennedy School, conducts engagement projects with various governments, and releases practical reports on issues such as conducting human rights due diligence. It also runs an educational outreach program and partners with international organizations, industry and multi-stakeholder groups in relation to specific projects that support implementation of the GPs and related standards. [219]

(e) Engagement with International Law Firms

Interestingly, law firms became exceptionally important in the process of norm entrepreneurship in a way that Ruggie had not originally envisaged when he started developing the GPs.[220] Ruggie initially involved top-tier firms at the outset of his mandate. At this stage, he was performing an overview of the current regulations in the area of corporate accountability and required pro bono assistance. As the UN project developed, so did Ruggie's relationship with several major law firms.

These firms have enviable lists of corporate clients and well-developed relationships with them. In addition, the concept of human rights due diligence – the principal mechanism through which Ruggie considered corporations could demonstrate compliance – is

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218 ibid.

219 Shift is the leading centre of expertise on the GPs. Founded in 2011, Shift's team of experts works globally with businesses, governments, civil society and international organizations to embed the GPs into practice. Current advisers at Shift were centrally involved in shaping and writing the GPs, and John Ruggie is the Chair of Shift's Board of Trustees: Shift, Available at: http://www.shiftproject.org/who-we-are/ (accessed 1 January 2016).

220 Interview with Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, HKS, 24 February 2015, London.

familiar to law firms well-versed in the investigatory methods required prior to corporate mergers and acquisitions. The firms became unexpected vehicles of change: once they were aware of the legal and regulatory modifications that could potentially be ushered in by the GPs, they were able to advise their (large, corporate) clients accordingly. In this way, law firms acted as normative 'multipliers,' and communicating with this group proved an extremely effective way for Ruggie and his team to promote awareness of the new GPs.[221] This is consistent with Miles Kahler's observations that the legal profession stands out as a particularly powerful constituency for legalisation.[222]

(f) Working Group

In June 2011, UNHRC established a Working Group on the issue of human rights and TNCs and other business enterprises.[223] The Working Group is comprised of five independent experts and is required to:

- Identify, exchange and promote good practices and lessons learned on the implementation of the GPs;
- Support efforts to promote capacity-building and the use of the GPs, as well as provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights;
- Conduct country visits;

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221 ibid.

222 Kahler writes that the legal profession has been pivotal to international legalisation efforts for several reasons: 'Legalized international institutions reflect the professional norms of lawyers, magnify the influence of lawyers on policy, and increase the demand for legal services. Lawyers have been major proponents of the international legalization of human rights during this century, beginning in the 1920s when they replaced groups that had been motivated primarily by religion. Their role has been supplemented since 1945 by a much wider transnational network of nongovernmental organization that have embraced the cause of legalization': Miles Kahler, 'Conclusion: the Causes and Consequences of Legalization,' International Organization 54, no. 03 (2000), p.667.

223 Human Rights Human Rights Council, 'Human rights and transnational corporations and other business enterprises ', UN Doc No.: A/HRC/RES/17/4 (6 July 2011).

- Explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies;

- Integrate a gender perspective throughout the work of the mandate and give special attention to persons living in vulnerable situations, in particular children;

- Work in close cooperation and coordination with relevant UN and other international bodies;

- Develop a regular dialogue and discuss possible areas of cooperation with governments and all relevant actors, including relevant UN bodies, specialised agencies, funds and programmes, in particular the OHCHR, the GC, the ILO, the World Bank and its IFC, the UN Development Programme and the International Organization for Migration, as well as TNCs and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organizations and other regional and subregional international organizations;

- Guide the work of the Forum on Business and Human Rights; and

- Report annually to UNHRC and the General Assembly.[224]

Significantly, all these functions are designed to disseminate and implement the GPs. A good example of this is the annual Forum on Business and Human Rights, which is organised by the Working Group and open to relevant stakeholder groups, including states, the wider UN system, intergovernmental and regional organizations, businesses, labour unions, national human rights institutions, NGOs, and other affected stakeholders.[225] The purpose of the Forum is to discuss trends and challenges in the

[224] Human Rights ibid.

[225] Office of the United Nations High Commissioner for Human Rights, 'United Nations Forum on Business and Human Rights,' Available at:

implementation of the GPs, identify good practices, and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors.[226] It is illustrative of the dynamism of the field that participation in the Forum has grown exponentially over the past years. The fourth Forum, held in November 2015, involved more than 2300 participants.[227]

(g) National Action Plans

One of the most significant ways that the GPs are being implemented is through National Action Plans (NAPs). In the field of business and human rights, a NAP is defined as an 'evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity' with the GPs.[228] Governments are increasingly adopting NAPs, with over 40 in various stages of development across Europe, the Americas, Africa and Asia.[229] This has followed on from the EU requesting that its member states develop NAPs to support the implementation of the GPs in 2011,[230] and UNHRC doing the same in June 2014.[231] Claire O'Methvan and others have rightly commented that it is an impressive result that

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http://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx (accessed 16 December 2015).

226 ibid.

227 Office of the United Nations High Commissioner for Human Rights, '2016 UN Forum on Business and Human Rights,' Available at: http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2016ForumBHR.aspx (accessed 1 September 2016).

228 UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (Geneva: OHCHR), November 2015.

229 National Action Plans have been launched in Denmark, Finland, Lithuania, the Netherlands, Norway, Sweden, and the United Kingdom, and are under development in Argentina, Azerbaijan, Belgium, Brazil, Chile, Colombia, France, Germany, Greece, Italy, Ireland, Jordan, Latvia, Malaysia, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Portugal, Scotland, Slovenia, Spain, Switzerland and the United States: ibid.

230 European Commission, 'Communication from the Commission to the European Parliament, the Council, the EES Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility'.

231 Human Rights Council, 'Human Rights and Transnational Corporations and other Business Enterprises', UN Doc No.: A/HRC/RES/26/22 (15 July 2014).

the soft law GPs have caused so many governments to make a political commitment to bring domestic laws, policies, and practices into alignment in just four years.[232]

Nevertheless, much work remains to be done. It remains the case that many NAPs incorporate few firm commitments and are largely declaratory in nature. Some consider the time and energy spent developing NAPs would be better invested identifying and shaming corporate actors who have violated human rights, or agitating for the introduction of harder laws at the domestic level.[233] However, these current limitations are generally acknowledged, and work on how to make NAPs more robust is ongoing. The Danish Institute for Human Rights and the International Corporate Accountability Roundtable, for instance, have developed a guidance 'toolkit' to assist governments in ensuring NAPs are consistent with international human rights standards.[234] As recently as November 2015, the UN Working Group provided updated guidance that sets out the essential criteria of NAPs[235] and how the NAPs implementation process can be structured in five phases.[236] Finally, the Chairperson of the UN Working Group reported to the UN General Assembly in 2015 that more information and measurement

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232 Claire Methven O'Brien et al., 'National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool,' *Business and Human Rights Journal* 1, no. 01 (2016).

233 ibid., p.118.

234 Claire Methven O'Brien et al., 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks' (Copenhagen/Washington DC: Danish Institute for Human Rights/International Corporate Accountability Roundtable), June 2014.

235 NAPs have four essential criteria. First, NAPs need to be founded on the GPs, and adequately reflect a state's duties under international human rights law to protect against adverse business-related human rights impacts and provide effective access to remedy. A NAP must also promote business respect for human rights, including through due diligence processes, and be underpinned by the core human rights principles of non-discrimination and equality. Second, NAPs must be context-specific and address the country's actual and potential business-related human rights abuses. These include adverse impacts occurring within the country's territory and/or jurisdiction as well as the adverse impacts of companies' activities outside of the state's jurisdiction. Third, NAPs need to be developed in inclusive and transparent processes. Fourth, NAP processes need to be regularly reviewed and updated: UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights', pp.3-4.

236 ibid., pp.5-9.

of data is required to accurately assess the extent to which states and governments are implementing the GPs.[237]

Pushback?

The GPs certainly have their imperfections, but they also represent a promising and innovative way of approaching difficult global governance problems. However, this progress may be at risk in light of recent efforts by some governments to reignite the treaty conversation. In September 2013, Ecuador proposed that UNHRC establish an intergovernmental working group to negotiate a new treaty on business and human rights.[238] This was viewed by some as an attempt to 'reopen a battle fought in the 1970s, when the regulation of transnational corporations was a major component of the attempt to establish a 'New Economic Order, or as a resurrection of the proposal made in 2003 [for the adoption of the UN Draft Norms]'.[239] To a significant extent, Latin American governments have driven the push for a treaty following a proliferation of lawsuits brought to them by TNCs under bilateral investment treaties signed in the 1990s. Most prominently, this includes a legal battle between Ecuador and Chevron which was briefly discussed in the last chapter.

On 26 June 2014, UNHRC adopted a resolution calling for the establishment of an open-ended intergovernmental working group 'to elaborate an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises'. Ecuador's resolution was co-

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237 Office of the United Nations High Commissioner for Human Rights, 'Statement by Ms. Margaret Jungk, Chairperson, UN Working Group on the issue of human rights and transnational corporations and other business enterprises at the 70th session of the General Assembly, Third Committee, Item 72 (b & c),' Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16660&amp (accessed 23 December 2015).

238 It is significant is that the fails to establish a regime to address specific human rights abuses. Instead it looks to set up an overarching international legal framework to govern the relationship between corporations and human rights. Notably, 'other business enterprises' are defined to exclude national companies, so that the new legal framework would apply only to international corporations.

239 Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights,' *Business and Human Rights Journal* 1, no. 01 (2016), p.43.

sponsored by Bolivia, Cuba, South Africa, and Venezuela. Twenty members (including a majority of African members as well as China, and India) voted in favour of the resolution. The resolution was also strongly supported by a coalition of civil society organisations who formed a 'Treaty Alliance'. Fourteen members voted against (including the EU and the United States), with thirteen abstentions (including all Latin American countries other than those who sponsored the resolution, notably Brazil).[240] The following day, the UNHRC adopted a resolution tabled by Argentina, Ghana, Norway and Russia that explicitly built on the process initiated by the GPs. This resolution 'call[ed] upon all business enterprises to meet their responsibility to respect human rights in accordance with the Guiding Principles'.[241] It also expressed strong support for the Working Group on Business and Human Rights. Since these developments, states opposed to reopening treaty negotiations have been developing and promoting NAPs in order to demonstrate their commitment to the GPs.[242]

Several outcomes are possible. On the one hand, it is conceivable that moves for a binding treaty will derail the rolling out of the GPs. This is certainly one of Ruggie's predominant concerns – he has said that it would be disappointing for new arguments over a treaty to take the energy and focus away from the momentum generated by the GPs, especially given that the past treaty processes have produced few tangible results.[243] Another possible (and more positive) outcome would be the development of targeted treaties in relation to specific areas. For instance, narrowly-framed treaties could be drafted to clarify that states must regulate the extraterritorial actions of their corporate nationals overseas, oblige states to develop NAPs on business and human

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[240] Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights'', UN Doc No.: A/HRC Res. 26/9 (26 June 2014), para.9.

[241] Human Rights Council, 'Human rights and transnational corporations and other business enterprises', UN Doc No.: A/HRC/26/L.1, Rev.1 (27 June 2014), para.3.

[242] Interview with Claire Methven O'Brien, Strategic Adviser, Danish Institute for Human Rights, 29 May 2015, London.

[243] Interview with Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, HKS, 24 February 2015, London.

rights, or require that states provide mutual legal assistance to each other in order to provide adequate access to remedies for victims.[244] By targeting specific problems, such treaties would avoid the pitfalls of the Draft Norms and escape heading down 'a road that would end in largely symbolic gestures, [be] of little practical use to real people in real places, and with the high potential for generating serious backlash against any form of further international legalisation in this domain'.[245]

Conclusion

Table 6: Summary of Chapter 4 Findings

Initiative	Obligation	Delegation	Precision	Implement'n
Global Compact	Low	Low	Low	High
Draft Norms	High	Low	Low	Low
GPs	Low	Low	High	High

This chapter analysed the numerous attempts at legalisation that have unfolded within the UN in connection to TNCs since the 1970s. First, the chapter considered the UN Code of Conduct for Transnational Corporations, and illustrated why this initiative failed to materialise despite many years' work. Second, the chapter examined the inception of the GC and concluded that this initiative (although voluntary and vague in its elucidation) placed a particular emphasis on implementation that has proven to be representative of new trends in legalisation. The GC was innovative in encouraging the participation of non-state actors and embracing the principles of consensus-building, networks and norm promotion. The GC and its associated local networks continue to flesh out the GC principles today by offering more detailed guidance to companies and industry bodies working in particular regions.

244 De Schutter, 'Towards a New Treaty on Business and Human Rights' p.66.

245 Ruggie, 'A UN Business and Human Rights Treaty?', p.5.

Third, the chapter considered the development and demise of the Draft Norms. On one view, the Draft Norms can be seen as a reversion to traditional legalisation through the conventional methods of treaty negotiations, with state parties acting as the dominant players. The process was unsuccessful in producing an agreement, and had a negative impact on the state of debate. This demonstrates that in demanding far-reaching and fundamental change of huge corporate entities, an emphasis on implementation (rather than the binding quality of proposed rules) must stand at centre stage. Nevertheless, in certain respects, the process did reflect newer trends in legalisation. For instance, the Sub-Commission that worked on the draft held numerous consultation meetings with NGOs, and envisaged that NGOs and civil society would play a significant monitoring role when the Norms were finally implemented.[246]

Finally, this chapter analysed the development of the GPs, the most recent UN initiative in the field of business and human rights. This section highlighted the innovative nature of Ruggie's approach to generating new legal and social norms, and argued that the SRSG's methodology was grounded in his background as an IR and constructivist scholar. This section highlighted how Ruggie and his team acted as norm entrepreneurs through consultations, reporting, and encouraging alignment with other international organisations.

The final section highlighted that the GPs rank low in terms of the traditional legalisation characteristics of obligation, precision, and delegation. This provides more evidence that these characteristics alone fail to capture the true extent of legalisation engendered by the GPs, and that it is necessary to include implementation. As demonstrated, the GPs have had disproportionate influence for a soft law instrument, especially in light of the fact that they have existed for only four years. This influence

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246 Larry Cata Backer agrees that the process illustrated that the balance of power between insiders (shareholders, lenders etc) and outside stakeholders (community, society, the state) had shifted. Larry Catá Backer, 'Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as Harbinger of Corporate Responsibility in International Law,' *Columbia Human Rights Law Review* 37(2005), pp.384-88.

can be explained by their focus on implementation, manifested through the establishment of a UN Working Group, the exponential growth of National Action Plans, a significant uptake of the GPs by international organisations, and the ongoing creation of standards through groups such as Shift, national human rights institutes, and national bar associations.

Chapter 5: Processes of Legalisation in Multi-Stakeholder Initiatives

'What if it is not about bribery or bribery by another name, but about a decaying democracy, a military takeover, a human rights abuse or ethnic cleansing? What role in this, if any, is there for a legitimate foreign company with legitimate diamond interests? […] The questions bring to mind the boiled frog syndrome: it is said that if you drop a frog in boiling water, it will jump out immediately. But if you put a frog in cold water and gradually turn up the heat, it will boil to death.'[1]

Ian Smillie, Co-Founder of the Kimberley Process (2010)

'Twenty years ago our work seemed an impossible dream. Now it's coming true'.[2]

Ben Elers, Transparency International (2014)

The last chapter considered processes of legalisation in the context of international organisations, in particular the United Nations. In this chapter, we discuss legalisation in multi-stakeholder initiatives (MSIs). MSIs bring together a range of stakeholders – including corporations, civil society, government, and local communities – to cooperate in relation to a specific issue.[3] In the area of business and human rights, this generally involves developing standards for particular industries, regions, or issues in connection to human rights. MSIs may include certification schemes, grievance mechanisms, and exist in most major global industries, including textile manufacturing, extractives, and commodities including palm oil, coffee and soy. Although MSIs are

1 Ian Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade* (London: Anthem, 2010), pp.171-72.

2 'The Openness Revolution', *The Economist* 13 December 2014. Available at: http://www.economist.com/news/business/21636070-multinationals-are-forced-reveal-more-about-themselves-where-should-limits (accessed 26 December 2015).

3 MSI Integrity, 'What are MSIs?,' Available at: http://www.msi-integrity.org/about/what-are-msis/ (accessed 31 August 2016).

becoming increasingly common, there has as yet been no comprehensive mapping of existing MSIs in the area of business and human rights.[4]

MSIs are important to the study of legalisation for several reasons. First, although MSIs in no way comprise an overarching legal framework, they are illustrative of a new type of global governance comprised of 'fragments of collaborative governance' across a range of sectors.[5] The involvement of corporations, NGO, governments, and community representatives in these initiatives highlights the importance of non-state actors in transnational legalisation.

Second, MSIs may generate substantial legalisation spillover effects if financial institutions and investors adopt or incorporate the rules of MSIs into their own performance criteria. For example, the International Finance Corporation (IFC) updated its environmental and social performance standards in 2006 to integrate several key aspects of the Equator Principles, including a requirement for security-related risk assessments in respect of IFC loans above US$50million. Similar provisions have since been included in the lending policies of more than 80 Equator banks that cooperate with the IFC.[6]

This chapter examines three hybrid governance schemes that have developed to address specific human rights issues in the extractives industry sector. Although MSIs exist across a range of sectors, this chapter focuses on human rights violations in the extractives industry sector because MSIs in this sector are amongst the most advanced, and also because focusing on one particular industry draws out different approaches in

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4 MSI Integrity is currently working to identify and map existing MSIs in the area of business and human rights. This is the first initiative of this kind, and the information will be made available in an open and accessible database: ibid.

5 Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

6 International Financial Corporation, 'Equator Principles Financial Institutions,' Available at: http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Partnerships/Equator+Principles+Financial+Institutions/ (accessed

regulation most keenly. The first section considers the Kimberley Process Certification Scheme (KPCS), which was launched in response to the ongoing export of conflict diamonds from Africa. The second discusses the Extractive Industries Transparency Initiative (EITI), a global standard designed to promote open and accountable management of natural resources. Governments voluntarily subscribe to the EITI, and once they do, it becomes obligatory for extractive companies working in those countries to comply with the EITI principles. The third section discusses the Voluntary Principles on Security and Human Rights (VPs), which were adopted to counter human rights violations committed by security personnel connected to extractive operations in developing states.

The Kimberley Process

The diamond industry presents a unique context in which to examine the obligations of business in upholding human rights. Although recognised throughout the Western world as an enduring symbol of romance, fidelity and love, diamonds are responsible for fuelling conflicts throughout central Africa that have caused the death and displacement of millions.[7] During the 1990s, diamonds played an important role in promoting war and political instability across Angola, Sierra Leone, Liberia, the Congo, Central African Republic and Cote D'Ivoire. Although all natural resources are vulnerable to political exploitation, conflict diamonds remain the most notorious source of rebel funding.

Stones find their way on to the global market through a range of legal and illegal trades. In many regions in Africa, diamonds are relatively easy for local artisanal miners to extract. These stones are then sold through local middlemen and acquired in larger quantities by rebel purchasers. Profits from the sale of these diamonds may be used to

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7 One estimate suggests these wars were responsible for the displacement of 6.5 million and the death of 3.7 million: Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc No.: E/CN.4/2006/97 (February 2006).

pay for arms, supplies or soldiers' salaries.[8] Importantly, diamonds are small, easy to conceal and transport, and difficult to identify as precious stones when uncut and unpolished. They are also challenging to track, as few practical methods exist that can identify a diamond's geographical source based on its physical characteristics.[9]

The Kimberley Process Certification Scheme (KPCS) was an innovative experiment in legalisation that attempted to respond to this situation. It is regularly held up as an archetypal example of innovation in global governance, an initiative that engages in a new way with the dynamics of conflict prevention and 'makes sense in an era of economic globalization'.[10] Doubters, however, lament that the KPCS process does not go far enough, and, worse still, may provide convenient 'whitewash' for the worst of abuses still perpetrated by the industry. At the heart of all the debates and difficulties raised by the Kimberley Process lies another, more fundamental question: in evaluating the KPCS – as well as other pioneering legalisation experiments – how should we measure success?

The discussion of the KPCS is divided into four parts. First, I outline the main problem that the KPCS was developed to address: the trade of conflict diamonds in central Africa. This section draws principally on the experiences of Angola and Sierra Leone in order to illustrate the most important dynamics at play. Second, I examine the events that precipitated the creation of the KPCS and the specific roles played by NGOs, governments and business in this process. Third, I outline the main requirements set out by the scheme. Finally, this section concludes by considering the extent to which the KPCS rules generate obligation, precision and delegation. This section also argues that

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8 Shannon K Murphy, 'Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail in Ending Conflicts Fueled By Blood Diamonds,' *Pepperdine Dispute Resolution Law Journal* 11(2010), p.28.

9 Seth A Malamut, 'A Band-Aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo,' *Suffolk Transnational Law Review* 29(2005), pp.27-28.

10 Virginia Haufler, 'The Kimberley Process Certification Scheme: an Innovation in Global Governance and Conflict Prevention,' *Journal of Business Ethics* 89, no. 4 (2009), p.404.

the KPCS demonstrates that 'implementation' should be considered an essential dimension of legalisation in the transnational context.

The Impact of Diamonds in Angola and Sierra Leone

The relationship between diamonds, conflict, and human rights violations is best illustrated by examining the role of diamonds in specific political contexts. For this reason, I set out a brief description of events that unfolded in Angola and Sierra Leone when both countries were bitterly affected by the illicit trade in diamonds.

(a) Angola

We turn first to Angola, a country that fought a bitter war of independence against Portugal from 1961 until the colonial power withdrew in 1975. This split the country between three nationalist movements: the Popular Movement for the Liberation of Angola (MPLA), the National Front for the Liberation of Angola (FNLA), and the National Union for the Total Independence of Angola (UNITA). The MPLA soon seized control, leaving UNITA as its main opposition. These two sides would fight a war over the next two decades that would displace half the population and kill more than 500,000 people. Cold War politics also complicated the dispute. The MPLA was supported by the Soviets and the Cubans, whilst UNITA was reinforced by South African soldiers and American funds. By 1985, there were 950 Soviet officers and 45,000 Cuban troops in Angola.[11]

After the fall of the Berlin War, the funding from MPLA's and UNITA's Cold War sponsors dried up, precipitating a cease-fire in 1991 and elections in 1992. However, havoc erupted after UNITA leader Jonas Savimbi (who had anticipated victory) lost the presidential election. Fighting soon resumed, but with MPLA and UNITA relying far more on domestic resources in the absence of funding from their Cold War allies. This led to MPLA drawing extensively on national oil reserves while UNITA sought to

[11] Jamila D Holmes, 'The Kimberley Process: Evidence of Change in International Law,' *International Law & Management Review* 3(2006), pp.78-79.

capture and control the most lucrative diamond mines.[12] UNITA had already begun sourcing diamonds in the 1970s and overran some key diamond-producing areas in the 1980s. By the mid-1990s, UNITA was exporting more than a million dollars a day worth of diamonds[13] through an advanced mining, sorting and marketing operation, effectively creating a 'ministry' of natural resources.[14]

By 1997, the continuing war in Angola propelled the UN Security Council (UNSC) to take a more active role. Additional sanctions were imposed on UNITA, and Resolution 1173 explicitly recognised the role of diamonds in perpetrating the conflict.[15] At the time, the UNSC's focus on Angola was informed by a greater interest in targeted (or 'smart') sanctions, as well as the presence of Brazil and Canada on the Security Council.[16] Resolution 1173 placed a worldwide ban on the purchase of diamonds from UNITA or UNITA-controlled areas, with an exception for diamonds certified by the official Angolan government.

However, this scheme was only partially effective. In some cases, diamonds were mined unofficially and smuggled out through government channels or established trafficking routes.[17] In other instances, the certification scheme was not strictly followed, and stones flowed out from UNITA-controlled areas to Antwerp via Zambia, the DRC and the Republic of Congo. [18]

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12 Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: p.9.

13 Tracey Michelle Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate,' *Minnesota Journal of International Law* 12(2003), p.1004.

14 Ian Smillie, 'Blood Diamonds and Non-State Actors,' *Vanderbilt Journal of Transnational Law* 46(2013), pp.82-83.

15 UN Security Council, 'The Situation in Angola', UN Doc No.: S/RES/1173 (12 June 1998).

16 Brazil's concern for Angola reflected the countries' shared Portuguese heritage. Canada had a specific interest in the conflict diamond issue: Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: p.25.

17 Franziska Bieri, *From Blood Diamonds to the Kimberley Process: How NGOs Cleaned Up the Global Diamond Industry* (Farnham: Ashgate, 2013), p.90.

18 Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: p.389.

These failures were highlighted in the ground-breaking report *A Rough Trade* by Global Witness, which stated that 'since 1992, UNITA have consistently controlled 60-70 per cent of Angola's diamond production, generating US$3.7billion in revenue enabling them to maintain their war effort'.[19] The report also highlighted the troubling complicity of business. Global Witness noted that the annual reports of De Beers showed that the company had purchased 'open market' Angolan diamonds (not sold by the state diamond company, ENDIAMA).[20] It concluded that 'UNITA's diamonds reach the major international markets through a worldwide diamond industry that operates with little transparency or scrutiny from the international community'.[21]

(b) Sierra Leone

Diamonds have also exacerbated the conflict in Sierra Leone. Home to the world's richest diamond mines yet perpetually at the bottom of the UN Human Development Index, perhaps no other country exemplifies the harsh reality of the resource curse more than Sierra Leone. The war that wracked the country in the 1990s killed more than 70,000 people, displaced 2.6 million[22] and will no doubt go down in history as 'a tragedy of major humanitarian, political, and historical proportions'.[23] Conflict started when the Revolutionary United Front (RUF) tried to overthrow then-President Joseph Momoh, who had presided over a long era of corruption, chronic unemployment and

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19 Global Witness, 'A Rough Trade' (London: GW), 1998, p.3.

20 Ian Smillie notes that there was nothing covert about this. In 1992, Nicky Oppenheimer wrote to the Angolan President Eduard dos Santos: 'I am writing to you once again to draw your attention to the continuing problem of theft from the Angolan diamond mining areas…We have bought these diamonds as part of the [Central Selling Organisation's] continuing role of ensuring stability in the diamond market. It will be evident to you that the Republic of Angola has derived no benefit whatsoever from this sale and that is a matter which causes me some great regret'. Letter, N.F. Oppenheimer to President dos Santos, 6 February 1992 quoted in Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: p.233.

21 Global Witness, 'A Rough Trade', p.3.

22 Mary Kaldor and James Vincent, 'Case Study of Sierra Leone: Evaluation of UNDP Assistance to Conflict-affected Countries' (New York: UNDP Evaluation Office), 2006, p.4.

23 Ian Smillie, Lansana Gberie, and Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds & Human Security: Complete Report* (Collingdale: Diane Publishing, 2000), p.1.

economic mismanagement. From the start of the fighting, the RUF aimed to cut off Momoh's access to the lucrative diamond mines in the country's eastern province. In April 1992, Momoh was overthrown in a military coup led by 27-year old army captain Valentine Strasser. Strasser promised to end corruption but, when in power, further looted the country's diamond resources.[24]

The RUF continued its opposition to the ruling political junta, proclaiming that it would only stop fighting once specific reforms had been implemented. Initially, people viewed the RUF as 'a heroic army that would fight for multiparty government and equitable wealth distribution'.[25] But in reality, the RUF was motivated by little more than a thirst for power. Price describes how the RUF 'took over the diamond-rich areas, capturing the mines allegedly to hold as ransom in exchange for a more democratic system, whilst killing and mutilating the local villagers'.[26] The presence of diamonds in an incendiary political climate eventually resulted in the complete disintegration of the state with the most severe political, economic, and social consequences:

> *Rebel butchery left thousands of women, men and children without hands and feet, disfigured physically and psychologically for life. Children were forced into combat and sexual slavery. At different times during the crisis, as many as half of Sierra Leone's people…became displaced or were refugees. Schools, hospitals, government services and commerce ground to a halt in all but the largest urban centres. Mineral resources which should have been available for development were used instead to finance war, robbing the potential beneficiaries and an entire generation of children.*[27]

By 1995, the RUF controlled diamond mines in the Kono District and Tongo field, and was using forced labour in order to extract stones from these areas. The gems were

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24 Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: p.115.

25 Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' p.13.

26 ibid.

27 Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: pp.108-09.

subsequently trafficked via Liberian warlord Charles Taylor in exchange for weapons sourced from international criminal networks.[28] At the same time, the military junta operated its own underground diamond scheme, and in May 1995 paid a private military company called ‘Executive Outcomes’ with diamond concessions in exchange for fighting rebels in Freetown and diamond-producing regions. A few weeks later, Executive Outcomes was given a 25-year lease on diamond concessions in Kono. [29]

In 1996, a glimmer of hope emerged when a former UN officer, Ahmad Tejan Kabbah, was elected leader of the Sierra Leone People’s Party (SLPP) and won a presidential election the same year. The Abidjan Peace accord was subsequently signed in November, removing Executive Outcomes from the country. However, civil unrest soon resumed, leading the government to be toppled by former prisoner Johnny Paul Koroma. Koroma formed a coalition between his Armed Forces Ruling Council (AFRC) and the RUF, resulting in the torture and murder of many public officials.

The UNSC responded to these developments in 1997 by imposing sanctions against the military junta, including an embargo on weapons and petroleum.[30] The Economic Community of West African States Monitoring Group (ECOMOG) also became involved, and forced the AFRC and the RUF to relinquish the capital in February 1998.[31] On 10 March 1998, President Kabbah was returned to office. On 7 July 1998, Kabbah finalised the Lomé Peace Accord, a highly controversial peace deal that included a blanket amnesty for all RUF fighters, four ministerial posts in Kabbah’s

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28 ibid., p.117.

29 ibid.

30 UN Security Council, 'Resolution 1132: The Situation in Sierra Leone', UN Doc No.: S/RES/1132 (8 October 1997).

31 United Nations, 'Sierra Leone - UNAMSIL - Background,' Available at: http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html (accessed 27 January 2016).

government and vice-presidential status for Foday Sankoh, who was placed in charge of a new commission to oversee the country's diamond resources.[32]

As part of the agreement, the UNSC agreed to send peacekeepers and authorised the establishment of the United Nations Mission in Sierra Leone (UNAMSIL) in October 1999. However, UNAMSIL was underprepared and ill-equipped, as demonstrated when eight peacekeepers were killed and 500 kidnapped near the rebel-held town of Makeni. The event caused uproar at the UN and resulted in the UK sending a battalion of paratroopers and five warships in order to stabilise Freetown.[33] A massive public demonstration soon followed outside Foday Sankoh's house, precipitating his arrest.[34] A UNSC Expert Panel was subsequently commissioned to examine the relationship between diamonds and weapons. An embargo was placed on all Liberian diamonds and arms restrictions were tightened, eventually restricting the RUF's access to weapons.[35] In January 2002, Ahmad Tejan Kabbah declared the war to be over, and subsequently won the presidential election in May of that year.[36]

The Origins of the KPCS

The horrific series of events that unfolded in central Africa precipitated various stakeholders to take action. Human rights organisations, individual politicians, and the UN all contributed to this effort.

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32 Sierra Leone Web, 'Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF),' Available at: http://www.sierra-leone.org/lomeaccord.html (accessed 27 January 2016).

33 Alex Renton, 'Sierra Leone: One Place where Tony Blair remains an Unquestioned Hero', *The Guardian* 18 April 2010. Available at: http://www.theguardian.com/world/2010/apr/18/sierra-leone-international-aid-blair (accessed 27 January 2016).

34 Foday Sankoh, 'The Cruel Rebel', 30 April 2003. Available at: http://news.bbc.co.uk/1/hi/world/africa/3110629.stm (accessed 27 January 2016).

35 Karen McGregor and Katherine Butler, 'Kidnapping puts UN Sierra Leone Mission in Doubt', *Independent,* 4 May 2000, pp.125-26.

36 Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*: p.126.

As noted above, Global Witness' seminal 1998 report *A Rough Trade* highlighted the death and destruction of the Angolan war, estimating that UNITA had generated US$3.7 billion in diamond sales between 1992 and 1998. It also accused De Beers of indiscriminately purchasing the rough stones at a time when UNITA controlled a majority of Angola's diamond exports and operated in contravention of the Lusaka Peace accords. Finally, the report documented the specific failure of the UN, the EU, and the international community to improve the situation:

> *Global Witness investigations show that governments flout the United Nations Security Council (UNSC) embargo on unofficial Angolan diamonds […] Furthermore, lack of understanding and government scrutiny of the functioning of the diamond trade has resulted in the absence of any serious examination of corporate culpability, allowing many diamond companies to continue to operate without fear that their actions may be called into question by consumers […] The international community must examine how it has become complicit with diamond barons and what this means for the effectiveness and reputation of the United Nations.*[37]

A year later, the NGO Partnership Africa Canada (PAC) produced another report entitled *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*.[38] It expressly emphasized that De Beers had wilfully turned a blind eye to the source of many diamonds purchased in Liberia that were actually of Sierra Leonean origin. During the same period, De Beers had publicly claimed that it had not purchased stones from Sierra Leone. The report also drew attention to the role of Belgium's Diamond High Council, which effectively obfuscated the true origin of Sierra Leonean diamonds, making them easier to sell and more difficult to track.[39]

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37 Global Witness, 'A Rough Trade', p.2.

38 Smillie, Gberie, and Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds & Human Security: Complete Report*.

39 ibid., pp.3-4.

The efforts of the NGOs were also assisted by political developments in the US. One month before the publication of the PAC report, Democratic Congressman Tony Hall proposed in the US House of Representatives that a bill be passed entitled 'Consumer Access to a Responsible Accounting for Trade' – the CARAT Act.[40] If passed, this bill would require diamond importers to demonstrate that their goods did not originate in conflict zones. Hall was soon supported by Republican Congressman Frank Wolf and a significant group of NGOs, including Physicians for Human Rights, World Vision, and Oxfam America.[41]

In Europe, momentum against conflict diamonds was also building following the launch of a NGO-led campaign called 'Fatal Transactions'. Global Witness, Medico International, the Netherlands Institute for Southern Africa, and Novib (the Netherlands Organisation for International Development Cooperation) were all involved. This group employed formidable tactics, including packing cut-glass 'diamond' rings into small jewellery boxes and sending these to newspaper editors with literature on conflict diamonds.[42] They also promoted slogans such as 'diamonds are a guerrilla's best friend' and 'amputation is forever'.[43] In the US, a comparable 'Campaign to Eliminate Conflict Diamonds' was launched in the US on Valentine's Day in 2001. This group involved more than 100 NGOs, which tried to persuade jewellers to not 'let diamonds go the way of fur'.[44] One particularly arresting advertisement is described by Grant and Taylor:

> *As a hand on-screen started to slip a diamond ring on another (woman's) hand, signifying romance and love, the scene changed and became one of shadowy figures cutting off the*

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40 GovTrack, 'Text of the Consumer Access to a Responsible Accounting of Trade Act of 2000,' Available at: https://www.govtrack.us/congress/bills/106/hr5147 (accessed 27 January 2016).

41 Smillie, 'Blood Diamonds and Non-State Actors' pp.1008-09.

42 J Andrew Grant and Ian Taylor, 'Global Governance and Conflict Diamonds: the Kimberley Process and the Quest for Clean Gems,' *The Round Table* 93, no. 375 (2004), p.390.

43 ibid.

44 ibid., p.391.

hand of a prisoner, referring to the amputations that marked the RUF's campaigns in Sierra Leone in the fight for control of diamond mining areas.[45]

At the same time, the UN renewed its focus on the issue of conflict diamonds. In May 1999, Ambassador Fowler of Canada formed a panel of experts to assess the effectiveness of sanctions on Angola and links between diamonds and conflict. The Fowler Report, launched in March 2000, found that UNITA diamonds had been smuggled through South Africa, Namibia, and Zambia, and that sitting heads of states had deliberately subverted UN sanctions to allow UNITA to source weapons and other supplies. The report also criticised Belgium for failing to implement an effective import identification regime.[46]

The Fowler Report marked a turning point for several reasons. First, it was rare for a UN Expert Panel report to be so straightforward and directly implicate government leaders still in power.[47] Second, the document forced the diamond industry to finally engage in the debate. In 1999, Ambassador Fowler met with Nicky Oppenheimer and Gary Ralfe, the respective Chairman and Managing Director of De Beers. Dr Franziska Bieri recounts an interview with Mark Van Bockstael, head of the Diamond High Council in Belgium (HRD), during which he recalled that it was Fowler and the UN investigations that were the 'wake up' call that motivated De Beers to move from denial to engagement.[48]

On 5 October 1999, De Beers announced that it would stop buying diamonds from Angola and review its purchasing processes in the DRC and Guinea. Gary Ralfe, the Managing Director, stressed that the company shared 'the world's deep concern over

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45 ibid.

46 United Nations, 'Final Report of the UN Panel of Experts on Violations of Security Council Sanctions Against UNITA', UN Doc No.: S/2000/203 (10 March 2000).

47 Haufler, 'The Kimberley Process Certification Scheme' pp.408-09.

48 Bieri, *From Blood Diamonds to the Kimberley Process*: p.22.

the continued suffering' of the people of Angola.[49] Nicky Oppenheimer spoke about the disastrous cost a boycott would inflict on conflict-free diamond producing countries in the developing world, including Botswana, Namibia, and South Africa.[50] This was supported by statements from former South African President Nelson Mandela, who highlighted the importance of diamonds for the economies of southern Africa and the harm that would be caused by a boycott:

> *The diamond industry is vital to the Southern African economy. Rather than boycotts being instituted, it is preferable that through our own initiative the industry takes a progressive stance on human rights issues.*[51]

However, others saw De Beers' position more cynically:

> *Before the conflict-diamond issue gather gathered steam, it made economic sense to continue to trade with killers since no-one was paying attention and it didn't threaten the demand for the goods; after the issue began attracting the attention of human rights organizations and people started whispering the dreaded 'B' word (boycott), it made economic sense for the industry to condemn the trade and to wash its hands.*[52]

Another prominent voice came from US diamond trader Martin Rapaport, who visited Sierra Leone in 2000 and wrote an article about his journey entitled 'Guilt Trip'. In that article, he stressed the responsibility of the industry, and urged business to address some of the problems rather than pretend they were not happening:

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49 Grant and Taylor, 'Global Governance and Conflict Diamonds' p.391.

50 Rapaport, 'Nicky Oppenheimer's speech to the Southern Africa Business Association (SABA), London,' Available at: http://www.diamonds.net/News/NewsItem.aspx?ArticleID=4181&ArticleTitle=Nicky+Oppenheimers+SABA+Speech (accessed 27 January 2016).

51 Andrew Bone, 'Conflict Diamonds: the De Beers Group and the Kimberley Process,' in *Business and Security: Public-Private Sector Relationships in a New Security Environment*, ed. Alyson JK Bailes and Isabel Frommelt (Oxford: OUP, 2004), p.131.

52 Greg Campbell, *Blood Diamonds: Tracing the Deadly Path of the World's Most Precious Stones* (Boulder, Colarado: Westview, 2002), p.116.

> *We cannot sit back and write off the problems of Africa as unsolvable – the human suffering is simply too great […] The time has come for us to band together and make sure that we can be trusted to ensure the legitimate origin of our diamonds and the legitimacy of our diamond industry […] If you don't know where or from whom the diamond comes from – don't buy it. We must no longer deal in grey diamonds.*[53]

As a result of this rising clamour for change, the South African Minister of Minerals and Energy, Phumzile Mlambo-Ngcuka, convened a meeting in Kimberley, South Africa in May 2000. States with significant diamond industries, international NGOs, and major representatives from business were all involved. The meeting succeeded in generating a nine-point plan, and the UN General Assembly subsequently passed a resolution supporting the creation of an international certification scheme for rough diamonds in December 2000.[54] The end result, finally negotiated by November 2002, was the KPCS. The scheme officially entered into force in 2003.[55]

The KPCS Framework

The KPCS is open to all states that are 'willing and able to implement its requirements'.[56] Currently the KPCS has 54 Participants representing 81 states (the EU and its member states are counted as a single participant). It is significant that the world's most powerful states, including the US, China, Russia, India, Brazil, Japan and the EU, are all represented. The KPCS imposes a range of requirements on participating states ('Participants') to allow them to certify shipments of rough diamonds as 'conflict-free'. Participants are required to implement national legislation as well as export, import and internal controls. They must also commit to transparency, and the

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53 Martin Rapaport, 'Guilt Trip,' *Rapaport Diamond Report* (7 April 2000), p.9.

54 UN General Assembly, 'Resolution 55/56: The role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts', UN Doc No.: A/Res/55/56 (29 January 2001).

55 KPCS, 'KP Basics,' Available at: http://www.kimberleyprocess.com/en/about (accessed 25 February 2016).

56 ibid.

exchange of statistical data. Crucially, Participants can only legally trade with other Participants who have met the minimum requirements of the scheme. Each international shipment of rough diamonds must be accompanied by a KP Certificate guaranteeing that it is conflict-free.[57]

The KPCS is chaired by participating countries on a rotating basis. States that have chaired include South Africa, Canada, Botswana, the EU, India, Namibia, Israel, the DRC, the US, South Africa, the Republic of China, and Angola. The Chair is responsible for organising plenary sessions, considering policy initiatives for discussion, and assembling groups to develop and implement particular initiatives.[58] Decisions are made by consensus. This was codified in 2003,[59] and it is now accepted by convention that consensus includes civil society and industry observers.[60] Whilst this convention has no doubt caused some serious problems for the regime, it has also allowed the system to develop to accommodate a wide array of interests held by a range of parties. The implementation of the KPCS requirements is monitored through 'review visits', the submission of annual reports, and the exchange of statistical data.[61] Significantly, KPCS Participants now account for approximately 99.8% of the global production of rough diamonds.[62] Working groups also play an important part in the scheme – these groups monitor Participants' implementation of the KPCS, assess applications to join, gather and analyse statistics, and canvass technical issues that arise. They include the Working Group of Diamond Experts (WGDE)[63], Working Group on Monitoring (WGM),

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57 ibid.

58 Bone, 'Conflict Diamonds,' p.136.

59 KPCS Core Document, Section VI(5).

60 J Andrew Grant, 'Consensus Dynamics and Global Governance Frameworks: Insights from the Kimberley Process on Conflict Diamonds,' *Canadian Foreign Policy Journal* 19, no. 3 (2013), p.327.

61 KPCS, 'KP Basics'.

62 ibid.

63 The Working Group of Diamond Experts (WGDE) solves technical problems in the implementation of the KPCS. This includes proposing changes to the 'Harmonised System Codes' for rough diamonds to the World Customs Organisation, the classification of diamond powder, harmonisation of valuation methodologies, and the international transfer of diamond samples from exploration

Working Group on Statistics (WGS), Working Group on Artisanal & Alluvial Production (WGAAP)[64], Committee on Participation and Chairmanship (CPC) and Committee Rules and Procedures (CRP).

In many respects, the KPCS is a true global governance initiative, a concept that Thomas Weiss says 'implies a wide and seemingly growing range of actors in every domain' including 'local and international NGOs, grassroots and citizens' movements, multinational corporations and the global capital market'.[65] Diamond industry representatives and NGOs are officially characterised as Observers, but this title belies their significant involvement at almost every stage of the scheme, including developing the initiative, building support for the process, assisting in the drafting of the KP Technical Document, and assisting with negotiations and implementation.[66] The participation of business has also been facilitated by the establishment of the World Diamond Council (WDC) in September 2000, which early on appointed a small and focused team to improve communication with NGOs. This initiative succeeded to the extent that occasionally 'industry and civil society representatives [have found] themselves in "furious agreement" at times when governments appeared stubbornly unwilling or unable to implement reforms'.[67]

NGOs have also played a pivotal role, with Global Witness and PAC acting as leaders in this respect. These organisations have engaged with governments and business representatives, performed independent monitoring and research functions, and made

projects. The technical working group also delivers background information to other KPCS bodies or international organisations working in particular states such as Cote d'Ivoire, the Democratic Republic of the Congo, Ghana and others.

64 The Working Group on Artisanal and Alluvial Production (WGAAP) is the youngest KPCS working group. The WGAAP promotes more effective internal controls on the production and trade of alluvial diamonds to ensure that only diamonds produced and traded in accordance with national legislation and KPCS standards can be exported or polished locally.

65 Thomas G Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges,' *Third world quarterly* 21, no. 5 (2000), p.810.

66 Global Witness, 'The Kimberley Process at Risk' (London: GW), November 2006, p.2.

67 Bone, 'Conflict Diamonds,' pp.136-37.

wide-ranging recommendations.[68] On the whole, NGOs have sought to remain involved with the scheme even when challenges have appeared to compromise the integrity of the KPCS. However, in a significant move, Global Witness opted to exit the scheme in 2011 after the KP failed to address serious concerns relating to suspected trade in conflict diamonds from the Cote d'Ivoire, breaches of the rules by Venezuela, and corruption and state-sponsored violence in Zimbabwe.[69]

Summary 3: KPCS Requirements for Participation

The KPCS: Requirements for Participation

The requirements for participation are outlined in Sections II-V of the KPCS of the core document, and are briefly summarised below.

Section II (The Kimberley Process Certificate) states that each Participant should ensure that a Certificate accompanies each shipment of rough diamonds. Processes for issuing Certificates must meet the minimum standards set out in Section IV. Certificates must meet the physical and security requirements set out in Annex I, but may also include discretionary elements (such as additional security characteristics). Participants are required to notify all other Participants regarding the specific features of their own Certificates.

Section III (Undertakings in respect of the international trade in rough diamonds) states that each Participant should, with regard to shipments of rough diamonds exported to a Participant, require that each shipment is accompanied by a duly validated Certificate. In relation to shipments of rough diamonds imported from a Participant, each Participant should require a duly validated Certificate, ensure that confirmation of receipt is sent expeditiously to the relevant Exporting Authority, and require that the original of the Certificate be readily accessible for period of at least three years. Each Participant should also ensure that no shipment of rough diamonds is imported from or exported to a non-Participant. Participants through which shipments transit are not required to meet the requirements set out above, provided that the designated authorities ensure that shipments leave the territory in an identical state (i.e. unopened and not tampered with).

68 For instance, see: Global Witness, 'The Kimberley Process at Risk'; Ian Smillie, 'Paddles for Kimberley: An Agenda for Reform' (Ottawa: PAC), June 2010.

69 Global Witness, 'Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable', 2 December 2011. Available at: https://www.globalwitness.org/en/archive/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable/ (accessed 1 September 2016).

Section IV (Internal Controls) sets out that each Participant should: (a) establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory; (b) designate an Importing and Exporting Authority; (c) ensure that rough diamonds are imported and exported in tamper-resistant containers; (d) amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions; (e) collect and maintain relevant official production, import and export data, and collate and exchange such data in accordance with the provisions of Section V; (f) when establishing a system of internal controls, take into account, where appropriate, further options and recommendations for internal controls (as elaborated in Annex II).

Section V (Cooperation and Transparency) sets out requirements in relation to information-sharing and cooperation. Each Participant is asked to share information identifying its designated authorities for implementing the KPCS. Information on relevant laws and regulations in addition to statistical data (as set out in Annex III) is also to be provided by each Participant. Participants must exchange information on experiences and self-assessments, with the objective of arriving at the best practice in specific circumstances, and should respond favourably to requests from other Participants for assistance to improve the function of their own certification schemes. A Participant should inform the relevant Participant (via the Chair) if it considers that the laws, regulations, rules, procedures or practices of that Participant do not ensure the absence of conflict diamonds in that Participant's exports. Participants should cooperate with other Participants to attempt to resolve problems arising from unintentional circumstances and which could lead to non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates, and inform all other Participants of the problems encountered and solutions found. Finally, Participants should encourage, through their relevant authorities, closer co-operation between law enforcement agencies and between customs agencies of Participants.

Section VI sets out the administrative rules of the KPCS. Participants and Observers must meet in plenary meetings annually, or more frequently as deemed necessary, with the objective of evaluating the effectiveness of the scheme. Meetings shall be held in the country in which the Chair, who is elected each year, is based.

Application of the Legalisation Framework

Obligation

The Kimberley Process constitutes a unique innovation in legalisation that has important implications for how we understand the concept of 'obligation'. Unlike an instrument such as an international treaty, the KPCS is a non-binding international agreement and a voluntary system of industry self-regulation. However, from a practical standpoint, the scheme does exert strong obligation on governments. States are not legally obliged to join but have a great economic incentive to do so, as Participants may only legally trade with other Participants who have also met the minimum requirements of the scheme. In such circumstances, soft law effectively takes on the characteristics of hard law. KPCS and global governance expert Franziska Bieri emphasises that '[w]hile the KPCS is voluntary, it in essence became compulsory for any state seeking to trade in diamonds'.[70] This is indicated by the fact that 37 states and the EU endorsed the KPCS at its inception in 2003, and membership has since expanded to 54 member states plus the EU in 2016.[71]

Second, at the international level, the obligation extended by the KPCS is underpinned by and given legitimacy by a range of soft law instruments, including UN General Assembly resolutions, UNSC directives, and statements of endorsement from the Group of Eight (G8).[72] The process has also been legitimised through the support of other soft law instruments, including an official waiver from the World Trade Organisation (WTO). The WTO would ordinarily prohibit schemes such as the KPCS, which

70 Bieri, *From Blood Diamonds to the Kimberley Process*: p.103.

71 ibid.

72 Grant, 'Consensus Dynamics and Global Governance Frameworks' p.324.

effectively imposes cartel-like restrictions on the trade of goods and services in a particular industry.[73]

Finally, the KPCS demands obligation by requiring Participants to pass implementing legislation, thereby hardening the otherwise soft principles outlined in the KPCS. Participants must establish specific internal controls,[74] designate importing and exporting authorities,[75] and 'amend or enact appropriate laws or regulations to implement and enforce the Certificate Scheme and to maintain dissuasive and proportional penalties for transgression'.[76] Obligation therefore becomes stronger because the scheme requires that Participants pass and implement appropriate laws at the domestic level. From this perspective, '[t]he fact that the Kimberley hinges on national legislation is what gives it strength'.[77]

Overall, therefore, it is difficult to categorise the obligation as low or high. From a strictly legal perspective, obligation is low. No country can be compelled to join the KPCS. From a pragmatic perspective, obligation is much higher in two senses. First, there is potentially great economic disadvantage for diamond-producing countries that elect not to join the scheme. Second, the fact that KPCS rules must take concrete form in legislation at the domestic level increases the obligation for all individuals, businesses, and government representatives that participate in the scheme.

Precision

The KPCS Core Document includes rules that vary in their level of precision. In connection to technical issues, the KP rules are relatively specific. For instance, Section III (a) sets out unambiguously that Participants must only accept shipments

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73 Karen E Woody, 'Diamonds on the Souls of her Shoes: the Kimberley Process and the Morality Exception to WTO Restrictions,' *Connecticut Journal of International Law* 22(2007).

74 KPCS Core Document, Section IV(a).

75 KPCS Core Document, Section IV(b).

76 KPCS Core Document, Section IV(d).

77 Global Witness, 'An Independent Commissioned Review: Evaluating the Effectiveness of the Kimberley Process' (London: GW), April 2006, p.19.

accompanied by a valid KP Certificate. Section IV(c) prescribes that diamonds must be 'imported and exported in tamper resistant containers'. Section V(a) specifies explicit information-sharing requirements, and (b) requests that Participants compile and make available to other Participants statistical data in line with specific principles set out in Annex III. The minimum requirements of KP Certificates are included in Annex I, which sets out that certificates must be tamper and forgery resistant, include the date of issuance, the date of expiry, the issuing authority, the carat weight/mass, and other relevant details.[78]

Still, other rules are far less precise to allow more scope for individual Participants to develop laws and procedures specific to their national circumstances. As set out in the discussion on 'Obligation' above, Section IV specifies that states must establish proper authorities, maintain internal controls, and amend or enact appropriate laws or regulations to implement and enforce the KPCS and to maintain 'dissuasive and proportional penalties for transgressions'.[79] Indeed, the fact that states must pass domestic legislation effectively translates soft law obligations into hard domestic law. Nevertheless, the phrasing is deliberately open in order to allow Participants to establish institutions and pass laws that they consider to be most suited to their particular national context. This vague wording carries disadvantages too, as exactly what is required by participating governments is consequently ill-defined.

This lack of clarity has had serious consequences. In 2006, for example, despite noting the considerable achievements of the scheme at the three-year mark, Global Witness prepared a report in which it stated that 'the most obvious criticism of the scheme lies in the uneven adoption and enforcement of specific measures – the "system of internal control" – that each country must develop and implement in order to track the origin of

78 KPCS Core Document, Annex I.

79 KPCS Core Document, Section IV(a)-(e).

diamonds'.[80] Yet Global Witness acknowledges that demanding a compulsory set of minimum requirements is also not the answer: 'such a solution ignores the political compromise that allowed each country to devise its own system of internal controls was key to achieving agreement in the first place'.[81] This suggests that in voluntary, market-based schemes, there may be trade-offs between obtaining the political consensus necessary for the initial agreement and the inclusion of precise obligations that require a high-level of compliance. This may be especially the case where participant governments have low levels of capacity and are reluctant to commit to schemes that depend on the implementation or maintenance of resource or skill-intensive institutions.

Delegation

Delegation is the quality that has proved most elusive in the context of the KPCS. Certainly, the scheme has no independent enforcement mechanism. Certain procedures do, however, apply where Participants are not following the rules as required. If a Participant considers that the laws, regulations, rules, procedures or practices of another Participant fail to ensure the absence of conflict diamonds in the exports of that Participant, the first Participant is obliged to inform the second Participant through the Chair.[82] The Chair is then required to inform all Participants without delay in relation to the relevant concern, and to enter into dialogue as to how the specific problem should be addressed. Another institutional characteristic that potentially compromises informal sources of delegation is the confidentiality requirement. Participants and Observers are required to make 'every effort' to observe strict confidentiality relating to any compliance matter, meaning that there is little transparency.[83]

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80 Global Witness, 'An Independent Commissioned Review: Evaluating the Effectiveness of the Kimberley Process', p.8.

81 ibid., p.9.

82 KPCS Core Document, Section V(e).

83 KPCS Core Document, Section VI(16).

Critics claim that the absence of effective delegation ultimately limits the utility of the KPCS as a legalisation imitative. Murphy, for instance, says that the scheme suffers for not having any independent court or tribunal, and suggests that – as in the WTO dispute resolution system – certain actors should have private rights of action against others to provide a coherent system of enforcement:

> *If this private cause of action [against individuals, companies, and governments] were established, industry leaders, as well as countries, would be able to participate more aggressively in the system. Like other methods of prosecution, many industry and government leaders would find the threat of suit deterrence enough, looking to avoid bad press (an often fatal blow in the realm of luxury goods). However, until the KPCS becomes formalized law, or at the very least binding among its signatories, this cause of action remains a fiction.*[84]

Nevertheless, J. Andrew Grant describes several instances where the consensus-based model of delegation has worked reasonably well, despite the lack of a formal system. For example, in 2003, the Central African Republic was suspended from the KPCS following reports that rebels had captured territory including diamond-mining areas. Lebanon was suspended in 2004 because it had not passed the domestic laws required by the KPCS to provide more comprehensive oversight for the importation and exportation of rough diamonds. These suspensions were ended once the countries were able to demonstrate that they met minimum standards.

Both countries were motivated to adopt reforms for two reasons. First, the standing of the KPCS institution itself was important, as both governments sought to 'regain their places in what they perceived to be a legitimate and well-regarded multilateral institution'.[85] Second, even through the bans lasted for less than a year, by this time the governments were able to fully appreciate the economic disadvantages of their

84 Murphy, 'Clouded Diamonds' p.220.

85 Grant, 'Consensus Dynamics and Global Governance Frameworks' p.329.

suspensions.[86] Certainly, governments will 'jump through hoops' set by the KPCS, even unwillingly, to avoid the economic impact of permanently leaving. Relying only on smuggling, governments risk losing 30-50% of the value of their diamonds.[87] Speaking in relation to Zimbabwe, Nadim Kara of PAC has commented:

> *Why didn't they walk away? Because at the end of the day, unlike other global governance initiatives, the KPCS has some power over the ability of governments to make money.*[88]

Other situations have proved more difficult to resolve, especially where the states in question have felt 'more confident in their standing in international affairs and therefore more resistant to Kimberley Process suspension efforts'.[89] The Republic of Congo (ROC), for instance, was found in 2004 to have improperly issued Certificates for over five million carats of rough diamonds.[90] Early in the year, the ROC's irregular statistics came to the attention of the then KP Chair, Tim Martin, and members of the Canadian delegation. A subsequent KP Review Mission found evidence that the ROC's ministries of revenue and mineral resources could not demonstrate the provenance of the country's diamond exports. On 9 July 2004, the ROC was suspended by the KPCS for non-compliance based on misuse of Certificates, misrepresentation of diamond exports, and failure to provide adequate details in relation to its mining sites. Despite the anger and allegations of the ROC representative, Louis-Marie Djama, that several KPCS members had organised a conspiracy against the ROC, Djama failed to convince any Participant to delay or block the consensus-based decision to suspend the ROC. Nevertheless, it is still noteworthy that other Participants generally remained supportive of the ROC even in the wake of the scandal. The ROC was not vilified by other

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86 ibid.

87 Rob Bates, 'Why We Still Need a Kimberley Process', *Cutting Remarks* 27 August 2010. Available at: http://www.jckonline.com/blogs/cutting-remarks/2016/01/20/why-we-still-need-kimberley-process (accessed 30 September 2016).

88 ibid.

89 Grant, 'Consensus Dynamics and Global Governance Frameworks' p.329.

90 Murphy, 'Clouded Diamonds' p.222.

members for its transgressions, and soon the ROC set out on steps towards re-certification, including the engagement of an independent French firm to determine the country's productive capacity for diamond mining, leading to the country's readmission to the scheme in November 2007.[91]

But such problems within KPCS delegation processes have at times compromised the overall legitimacy of the scheme. First, from 2006, rebels in control of the Bobi mine in northern Côte d'Ivoire smuggled vast quantities of diamonds via Mali and Ghana, causing Global Witness to comment that the KPCS risked becoming 'little more than a paper-pushing exercise'.[92] This incident caused the *Economist* to conclude that the 'self-regulating Kimberley Process has failed to interrupt the myriad diamond-trading networks that operate across the loose borders of west Africa'.[93]

Second, and also in 2006, evidence emerged in Venezuela of widespread mismanagement in its diamond sector. A PAC investigation concluded that vast quantities of diamonds were being smuggled into Guyana.[94] After the release of the PAC report, Venezuela decided to self-suspend itself and ignored further enquiries from the KPCS.[95] An article by Time in 2012 highlighted quotes from several diamond buyers who conceded that they had purchased stones from Venezuela without being able to verify their origins.[96] These stones were then issued false KPCS Certificates so that they could enter the global market.[97] At the November 2013 Plenary meeting in

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91 Grant, 'Consensus Dynamics and Global Governance Frameworks' p.331.

92 'Still a Rebel's Best Friend', *The Economist* 9 November 2006. Available at: http://www.economist.com/node/8150152 (accessed 14 February 2016).

93 ibid.

94 Partnership Africa Canada, 'Venezuala,' Available at: http://www.pacweb.org/en/venezuela (accessed 14 February 2016).

95 ibid.

96 Girish Gupta, 'Not Just Out of Africa: South America's "Blood Diamonds" Network', *Time* 20 August 2012. Available at: http://world.time.com/2012/08/20/not-just-out-of-africa-south-americas-blood-diamonds-network/ (accessed 14 February 2016).

97 Partnership Africa Canada, 'Venezuala'.

Johannesburg, the KPCS finally decided to take action and officially placed Venezuela on a list of countries not permitted to trade diamonds.[98] In May 2016, it was reported that discussions on the readmission of Venezuala are 'moving forward'.[99]

But is perhaps the alleged human rights violations in the Marange region in Zimbabwe that has caused the most reputational damage. The events even prompted Global Witness, one of the KP's most important NGO Observers, to exit the scheme. After a 'diamond rush' attracted approximately 30,000 artisanal miners to the Marange area in 2006, the Zimbabwean government sent in military and police to address what it considered to be illegal mining activity. Officers soon imposed their own rules over the area and extracted informal fees and taxes over the miners working there. Events took a more serious turn in October 2008, when Zimbabwean military armed with helicopter gunships murdered 214 civilians over three weeks. Human Rights Watch also alleged that the armed forces were torturing and beating local villagers, as well as engaging the forced labour of children and adults.[100]

In March 2009, the Namibian Chair, Bernhard Esau, visited Zimbabwe, and in June 2009, a Kimberley Process Review Mission toured Marange in addition to other regions in the country. The Review Mission eventually found that Zimbabwe was not compliant with the KPCS. However, no consensus could be reached on whether Zimbabwe should be suspended from the scheme. At the time, the Namibian Chair was extremely reluctant to suspend Zimbabwe given the political links between Zimbabwe and Namibia. The enormous wealth in the Marange field also had important political implications, with the *Economist* reporting that 'if the revenue [from the Marange field]

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98 KPCS, 'Final Communiqué from the Kimberley Process Plenary Meeting' (Johannesburg), 22 November 2013.

99 Rapaport, 'Kimberley Process to Readmit CAR, Venezuela,' Available at: http://www.diamonds.net/News/NewsItem.aspx?ArticleID=57241&ArticleTitle=Kimberley+Process+to+Readmit+CAR%2C+Venezuela (accessed 30 September 2016).

100 Human Rights Watch, 'Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe' (New York: HRW), June 2009.

fell exclusively into the hands of President Robert Mugabe's ZANU-PF it could… spell the return of a single-party dictatorship'.[101]

The other factor that worked in Zimbabwe's favour was the fact that Participants recognised that it was undesirable to facilitate the country's exit from the system because this would create potential sources and a new market for illicit diamonds in the centre of southern Africa. Grant recounts that:

> *[F]rom July 2004 to November 2007, the general attitude within the Kimberley Process towards the Republic of Congo was one of helping the country becoming KPCS-compliant so that the suspension could be lifted without undue delay. This rationale contributed to the reluctance to suspend Zimbabwe based on fears that the diamond-rich country could become a hub for the trafficking of illicit diamonds that would create a significant market located beyond the scrutiny of the Kimberley Process and its monitors.*[102]

Instead of the outright ban on Zimbabwean diamond sales, which was recommended by the WDC, the KPCS in November 2009 decided to suspend sales for six months to give the government another chance to comply with KPCS standards and withdraw troops from the Marange area. The Chair, Participants and Observers developed and adopted a 'Joint Work Plan on Zimbabwe,' which was adopted at the November 2009 Plenary meeting in Swakopmund, Namibia. The plan required that a forensic audit of the 2007-2009 stockpile be carried out, that technical assistance be provided to the government to assist it with governance of the diamond industry, that the military be gradually withdrawn from the Marange, and that more robust controls be implemented in relation to mining concessions and at border crossings.[103] Abbey Chikane, formerly of the South African Diamond Board, was appointed to oversee the process. Chikane later wrote a report leaked in June 2010 that recommended Zimbabwe be permitted to

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[101] 'Blood and Dirt', *The Economist* 24 June 2010. Available at: http://www.economist.com/node/16438814 (accessed 14 February 2016).

[102] Grant, 'Consensus Dynamics and Global Governance Frameworks' p.329.

[103] ibid.

resume sales. This was despite reports of continuing human rights abuses, the sale of uncertified diamonds on the black market, and the flow of proceeds to ZANU-PF representatives and army officers.[104]

Zimbabwe did make attempts to adhere to the terms of the agreement, but Observers reported further human rights abuses, including the arrest on 3 June 2010 of Farai Maguwu, head of a Marange-based NGO called the Centre for Research and Development. On 18 June, Obert Mpofu, Zimbabwe's minister of mines, reported to the Zimbabwe chamber of commerce that it had received a letter from the KPCS demanding Mr Maguwu's immediate release if Zimbabwe were to be allowed to resume diamond trading. Mpofu retorted that he could not possibly intervene in Zimbabwe's justice process, and affirmed that 'nothing would stop us'. This was intended to mean that Zimbabwe would sell its diamonds regardless of the determination of the KPCS.[105] These complaints culminated in a follow-up KP Process Review Mission in August 2010, which concluded that systems were working better but problems continued in some areas. At this point, cracks in the consensus-based system began to show. The DRC Chair, Mathieu Yamba, caused consternation when he unilaterally announced that two Zimbabwean diamond companies, Marange Resources and Mbada, could commence exporting diamonds. This decision was not supported by consensus. Only South Africa, in addition to the DRC and Zimbabwe, had supported this decision, which received significant criticism from the international community.[106]

Civil society Observers finally walked out during the June 2011 KP Intercessional meetings in protest at the lack of consultation by the Chair and inauthentic claims of unity over the Zimbabwean crisis. In November 2011, Observers boycotted the Plenary meetings and Global Witness officially withdrew from the scheme. In November 2012,

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104 'Blood and Dirt'.

105 ibid.

106 'A Model's Best Friend', *The Economist* 5 August 2010. Available at: http://www.economist.com/blogs/dailychart/2010/08/biggest_diamond_producers (accessed 14 February 2016).

civil society Observers (without Global Witness) returned, although the more important questions regarding compliance remained unresolved. In November 2013, Zimbabwe stated that it had fulfilled the terms of the agreement and demanded that the KP export embargo be lifted. [107]

The repercussions of these events are still unfolding. Maguwu, the director of the Centre for Research and Development previously arrested, has commented that Global Witness's withdrawal was 'a very big blow'. According to Maguwu: 'The Kimberley Process will never be the same. A very influential member of the Kimberley Process has cast a vote of no confidence'.[108] Some governments, however, expressed their frustration with Global Witness. Michael Mann, a EU representative, stated that the KP 'may not be a perfect instrument, but it is the best we have, and therefore all parties, including civil society, should work to make it effective'.[109]

These examples highlight the challenges MSIs face in creating effective delegation. Without an independent body to monitor compliance, Participants need to communicate and cooperate effectively to provide adequate oversight. At times, political objectives may prevent parties reaching consensus, even when the bad behaviour of a particular Participant should prompt censure. Successful outcomes may be more likely when Participants are transparent about difficulties in their national systems, and open to receiving advice and assistance in relation to particular problems. Furthermore, these situations show that it can be difficult for NGOs to decide how best to engage with MSIs when they are underperforming – when do you stay, and when do you go?

Implementation

As illustrated above, the KPCS is not able to boast a robust delegation function in the traditional sense. At best, the softer delegation under the scheme operates by consensus,

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[107] Grant, 'Consensus Dynamics and Global Governance Frameworks' p.333.

[108] John Eligon, 'Global Witness Quits Group on 'Blood Diamonds'', *New York Times,* 2011, p.A5.

[109] ibid.

encouraging and assisting non-compliant Participants to improve performance so that they reach minimum standards. At worst, these processes at times have been so inconsistent and politicised that they have jeopardised the legitimacy of the system. Although no doubt this softer approach to delegation has its advantages and its drawbacks, it is also an illustration of the KPCS's focus on implementation, even when this priority comes at the expense of other institutional objectives.

Four main features of the KPCS highlight that it is an implementation-orientated initiative. First, participation is open on a global, non-discriminatory basis to all states willing and able to fulfil the requirements of the KPCS. This is reflected by the fact that the scheme now boasts 54 participants representing 81 countries, and that the KPCS enjoys institutional links with a range of industry as well as non-governmental institutions.

Second, the overall objective of the KPCS is to encourage Participants to implement certain laws and systems that allow only non-conflict diamonds to be traded. The KPCS document outlines the various steps that aspiring Participants must take and the institutions that they must create if they are to be included in the system. This is clearly illustrated by the requirements outlined in Section II (which concerns minimum requirements in relation to certificates); Section III (which concerns undertakings made by Participants in respect of international trade of rough diamonds); and Section IV (which covers the internal controls that Participants must establish).

Third, Participants are very specifically required to provide feedback on implementation progress through the provision of information on relevant laws, regulations, rules, procedures, and practices (Section V(a)). Statistical data is to be provided to other Participants (Section V(b)), and Participants are asked to 'exchange on a regular basis experiences and other relevant information, including on self-assessment, in order to arrive at the best practice in given circumstances' (Section V(c)). In addition to highlighting the importance of implementation and the role of information-sharing in promoting best practice, this section reflects the fact that the adoption of the KPCS rules is a learning experience and a work-in-progress for all concerned. This is an important point to keep in mind in considering how success and progress should be evaluated. The KPCS also incorporates a formal Monitoring Committee, which has the task of dealing with issues related to implementation. This Committee is responsible for the peer review mechanism, visits to participating countries for the purpose of review, and the assessment of Participants' annual reports. This group also manages related to implementation, especially when the integrity of the KPCS is endangered.[110]

Fourth, the implementation emphasis is demonstrated by the fact that Participants are required to assist each other in improving their performance. For instance, Participants should 'consider favourably requests from other Participants for assistance to improve the functioning of the Certification Schemes within their territories' (Section V(d)) and 'cooperate with other Participants to attempt to resolve problems which may arise from unintentional circumstances and which could lead to non-fulfilment of the minimum requirements for the issuance or acceptance of the Certificates, and inform all other Participants of the essence of the problems encountered and of solutions found'. (Section V(f)).

Participants also play a crucial role in assisting other members through the monitoring and peer review processes. As discussed above, where a member is found to be in breach of the rules, they are first notified through the Chair, and are given several opportunities to improve their systems prior to suspension. Overall, the attitude of Participants towards non-complying members has demonstrated a willingness to assist rather than sanction. However, there may be other reasons why Participants are reluctant to suspend members, including political motivations and the practical reality that suspended states may create new smuggling havens for conflict diamonds. Nevertheless, even these factors still create a pull towards encouraging Participants to implement measures and remain included rather than defect from the system entirely.

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110 KPCS, 'Monitoring (WGM),' Available at: https://www.kimberleyprocess.com/en/monitoring-wgm (accessed 27 February 2016).

No doubt the KPCS has had its share of problems. However, in evaluating the success of the KPCS, one should recall that the number of conflict diamonds being mined and traded has fallen dramatically since the scheme's inception. In the late 1990s, conflict diamonds comprised between 4 and 15% of the annual global trade. This figure dropped under 0.2% by the late 2000s and declined to almost nil by 2012.[111] Furthermore, the KPCS remains a leading example of a legalisation initiative that has successfully incorporated states, civil society and industry. By adopting a consensus-based approach, it has promoted inclusiveness and indicated its intention to be attentive to the interests of all Participants. In focusing squarely on implementation, it has compelled Participants to pass domestic laws that prevent trade in conflict diamonds and encouraged them in novel forms of monitoring such as peer review. The KPCS has also stimulated capacity-building in many countries where strengthening state capacity is of fundamental importance.

However, serious problems in relation to implementation still exist. Several of these are illustrated by the developments that have unfolded in Zimbabwe since 2006. A final issue raised by this crisis is that the definition of 'conflict diamonds' used by the KPCS is arguably outdated. This definition fails to encompass gems whose production does not fund rebel movements, but still causes serious human rights abuses. In 2012, the US Chair, Gillian Milovanovic, stressed this point in a speech in Cape Town when she said 'we see diamonds emerging from conflicts that do not involve the same kind of rebel movements, but from broader contexts of conflict and we believe the Kimberley Process should carefully consider how best to address this'.[112] Among future challenges for the KPCS, then, is consolidating the system so that legitimately-traded diamonds are not just 'conflict-free', but produced free from human rights violations as well.

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[111] Grant, 'Consensus Dynamics and Global Governance Frameworks' pp.333-34.

[112] KPCS, 'A Note from Ambassador Milovanovic,' Available at: https://www.kimberleyprocess.com/en/note-ambassador-milovanovic (accessed 27 February 2016).

The Extractive Industries Transparency Initiative (EITI)

The Extractive Industries Transparency Initiative (EITI) is another initiative launched in recent years with the objective of raising standards in the extractive sector. The first part of this section briefly describes the resource curse, which is the problem the EITI aims to address. The second section sets out the various steps in the legalisation process, explaining how and for what purpose the scheme developed. The third section considers the nature of obligation, precision, and delegation in the context of this initiative, and argues why implementation is a fundamental dimension of legalisation in this case.

The Resource Curse

The EITI is one response to the resource curse, which refers to the fact that countries with an abundance of natural resources tend to have less economic growth and worse development outcomes than those states with fewer natural resources.[113] The problem is neatly set out by Susan Aaronson:

> *Nigeria is awash in oil; Mali is flush with gold reserves; and Peru has abundant copper. These resources belong to the people, and thus, Nigerians, Malians, and Peruvians should benefit from their extraction and sale. But in many resource-rich developing countries, policymakers lack the skills, will, or expertise to effectively manage the funds derived from these resources. Officials may funnel mining or petrodollars to their allies and families to stay in power. In some nations with weak institutions, a lack of accountability and transparency about resource revenues can exacerbate poor governance, and lead to corruption, conflict, and inequality…Meanwhile, citizens of these resource rich countries have little say over how the revenues are spent or invested. This affliction is known as the resource curse.*[114]

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113 Paul Collier and Anke Hoeffler, 'Resource Rents, Governance, and Conflict,' *Journal of conflict resolution* 49, no. 4 (2005).

114 Susan Ariel Aaronson, 'Limited Partnership: Business, Government, Civil Society, and the Public in the Extractive Industries Transparency Initiative (EITI),' *Public Administration and Development* 31, no. 1 (2011), p.2.

The resource curse is highly relevant to human rights because it creates a situation in which human rights violations and potential violations are more prominent.[115] An expanding literature on the subject has led to an increased focus on the importance of transparency, as it is assumed that disclosing payments and revenue from extractive industries will lead to less corruption and improved governance, with advantages for a range of groups in society.[116] According to many anti-corruption campaigners, 'light is the best disinfectant'.[117]

Like the KPCS, an important report by Global Witness was a crucial step in instituting change. *A Crude Awakening* was published in December 1999, and exposed the lack of transparency in oil management in Angola. The report showed that the MPLA Angolan government was diverting most of its oil revenues for political purposes, and that European and North American oil corporations were participating in this process. It argued that by refusing to disclose information on revenues paid, corporations were complicit in the embezzlement of the natural resources by state leaders:

> *As the main generators of revenue to the government of Angola, the international oil industry and financial world must accept their complicity in the current situation. As such it is imperative that these companies change the way they conduct their affairs, creating new levels of transparency. The international oil industry and the finance companies that have provided oil backed loans, must play this leading role.*[118]

Following the Global Witness report, BP published the signature bonus of US$111 million that it had paid to the Angolan government for an offshore license, and

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115 Jena Martin and Karen E Bravo, *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: CUP, 2015), p.565.

116 Helmut Weidner, 'Extractive Industries Transparency Initiative,' *The Handbook of Transnational Governance: Institutions and Innovations* (2011), p.241.

117 'A Fight for Light', *The Economist* 24 October 2015. Available at: http://www.economist.com/news/business/21676701-global-initiative-bring-more-transparency-oil-gas-and-mining-turning-point-efforts (accessed 15 March 2016).

118 Global Witness, 'A Crude Awakening: The Role of the Oil and Banking Industries in Angola's Civil War and the Plunder of State Assets' (London: GW), December 1999, p.2.

committed to publish further financial details of similar payments.[119] These actions were met with such hostility from the national Angolan oil company that Lord John Browne (who was CEO of BP at the relevant time) commented in his memoir that 'clearly a unilateral approach, where one company or one country was under pressure to "publish what you pay" was not workable'.[120]

In consequence, oil companies argued that it was preferable that governments rather than corporations carried the obligation to report, as company reporting could potentially place lucrative oil contracts at risk. If company reporting was deemed necessary, corporations argued that such initiatives could only work if all companies operating in a specific country were required to disclose the same information.

Following these developments, representatives of the UK government (including individuals from the Cabinet Office, the Department for International Development (DFID), the Treasury, the Foreign Office, and the Department of Trade and Industry) saw an opportunity to develop a scheme based on feedback from oil companies and the transparency principles embodied in the 'Publish What You Pay' campaign, which had been launched by six London-based organisations in 2002.[121] A speech was prepared on the EITI by the then-Prime Minister, Tony Blair, who intended to deliver his remarks at the World Summit on Sustainable Development in Johannesburg in September 2002. However, due to strained relations between Prime Minister Blair and President Mugabe of Zimbabwe, the speech was never delivered as intended.[122]

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119 EITI, 'History of the EITI,' Available at: https://eiti.org/history (accessed 1 December 2015).

120 ibid.

121 Publish What You Pay, 'History,' Available at: http://www.publishwhatyoupay.org/about/history/ (accessed 1 December 2015).

122 Jonas Moberg and Eddie Rich, 'Beyond Governments: Lessons on Multi-Stakeholder Governance from the Extractive Industries Transparency Initiative (EITI),' *Commonwealth Governance Handbook* 14(2013), p.113.

The EITI Principles

Nevertheless, the speech was published, and soon afterwards DFID organised a meeting of civil society, company and government representatives with the objective of developing a reporting standard. In June 2003, the group agreed on a Statement of Principles to enhance the transparency of payments and revenues in the extractive sector.[123] These set out the general objectives and commitments of all stakeholders. The scheme also encapsulated the growing consensus on the importance of transparency amongst governments and non-state actors, and the need for cooperation between the public and private sectors to ensure accountability.

Summary 4: The EITI Principles

The EITI Principles (as set out in the revised EITI Standard 2016)

1.We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.

2.We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development.

3.We recognise that the benefits of resource extraction occur as revenue streams over many years and can be highly price dependent.

4.We recognise that a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development.

5.We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability.

6.We recognise that achievement of greater transparency must be set in the context of respect for contracts and laws.

[123] Department for International Development, 'Report of the Extractive Industries Transparency Initiative (EITI) London Conference, 17 June 2003,' Available at: http://collections.europarchive.org/tna/20070701080507/http:/www.dfid.gov.uk/news/files/eitireportconference17june03.asp (accessed 1 December 2015).

7.We recognise the enhanced environment for domestic and foreign direct investment that financial transparency may bring.

8.We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure.

9.We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.

10.We believe that a broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.

11.We believe that payments' disclosure in a given country should involve all extractive industry companies operating in that country.

12.In seeking solutions, we believe that all stakeholders have important and relevant contributions to make – including governments and their agencies, extractive industry companies, service companies, multilateral organisations, financial organisations, investors, and non-governmental organisations.

Following the meeting, several countries including Nigeria, Azerbaijan, Ghana, the Kyrgyz Republic, Peru, the Republic of Congo, São Tomé and Príncipe, Timor-Leste, and Trinidad and Tobago considered how these principles might be applied in their own national contexts. A meeting in March 2005 emphasised the need for further criteria to enhance the effectiveness and credibility of the scheme (set out in the six EITI Criteria, which have since been rolled into the revised EITI Standard).[124] The

[124] When they were drafted in 2005, the EITI Criteria specified that implementation of the EITI must be consistent with the criteria below:

- Regular publication of all material oil, gas and mining payments by companies to governments ('payments') and all material revenues received by governments from oil, gas and mining companies ('revenues') to a wide audience in a publicly accessible, comprehensive and comprehensible manner.
- Where such audits do not already exist, payments and revenues are the subject of a credible, independent audit, applying international auditing standards.
- Payments and revenues are reconciled by a credible, independent administrator, applying international auditing standards and with publication of the administrator's opinion regarding that reconciliation including discrepancies, should any be identified.
- This approach is extended to all companies including state-owned enterprises.

establishment of an International Advisory Group was also announced. The *Economist* reported in December 2005 that the World Bank was supportive of efforts to promote transparency, quoting Rashad Kaldany of the IFC as saying that 'Countries have no justification for secrecy…All of these agreements will be made public in the future'.[125] Furthermore, the 'best news', according to the *Economist*, was that leaders of developing countries were in agreement:

> *'Some two dozen in all have joined up. Nigeria's recent participation is encouraging the rest of West Africa…just as Azerbaijan's involvement has shamed Kazakhstan and other neighbours into cleaning up their act'.*[126]

At this stage, the EITI was still run informally with the main functions taking place in an EITI conference held every second year. The third EITI Global Conference was held in Oslo in October 2006. At this meeting, the International Advisory Group introduced the EITI Validation Guide, which set out the indicators that implementing countries were required to meet in order to become EITI compliant. The EITI Validation Guide was originally drafted to be a tool for those appointed as validators, but in the end was mostly used by implementing countries for guidance on implementation.[127] It was also agreed that the EITI required its own governance structure, board, and secretariat, which were later launched in Oslo in 2009. The EITI thus moved from being a loosely-organised initiative with an informal governance structure to an international non-for-profit organisation established under Norwegian law. Over time, the EITI continued to

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- Civil society is actively engaged as a participant in the design, monitoring and evaluation of this process and contributes towards public debate.
- A public, financially sustainable work plan for all the above is developed by the host government, with assistance from the international financial institutions where required, including measurable targets, a timetable for implementation, and an assessment of potential capacity constraints.

125 'The Paradox of Plenty', *Economist* 20 December 2005. Available at: http://www.economist.com/node/5323394 (accessed 1 December 2015).

126 ibid.

127 Tonje P. Gormley, 'Legal Mechanisms for Increased Transparency in the Extractive Industries,' in *Yearbook on International Investment Law & Policy 2011-2012*, ed. Karl P Sauvant (Oxford: OUP, 2013), p.258.

develop to reflect the needs of governments attempting to implement the framework. In 2009 and 2011, the EITI replaced the EITI Validation Guide with the EITI Rules, which were drafted as steps to be followed by implementers rather than as indicators to be assessed by external validators.[128]

A Revised EITI Standard

Following a review in 2011 and two years of consultations, a revised EITI Standard was negotiated and launched in May 2013. It is split into two parts: (1) Implementation of the EITI Standard; and (2) Governance and management. The first part includes:

- The EITI Principles, which were agreed by all stakeholders in 2003 (listed above);
- The EITI Requirements, which must be adhered to by countries implementing the EITI. These requirements incorporate provisions previously set out in the EITI Criteria, EITI Requirements and the EITI Policy Notes of the 2011 EITI Rules;
- The Validation Guide, which provides guidance for EITI Validators and implementing countries on the process of Validation. The Validation Guide was first agreed in 2006 but has been revised since this date;
- The protocol entitled 'Participation of civil society', which was first approved by the EITI Board on 16 February 2011.

The second part includes a brief introduction regarding how the EITI is organised, the EITI Articles of Association, and the EITI Openness Policy. The draft EITI Code of Conduct and draft EITI Constituency Guidelines are also included here.

The 2013 revisions reflected several changes. First, in an attempt to ground the scheme in a national dialogue about the governance of natural resources, the revised EITI requires that each participating country establish an EITI multi-stakeholder group that must develop a 'work plan'. This plan should articulate the objectives that the group

[128] Moberg and Rich, 'Beyond Governments: Lessons on Multi-Stakeholder Governance from the Extractive Industries Transparency Initiative (EITI)' p.116.

seeks to promote under the EITI, and set out a proposal as to how those objectives will be realised.

Second, the revised EITI Standard introduces a new obligation that EITI Reports must contain basic contextual information about the extractive sector. Crucially, it also strengthens several of the EITI reporting requirements, necessitating that payments be disaggregated in respect of each company and each revenue stream. In particular, the revised EITI Standard imposes reporting requirements on state-owned enterprises (SOEs), which are required to report their level of ownership in extractive projects and any material payments to SOEs from oil, gas and mining companies.

Third, reports are to be made available electronically and codified to allow for international comparisons. In addition, implementing countries must 'maintain a publicly available register or cadastre system(s)' that sets out detailed information pertaining to all licences, including concessions, to companies covered in the EITI report as well as entities not mentioned in the report.[129]

Fourth, the revised EITI Standard aims to recognise countries that implement measures beyond the minimum standard by introducing more frequent and nuanced validations to create incentives for new EITI innovations to occur at the national level. Finally, the revised EITI Standard condenses the previous 21 requirements and policy notes into a more concise seven requirements.[130]

[129] EITI Standard 2016, Requirement 2.3

[130] As noted by Simons and Macklin, previous versions of the EITI rules only required reconciliation of material payments made by extractive companies with government revenues from the sector and there was no obligation to ensure that such numbers are in fact correct. Furthermore, there was no requirement to break down financial information by company or revenue stream, and Candidate and Compliant countries were not required to provide information on the award of concessions: Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.154. See also Dilan Ölcer, 'Extracting the Maximum from the EITI (Working Paper No. 276)' (Paris: OECD Development Centre), 2009.

Summary 5: EITI – Applying to become a Candidate/Compliant

Implementing countries are divided into two groups: EITI Candidate and EITI Compliant countries. EITI candidature is intended to be a temporary state that should lead an implementing country to compliance with the EITI Standard in a timely fashion. In order to become an EITI Candidate Country, certain entry criteria must be satisfied. A government must make a clear public statement of its intention to implement the scheme, commit to work with both NGOs and businesses on implementation, appoint a 'senior individual' to lead the EITI's implementation, establish a multi-stakeholder group to oversee EITI implementation, and publish and distribute a workplan that is 'fully costed and aligned with the reporting and Validation deadlines established by the EITI Board'.[131] A government may only submit a Candidate application after meeting these criteria. This application is then reviewed by the EITI Outreach and Candidature Committees, which assess whether the sign-up steps have been completed and make a recommendation to the EITI Board.[132] The EITI Board then makes a determination regarding whether or not the applicant state should be admitted as a Candidate Country.

Applying to be a Compliant Country

Following admission as Candidate Country, a state is required to be validated as a Compliant Country within two and a half years. A Candidate Country's first EITI Report must be published within 18 months from the commencement of candidature, and Validation must be commenced within two and a half years of the same date. Validation assesses compliance with the EITI Requirements and is carried out by an independent validator. If the Board considers that the country meets the EITI Requirements, the country will be designated as EITI Compliant. Compliant Countries must undergo Validation every three years, or upon the request from the EITI International Board. Where a Validation Report shows that a country has made progress but does not meet all the EITI Requirements, the country will remain a Candidate (although time limits on the maximum candidacy period apply). Where Validation shows that no meaningful progress has been achieved, or where the maximum candidacy period has been exceeded, the Board may revoke the country's candidate status.

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131 EITI Standard 2016, Requirement 1.5

132 Stakeholders at the national level will be contacted and comments sought from supporting governments, international civil society groups, and supporting investors and companies. The International Secretariat will work closely with the senior individual appointed by the government to lead on EITI implementation in order to clarify any outstanding issues.

Summary 6: EITI Requirements

A Summary of the EITI Requirements

Effective oversight by the multi-stakeholder group: The EITI requires effective multi-stakeholder oversight including a functioning multi-stakeholder group that involves the government, companies and the full, independent, active and effective participation of civil society. The key elements of this requirement include: (1.1) government commitment; (1.2) government oversight; (1.3) the establishment of a multi-stakeholder group; and (1.4) an agreed workplan with clear objectives for EITI implementation, and a timetable that is aligned with the deadlines established by the EITI Board (1.6-1.8).

Timely publication of EITI Reports: EITI Reports are most useful and relevant when published regularly and include timely data. Requirement 2 establishes deadlines for timely EITI Reporting. Implementing countries are required to produce their first EITI Report within 18 months of being admitted as an EITI Candidate. Thereafter, implementing countries are expected to produce EITI Reports on an annual basis.

EITI reports that include contextual information about the extractive industries: This information should include a summary description of the legal framework and fiscal regime (3.2); together with an overview of: the extractive industries (3.3); the extractive industries' contribution to the economy (3.4); production data (3.5); state participation in the extractive industries (3.6); revenue allocations and the sustainability of revenues (3.7–3.8); licence registers and licence allocations (3.9- 3.10); and, any applicable provisions related to beneficial ownership (3.11) and contracts (3.12). The multi-stakeholder group should agree on who prepares the contextual information for the EITI Report (3.1).

The production of comprehensive EITI Reports that include full government disclosure of extractive industry revenues, and disclosure of all material payments to government by oil, gas, and mining companies: An understanding of company payments and government revenues can inform public debate about the governance of the extractive industries. The EITI requires a comprehensive reconciliation of company payments and government revenues from the extractive industries. Requirement 4 outlines the steps that the multi-stakeholder group needs to consider in order to ensure that the EITI Report provides a complete account of these payments and revenues. Section 4.1 sets out the requirements related to the types of payments and revenues to be covered in the EITI Report. Section 4.2 specifies which companies and government entities, including state-owned enterprises, should be required to report.

A credible assurance process applying international standards: Requirement 5 seeks to ensure a credible EITI reporting process so that the EITI Report contains reliable data. The EITI seeks to build on existing audit and assurance systems in government and industry and to promote adherence to international practice and standards. The multi-stakeholder group is required to appoint an Independent Administrator to reconcile the data submitted by companies and government entities (5.1). Section 5.2 outlines the issues that the multi-stakeholder group and the Independent Administrator need to consider in agreeing the terms of reference for the reconciliation. This includes the assurances that need to be provided by the reporting entities. Section 5.3 empowers the Independent Administrator to assess the comprehensiveness and reliability of the data and to make recommendations for the future. The EITI Report must be endorsed by the multi-stakeholder group (5.4).

EITI Reports that are comprehensible, actively promoted, publicly accessible, and contribute to public debate: Regular disclosure of natural resource revenue streams and payments from extractive companies is of little practical use without public awareness, understanding of what the figures mean, and public debate about how resource revenues can be used effectively. Requirement 6 ensures that stakeholders are engaged in dialogue about natural resource revenue management.

The multi-stakeholder group should take steps to act on lessons learned and review the outcomes and impact of EITI implementation: EITI Reports lead to the fulfilment of the EITI Principles by contributing to wider public debate. It is also vital that lessons learnt during implementation are acted upon, that discrepancies identified in EITI Reports are explained and, if necessary, addressed, and that EITI implementation is on a stable, sustainable footing.

Obligation

(a) A unique voluntary/compulsory framework

The EITI Principles exert obligation on participating states and companies in a variety of ways. Most directly, the EITI exerts obligation on states and companies through a unique voluntary/compulsory framework. The EITI website itself reflects that 'it is confusing to define the EITI as voluntary…[this] often stems from a lack of defining for whom the EITI is voluntary'.[133] As a voluntary scheme, governments are not compelled to join the EITI. Nevertheless, the initiative has enjoyed excellent uptake in its short life. By 2016, 51 governments were in the process of implementing the EITI.[134]

Countries choose to participate for a range of reasons, as was clearly articulated in Australia's announcement in May 2016 that it intended to join:

> *By joining the EITI, we ensure that our domestic policy is consistent with international efforts to increase transparency, including in tax systems. This will provide significant benefits for Australian companies through improved global investment conditions resulting from consistent and open reporting standards for the world's resources sector. It will also*

[133] EITI, 'Frequently Asked Questions (FAQ),' Available at: https://eiti.org/es/node/7235 (accessed 3 February 2016).

[134] In 2015, the following countries were EITI compliant: Albania, Burkina Faso, Cameroon, Chad, Cote d'Ivoire, Democratic Republic of Congo, Germany, Ghana, Guatemala, Guinea, Indonesia, Iraq, Kazakhstan, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Mozambique, Niger, Nigeria, Norway, Peru, Republic of the Congo, Sierra Leone, Tanzania, Timor-Leste, Togo, Trinidad and Tobago, and Zambia. Current EITI Candidates include: Afghanistan, Azerbaijan, Columbia, Dominican Republic, Ethiopia, Honduras, Madagascar, Malawi, Myanmar, Papua New Guinea, Philippines, Sao Tome and Principe, Senegal, Seychelles, Solomon Islands, Tajikistan, Ukraine, United Kingdom and the US. Suspended countries include Yemen and the Central African Republic: EITI, 'EITI Fact Sheet', June 2016. Available at: https://eiti.org/document/factsheet (accessed 30 September 2016).

allow Australia to demonstrate leadership in transparency and anti-corruption matters and strengthen its credibility in advocating the adoption of the EITI by other countries.[135]

This highlights that incentives for countries to join include aligning domestic policy with international best practice, optimising the national investment environment, and demonstrating leadership and support of anti-corruption efforts at the international level. Interestingly, relatively corrupt states have also demonstrated strong interest in joining the EITI. In considering why corrupt governments might choose to voluntarily 'expose themselves to sunlight', Liz David-Barrett and Ken Okamura have found that states seek membership due to concern for their country's reputation amongst international investors and donors, as well as the expectation that they will be rewarded by increased aid.[136] Once they have joined, participating governments are obliged to report on revenues received, which are then independently reconciled with what corporations claim they have paid.[137] Since the start of the scheme, more than 290 EITI reports have been published that set out details in relation to transfers with an aggregate sum of more than US$1.9 trillion worth of revenues.[138]

For corporations that operate in participating states, EITI requirements are compulsory. The binding nature of this obligation is reflected by the fact that in almost all implementing countries, the elements of the EITI have been enacted or decreed in some legislative form, with the method of domestic legalisation dependent on the particular national context. This illustrates that as originally formulated, the EITI was 'designed

135 Joint Statement of Australian Minister for Foreign Affairs, Julie Bishop, and the Minister for Resources, Energy and Northern Australia, Josh Frydenberg, quoted in Sam Bartlett, 'EITI welcomes Australia implementing the EITI', 9 May 2016. Available at: https://eiti.org/node/4500 (accessed 30 September 2016).

136 These researchers found that countries do obtain increased aid the further that they progress through the EITI Implementation process, and also that the EITI achieves real results in reducing corruption: Aaronson, 'Limited Partnership'.

137 EITI, "How to Become an Implementing Country',' Available at: https://eiti.org/implement-eiti (accessed 1 September 2016).

138 Benjamin K Sovacool et al., 'Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI),' *World Development* 83(2016), p.179; EITI, 'EITI Fact Sheet'.

only as a stepping-stone to further domestic governance reforms to address rent-seeking behaviour'.[139] For instance, Nigeria and Liberia have enacted explicit EITI laws.[140] In Norway, Ghana and Sierra Leone, specific clauses on EITI implementation are included in laws relating to the mining, minerals and petroleum industries.[141] Other governments have issued Presidential or Ministerial decrees, or Memorandums of Understanding.[142]

(b) International Support

As mentioned above, the fact that 51 governments – including Colombia, France, Italy, Mexico, the UK and the US – have chosen to participate in the EITI demonstrates that it has strong support from the international community. The figure of 51 represents steady, consistent growth since the scheme started in 2005 with just a handful of participants. In addition to this endorsement by governments, the EITI has gained a broad base of encouragement from a range of oil and mining companies, institutional investors, and NGOs. More than ninety firms, including BP, Royal Dutch Shell, BHP

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139 Liz David-Barrett and Ken Okamura, 'The Transparency Paradox: Why Do Corrupt Countries Join EITI?,' (2013), p.259.

140 The relevant Acts in Nigeria and Liberia respectively are the Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007 and the Liberia Extractive Industries Transparency Initiative (LEITI) 2009.

141 In Norway, reporting requirements are set out in 'Regulation on reporting and reconciliation of revenue flows from petroleum activity,' available at: Lovdata, 'Forskrift om rapportering og avstemming av pengestrømmer fra petroleumsvirksomheten,' Available at: https://lovdata.no/dokument/SF/forskrift/2009-06-26-856 (accessed 1 February 2016). In Ghana, the *Petroleum Revenue Management Act 815 2011* at s 49 establishes transparency as a fundamental principle and at s 54 provides GHEITI with a seat on a Public Interest and Accountability Committee. In Sierra Leone, the *Mineral and Mines Act 2009* provides at s 159 that the Minister shall develop a framework for transparency in the reporting and disclosure by persons engaged in the extractive industry, of revenue due to or paid to Government, and shall disseminate by way of publication or otherwise, records, reports or any information concerning the revenue of the Government from the extractive industry, at least annually.

142 See, for instance, Presidential Decrees issued in Guinea (Presidential Decree D/2012/014/PRG/SGG), Côte d'Ivoire (Presidential Decree No. 2008-25) and Peru (Decrees DS No 027-2006 EM and DS No 028-2011-EM).

Billiton, ExxonMobil, Glencore and Chevron, back the initiative,[143] which is also supported by over ninety institutional investors.[144] Furthermore, Trafigura, one of the world's biggest commodity traders, formally declared its support in November 2014 and simultaneously reported that it made direct payments of $4.3bn to state oil companies in 2013.[145] The *Economist* attributed this move from commodity traders – 'usually a secretive bunch' – to Trafigura's perspective that 'change is coming anyway,' early movers are better placed to help shape the standards, and a high premium should be placed on transparency following the expensive fines imposed on several trading firms following alleged sanctions violations.[146]

As is the case with many MSIs, obligation under the EITI stems from a combination of soft law as well as hard law. In the case of the EITI, much of this law likewise reflects the strengthening normative trend towards transparency. In 2014, the *Economist* reported that 'business is being forced to open up in a host of reporting areas, from tax and government contracts to anti-corruption and sustainability programmes'.[147] This norm of increased transparency is also being reinforced by other trends, including the fact that governments are more likely to demand increased corporate accountability after the global financial crisis: 'No longer is ending corporate secrecy – the sharp end of which is money-laundering shell companies – an agenda pushed merely by Norway and a few

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143 The complete list of EITI Supporting Companies is available here: EITI, 'Companies,' Available at: https://eiti.org/supporters/companies (accessed 3 February 2016).

144 The complete list of EITI Supporting Investors is available here: EITI, 'Institutional Investors,' Available at: https://eiti.org/supporters/institutional-investors (accessed 3 February 2016).

145 Michael Kavanagh, 'UK Oil Groups Face Tougher Transparency Rules', *The Financial Times* 2 January 2015. Available at: https://www.ft.com/content/cd82c864-9287-11e4-a1fd-00144feabdc0 (accessed 3 February 2016). Trafigura has also published a 'Payments to Governments Policy', drawn up in consultation with the EITI International Secretariat. The policy commits the company to disclosing Trafigura's payments to National Oil Companies (NOCs) for crude oil and petroleum products, including gas, as well as associated corporate taxes and, where relevant, license payments to governments. On its website it writes that, '[a]s a leading commodities trading house we have a role in making such disclosures, and believe that Governments have an important part to play in disclosing how they use these funds'. See: Trafigura, 'Transparency,' Available at: http://www.trafigura.com/responsibility/transparency/ (accessed 1 February 2016).

146 'The Openness Revolution'.

147 ibid.

others; it has become a priority for the G20'.[148] This norm has also been buttressed by the efforts of NGOs, including Transparency International (TI) and Global Witness, who have become increasingly sophisticated advocates in this area.[149]

On the institutional side, various international bodies regularly note their association with the EITI as evidence of their own commitment to good governance. The UN General Assembly passed a unanimous UN resolution entitled 'Strengthening Transparency in Industry' on 11 September 2008, which gave strong backing to the EITI and encouraged all UN member states to promote transparency and accountability.[150] The World Bank's IFC standards for extractive projects reflect the EITI tenets, and the World Bank states on its website that 'the 'EITI is a core part of the World Bank Group's sector strategy for oil, gas, and mining and the Bank's governance and anti-corruption agenda'. The World Bank also administers a Multi-Donor Trust Fund (MDTF), which provides countries with resources to implement the EITI principles of revenue transparency.[151] Finally, the EITI is supported by a number of regional development banks, the African Union, the European Commission, the Commonwealth Secretariat, La Francophonie, and the leaders of the G7 and G20 countries.[152]

(c) Supporting domestic laws in the US, Canada and Europe

Complementary domestic laws in the US, Canada and Europe have also bolstered the EITI. First, in June 2010, US President Obama signed the *Dodd-Frank Financial Reform*

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148 ibid.

149 ibid.

150 UN General Assembly, 'Strengthening Transparency in Industries', UN Doc No.: A/RES/62/274 (11 September 2008).

151 The World Bank partly attributes the EITI's record of accomplishment to the World Bank/MDTF technical assistance and financing support leveraging ongoing sectoral work in EITI implementing countries: World Bank, 'Extractive Industries Transparency Initiative: Results Profile,' Available at: http://www.worldbank.org/en/results/2013/04/15/extractive-industries-transparency-initiative-results-profile (accessed 18 September 2016).

152 EITI, 'Partner Organisations,' Available at: https://eiti.org/supporters/partner-organisations (accessed 18 September 2016).

Act H.R. 4173. Section 1504 requires that all corporations listed in the US disclose full and detailed data on all payments over US$100,000 to the governments in the countries in which they operate. The law enables communities living near mines or oil fields to see precisely how much money is being created through local projects, and to hold their governments accountable for how those revenues are utilised.[153] In Canada, the *Extractive Sector Transparency Measures Act* was enacted in December 2014 and brought into force in June 2015. This Act similarly requires extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad.

Second, a new EU Accounting Directive introduced in June 2013 now requires listed and large non-listed extractive and logging companies to report all material payments to governments broken down by country and by project. The European Commission stated that the new requirements represented a response 'to international developments in this field, in particular the inclusion of a requirement to report payments to governments in the *Dodd Frank Act* in the United States'. Furthermore, the Commission stated that the new rules would 'complement the EITI efforts by legally requiring companies registered or listed in the EU to disclose payments to governments along the same lines as EITI,' with the 'ultimate objective [being] to contribute to the strengthening of the EITI and to extend its scope to all resource-rich countries'.[154] The Directive has teeth: the *Financial Times* reported that its implementation in the UK from 1 January 2015 meant that directors at UK oil, gas and mining companies could face criminal convictions and unlimited fines if they failed to properly disclose payments

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153 The US Securities Exchange Commission initially adopted Rule 13q-1 (as required by Section 1504) in August 2012, but re-proposed the rules in December 2015. In June 2016, the SEC published notice of the final rules and amendments, which must be complied with for fiscal years ending on or after 30 September 2018.

154 European Commission, 'New Disclosure Requirements for the Extractive Industry and Loggers of Primary Forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – Frequently Asked Questions', 12 June 2013. Available at: http://europa.eu/rapid/press-release_MEMO-13-541_en.htm (accessed 3 February 2016).

made to overseas governments.[155] Norway, which is home to oil company Statoil, also passed equivalent legislation in December 2013 requiring Norwegian companies in the extractive and forestry industries to report payments to governments on a project-by-project basis.[156]

Precision

On its website, the EITI notes that: 'In little over a decade, the EITI has developed from a vague initiative, to a multi-country multi-stakeholder forum, to a global rules-based transparency standard, towards an accountability process with minimum requirements'.[157] This reflects that the EITI rules have gradually evolved over time to become increasingly precise. Countries will only obtain Candidate or Compliant status after an explicit set of requirements has been met. As set out above, the EITI requirements for applying for EITI Candidature are very specific (i.e. the government must issue a public statement of support; appoint a senior individual to lead on EITI implementation; must work with civil society and companies to establish a multi-stakeholder group to oversee implementation etc.).[158] Participating countries must also adhere to exacting timelines in order to progress their candidature. EITI Candidates, for instance, are specifically required to commence Validation within two and a half years of becoming an EITI Candidate. A country may hold EITI Candidate status for no more than seven years from the date that it was admitted as an EITI Candidate.[159]

In addition, participating governments must issue reports by clear deadlines and include information on a specific range of topics. These are then reviewed by an Independent Administrator.[160] The EITI Board has proved itself willing to temporarily suspend

155 Kavanagh, 'UK Oil Groups Face Tougher Transparency Rules'.

156 Publish What You Pay, 'Norwegian Regulations concerning country-by-country reporting,' Available at: http://www.publishwhatyoupay.no/en/node/16414 (accessed 30 September 2016).

157 EITI, 'History of the EITI'.

158 EITI Standard 2016, Requirement 1.

159 EITI Standard 2016, Requirement 8.3(d).

160 EITI Standard 2016, Requirement 8.

participants that fail to meet report deadlines. Indonesia was temporarily suspended in February 2015 for persistent delays and inconsistencies in reports.[161] Tanzania was temporarily suspended in September 2015 for failing to publish a 2012/2013 report on time.[162] Nigeria is currently facing the threat of possible suspension, after failing to submit reports promptly.[163]

It is also notable that the Requirements define certain terms that, had they been left undefined, would give the International Secretariat more discretion in particular cases. For instance, the Requirements state that the process of Validation will determine whether a country is: (1) EITI Compliant; (2) not EITI Compliant, but has made meaningful progress; or (3) not EITI Compliant, and has not made meaningful process. The Standard specifically says that in assessing meaningful progress for the purpose of deciding extension requests, the EITI Board will have regard to: (1) the EITI process, in particular the functioning of the multi-stakeholder group and clear, strong commitment from government; and (2) the status and quality of EITI reporting, including meaningful progress in meeting the requirements for timely reporting.[164]

Delegation

Delegation in the EITI is operationalised through the Validation system, which aims to assess performance and promote dialogue and learning in the relevant country. It is also meant to be a standardising process that holds all EITI implementing countries to the

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[161] Emanuel Bria and Patrick Heller, 'Lower Oil Prices Create Challenges, Opportunities for Government', *The Jakarta Post* 23 March 2015. Available at: http://www.thejakartapost.com/news/2015/03/23/lower-oil-prices-create-challenges-opportunities-government.html (accessed 18 September 2016).

[162] Nuzulack Dausen, 'Tanzania: Hope Grows for Club to Lift Ban on Tanzania', *The Citizen* 9 December 2015. Available at: http://allafrica.com/stories/201512091251.html (accessed 18 September 2016).

[163] Bassey Udo, 'Ministerial Appointee Hands Over at NEITI', *Premium Times* 4 November 2015. Available at: http://www.premiumtimesng.com/news/top-news/192623-ministerial-appointee-hands-over-at-neiti-2.html (accessed 18 September 2016).

[164] EITI Standard 2016, Requirement 8.5(b).

same global standard, thus safeguarding the integrity of the EITI.[165] EITI Compliant countries are required to complete Validation every three years.

There are several steps in the Validation process. First, the International Secretariat informs the multi-stakeholder group in the relevant country regarding the schedule for Validation. The International Secretariat subsequently procures a Validator through a process set out in Section 3.3, who is required to measure the country's adherence to the EITI Standard by assessing compliance with the seven EITI Requirements. This is consultative process, during which the Validator consults a set range of documents and meets with the multi-stakeholder group, the Independent Administration, and other key stakeholders.[166] The Validator produces a draft Validation Report based on a standard template provided by the International Secretariat, which is subsequently submitted to the multi-stakeholder group and the EITI Board's Validation Committee. The Validator then prepares a final Validation report, which must comprehensively address the comments from the Validation Committee and the relevant multi-stakeholder group. This report must also address the impact of the EITI, lessons learned in EITI implementation, and any concerns expressed by stakeholders. Recommendations for the future implementation of the EITI are also included.

After this step is completed, the EITI Board analyses the final Validation Report and makes a determination regarding the status of the implementing country. Where the Board finds that the final Validation Report does not provide sufficiently detailed information regarding compliance with the EITI Requirements, the EITI Board may task the Validator with providing supplementary information. In circumstances where there is disagreement between the government, the multi-stakeholder group or the EITI Board in relation to the Validation report, the Validator must attempt to manage the conflict and amend the report if appropriate. If a disagreement cannot be resolved, this must be noted in the Validation Report. Serious disagreements are presented to the

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165 EITI Standard, Section 4 (Overview of Validation), p.39.

166 Ibid.

EITI Board, who will try to resolve them, but the Board also has the authority to reject complaints it considers to be trivial, vexatious, or unfounded.

If it is manifestly clear that an implementing country has not adhered to a significant aspect of the EITI Standard, the EITI Board will suspend or delist that country. This includes cases where a country has not met the requirements for timely EITI reporting, publication of annual activity reports and/or achieving compliance with EITI Requirements by deadlines established by the EITI Board. The EITI Board may set a time limit of twelve months for an implementing country to address any breaches, and suspension of an implementing country may be used as a temporary sanctioning mechanism. If the matter has not been resolved to the satisfaction of the EITI Board by the agreed deadline, the EITI Board will delist the country.[167]

Where a country has become EITI Compliant, but concerns are raised in relation to whether its implementation of the EITI has subsequently fallen below the required standard, the EITI Board reserves the right to require the country to undergo a new Validation or Secretariat Review. Stakeholders may petition the EITI Board if they consider that Compliant status should be reviewed. This request may be mediated through a stakeholder's constituency representative(s) on the EITI Board. The EITI Board will then review the situation and exercise its discretion as to whether to require an earlier Validation or Secretariat Review. Subject to the findings of that assessment, the EITI Board will determine the country's status. The EITI Board reserves the right to designate a previously Compliant country as an EITI Candidate, specify corrective actions, or to suspend or delist the country.

A good example of how this process can work is demonstrated by the EITI Board's recent engagement with Azerbaijan. Following reports that Azerbaijan had imposed

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[167] EITI Standard 2016, Requirement 8.7. The implementing country concerned may petition the EITI Board to review its decision regarding suspension, delisting or the country designation as EITI Candidate or EITI Compliant following Validation. In responding to such petitions, the EITI Board will consider the facts of the case, the need to preserve the integrity of the EITI and the principle of consistent treatment between countries. The EITI Board's decision is final: Requirement 8.8.

restrictive laws on NGOs, the EITI Board sent a fact-finding mission to assess conditions on the ground. In April 2015, the EITI Board downgraded Azerbaijan to a Candidate country and made it clear that Azerbaijan could be suspended if it did not take 'corrective actions' within 12 months.[168] Then-EITI Chair, Clare Short, made a statement at the time: 'There has been some progress in addressing our concerns, but further work is needed to ensure that civil society in Azerbaijan can participate in the EITI in a meaningful way'.[169] Azerbaijan's multi-stakeholder group is presently working on executing an Activity Plan for restoration of Azerbaijan's EITI Compliant Country status, but it is not yet clear how much progress has been made.[170]

Political instability within countries can similarly bring progress on the implementation of EITI principles to a standstill. For instance, on 10 April 2013, the EITI Board decided to temporarily suspend the Central African Republic's status as EITI Compliant on the basis that the country did not have a recognised government, deemed necessary for effective EITI implementation. This suspension was extended in May 2014.[171] In May 2016, it was reported that was 'edging closer' to readmission.[172]

Both these examples emphasise that it is questionable whether the EITI Board has the capacity to progress implementation when a government's non-compliance extends beyond accounting and reporting deficiencies. On the one hand, there is great virtue in ensuring that the implementation of the EITI in each state is a government-run endeavour; this generates a higher degree of local 'ownership' and provides more meaningful opportunities for state capacity-building. On the other hand, these issues

168 Financial Times, 'Azerbaijan Admonished by Resources Watchdog', 15 April 2015. Available at: http://www.ft.com/fastft/2015/04/15/azerbaijan-admonished-natural-resources-watchdog/ (accessed 3 February 2016).

169 ibid.

170 Anvar Mammadov, 'Azerbaijani Mining Companies Assume New Obligations as Part of EITI Report', *Trend News Agency* 25 December 2015. Available at: http://en.trend.az/business/economy/2474373.html (accessed 3 February 2016).

171 EITI, 'Central African Republic,' Available at: https://eiti.org/implementing_country/27 (accessed 18 September 2016).

172 Rapaport, 'Kimberley Process to Readmit CAR, Venezuela'.

highlight that the degree to which the EITI can succeed in a particular national context is limited by the political willingness and capacity of the government in question.

This also raises questions in relation to the quality of 'enforcement' apparently provided by the Validation process. Despite the fact that the EITI Board wields (and uses) the power to suspend countries in cases of non-compliance, critics legitimately complain that the Validation process at times seems like an accounting process that leaves more fundamental issues unaddressed. In some circumstances, governments and companies may approach EITI compliance like a box-ticking exercise, rather than as a substantive law-like regime that will react punitively towards participants that fail to engage with the substance of the rules. The potential for countries to adopt a superficial approach was highlighted in a topical report by Global Witness, which detailed that in recent years US$4 billion has been funnelled off to opaque companies, some of them linked to current or former government representatives, in just a small number of deals in four African countries including Nigeria, Angola, the Democratic Republic of Congo and Congo-Brazzaville. Three of the four are full members of the EITI.[173] Most fundamentally, these issues reflect a legitimate concern that transparency may not necessarily lead to accountability. As stated by Paul D. Ocheje, '[a]ccountability is the central purpose of transparency. Unless EITI spurs accountability, audit reports would only amount to going through the motions with no substantial consequences for those who engage in corruption and theft of public funds'.[174]

One way in which the EITI is trying to improve is by introducing new standards that relate to beneficial ownership. In a pioneering move two years ago, EITI members agreed that from 2016 private firms making or receiving payments in extractive industries should be required to disclose their ownership. In order to test drive the new standards, the EITI Board has introduced a pilot programme in nine countries.

173 Global Witness, 'How to Lose $4 Billion' (London: GW), October 2015.

174 Paul Ocheje, 'The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa,' *Journal of sustainable development in Africa* 8, no. 3 (2006), p.234.

However, it faces serious pushback from some members, who argue that companies should not have to reveal this information. Global Witness has called this moment a 'credibility test' for the EITI, which 'must now choose either to push ahead with bold disclosure requirements…or back away under pressure from those who argue that revealing the true ("beneficial") owners of companies involved in extractive deals with the state is tricky'.[175]

Implementation

(a) An implementation-driven Standard

The EITI presents an exceptional example of how implementation contributes to the process of legalisation. The EITI Standard is a document completely geared towards taking countries step-by-step through the process of realising the requirements necessary to become, first, an EITI Candidate country and, second, an EITI Compliant country. The rules are constructed to be direct and unambiguous in meaning. Take, for instance, the Sign-Up Steps set out under Requirement 1. In specifying that 'the government is required to issue an unequivocal public statement of its intention to implement the EITI,' the Standard further elaborates that the statement must be made by the head of state or government or an appropriately delegated government representative. After stating that the 'government is required to commit to work with civil society and companies, and establish a multi-stakeholder group' to oversee the EITI's implementation, the Standard expands on this by noting, amongst other requirements, that the 'government must ensure that there is an enabling environment for company and civil society participation with regard to relevant laws, regulations and administrative rules as well as actual practice in the implementation of the EITI'. Several paragraphs under Requirement 1 are devoted to the how the multi-stakeholder

[175] 'A Fight for Light'.

group should be established[176] and operate on a day-to-day basis.[177] In addition to the EITI Standard itself, the International Secretariat and the EITI's supporters have developed a range of guidance documents on how to implement and support implementation of the scheme.[178] The EITI website also hosts examples of scoping and feasibility studies conducted in particular countries, which may be used by implementing governments attempting to conduct similar processes.[179]

(b) Capacity-Building

Certainly, critics have queried the extent to which the EITI can truly deliver corporate accountability. However, there is no doubt that in several countries, the process of implementing EITI has spawned a range of legislative and government projects, acted as an effective instrument for capacity-building, and initiated national conversations on corruption, secret contracts, transfer pricing, taxation and subsidies. In Nigeria, for instance, implementing the EITI enabled the government to identify a number of system weaknesses caused by a lack of information-sharing amongst government entities, discover that confidentiality provisions in certain joint venture agreements were

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176 For example, the government must ensure that the invitation to participate in the group is open and transparent (Requirement 1.4(a)(i)) and that stakeholders are adequately represented and stakeholder groups have the right to appoint their own representatives (Requirement 1.4(a)(ii)).

177 Requirement 1.4(b) states that the multi-stakeholder group is required to agree to clear public Terms of Reference (ToRs) for its work, which should include minimum provisions on the role, responsibilities and rights of the multi-stakeholder group; the approval of work plans, EITI Reports, and annual activity reports; and the internal governance rules and procedures. Under Requirement 1.5, the multi-stakeholder group is required to maintain a current work plan that is fully costed and aligned with the reporting and Validation deadlines established by the EITI Board.

178 These documents specifically address particular issues implementing countries are likely to encounter including: (1) How to become an EITI Candidate country; (2) How to develop an EITI work plan; (3) License registers; (4) License allocations; (5) Producing an annual activity report; (6) Corporate funding to national EITI processes; (7) Contract transparency; (8) Multi-stakeholder group oversight of reporting; (9) Suggested checklist for establishing the scope of EITI Reporting; (10) Sub-national reporting; (11) Taxpayer confidentiality in EITI reporting; (12) Summary EITI Reports; (13) Defining materiality; (14) Establishment and governance of multi-stakeholder groups; (15) Barter arrangements; (16) Transportation revenues; (17) Social expenditures; (18) Participation of state-owned enterprises; (19) Publishing data; and (20) Developing, implementing and monitoring recommendations from EITI recommendations from EITI reporting.

179 EITI, 'Guidance Notes and Standard Terms of Reference,' Available at: https://eiti.org/guidance (accessed 18 September 2016).

preventing the necessary disclosure of information, and pinpoint several problems with the collection of petroleum taxes from upstream operators.[180]

Liberia's experiences have also highlighted the advantages (as well as the limitations) of implementing the EITI. After the EITI process highlighted some inconsistencies in reporting and reconciliation of figures, the Liberian government asked a British accounting firm, Moore Stephens, to carry out an audit of Liberian mining contracts executed between mid-2009 and the end of 2011. The audit found that 62 of the 68 concessions ratified by Liberia's parliament had not complied with laws and regulations. Although it was extremely positive – and directly a result of discussions relating to the EITI – that the government independently decided to undertake this project, the results of the audit underscored that progress in implementation can easily be overestimated in the absence of objective measurement. In addition, this experience demonstrates that effective implementation of the EITI may depend on proactive government support in order for the principles of transparency to take root and effect change.[181]

To conclude, the EITI in many respects is an exemplary model of a legalisation initiative explicitly targeted towards implementation. Certainly there remain two important concerns, including, first, that the effectiveness of the EITI is necessarily dependent on the level of government capacity and support in any particular national context, and, second, that increased accountability does not necessarily follow on from increased transparency. Nevertheless, the introduction of the EITI in many countries has prompted a wide range of legislative and government projects, acted as an effective instrument for capacity-building, and initiated important national conversations

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[180] EITI, 'Nigeria EITI: Making transparency count, uncovering billions', 20 January 2012. Available at: https://eiti.org/sites/default/files/documents/Case%20Study%20-%20EITI%20in%20Nigeria.pdf (accessed 30 September 2016). But see also a Chatham House 2009 report, which argues that EITI may have reinforced reforms in Nigeria but did not drive them: Nicholas Shaxson, Nigeria's Extractive Industries Transparency Initiative: Just a Glorious Audit? (London: Chatham House (Royal Institute of International Affairs), 2009).

[181] 'Where's Our Cut?', *The Economist* 7 December 2013. Available at: http://www.economist.com/news/middle-east-and-africa/21591215-regional-governments-look-better-deals-foreign-mining-firms-wheres-our (accessed 3 February 2016).

regarding corruption and transparency. Jonas Moberg, Head of the International Secretariat in 2013, commented that:

> *It is worth taking a step back and recognising how far we have come. The information published through EITI Reports used to be government and company secrets. Now the data is available in printed reports and online websites for the world to see. Transparency around these vast revenue flows is becoming the global norm.*[182]

For all of these reasons, there are good reasons for believing that the EITI has been fundamental in advancing a general norm towards increased transparency at the international level.

Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights (VPs) are human rights guidelines designed specifically for extractive companies working in fragile states. The VPs aim to respond to 'one of the most persistent patterns' of human rights violations linked to the presence of oil, gas, and mining businesses in developing countries. [183] The initiative is particularly thought-provoking from a legalisation perspective because a range of companies, both participants and non-participants, have incorporated the VPs into their management systems and agreements with contractors. In 2015, Participants included twenty-eight companies,[184] eight governments,[185] and ten NGOs.[186]

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182 Comment from Jonas Moberg, 2013 Head of the International Secretariat: EITI, 'Transparency is Becoming the Global Norm,' Available at: https://eiti.org/node/4204 (accessed 18 September 2016).

183 Patrícia Galvão Ferreira, 'Breaking the Weak Governance Curse: Global Regulation and Governance Reform in Resource-rich Developing Countries' (2012), p.357.

184 Anglo American, AngloGold Ashanti, Barrick Gold Corporation, BG Group, BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoRan Copper and Gold, Glencore, Hess Corporation, IAMGold, Marathon Oil, Newcrest Mining, Newmont Mining Corporation, Norsk Hydro, Occidental Petroleum Corporation, Pacific Rubiales, PanAust, Premier Oil, Rio Tinto, Shell, Sherritt International, Statoil, Talisman Energy, Total and Tullow Oil.

185 Australia, Canada, Colombia, Ghana, The Netherlands, Norway, Switzerland, UK and US.

This section is divided into three parts. The first sets out the background to the development of the VPs. The second outlines the basic framework of the VPs. The third considers the VPs through the lens of the OPD legalisation framework. This section highlights that it is possible for soft principles to harden if they are incorporated into binding contracts, as is now regularly the case with the VPs. I also draw on legal arguments raised in the 2013 Canadian case *Choc v Hudbay,* to show that it is possible that voluntary standards such as the VPs may in the future be enforced by domestic courts. Finally, this section considers the nature of implementation in the context of the VPs, concluding that the VPs – like both the KP and the EITI – demonstrate that 'implementation' must be considered a key dimension of legalisation.

Background to the VPs

The last two decades have seen allegations of murder, torture and even genocide tarnish the reputations of the world's most famous and well-regarded mining companies.[187] In the 1990s, Shell was accused of partnering with the Nigerian military to suppress protestors in Ogoniland, and of collaborating in the 1995 execution of writer Ken Saro-Wiwa and eight other Ogoni leaders.[188] In 1996, a group of Myanmar residents sued Unocal in the US, accusing it of complicity in forced labour, murder, rape and torture carried out by the Myanmar military during construction of a gas pipeline.[189] Chevron was similarly implicated in the 1998 murder and torture of villagers protesting against

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186 Fund for Peace, Human Rights Watch, International Alert, LITE-Africa, New Nigeria Foundation, Pact, Partners for Democratic Change International, Partnership Africa Canada, Pax and Search for Common Ground.

187 As described in an earlier chapter, some of these tragic instances have formed the basis of litigation, albeit with varying degrees of success.

188 BBC News, 'Nigeria hangs human rights activists', 10 November 1995. Available at: http://news.bbc.co.uk/onthisday/hi/dates/stories/november/10/newsid_2539000/2539561.stm (accessed 18 September 2016).

189 BBC News, 'Unocal pays out on Burma 'abuses'', 22 March 2005. Available at: http://news.bbc.co.uk/1/hi/world/asia-pacific/4371995.stm (accessed 18 September 2016).

environmental degradation caused by Chevron Nigeria's operations.[190] ExxonMobil was next, when in 2001 eleven Indonesian villagers filed a suit alleging complicity in abuses committed by Indonesian security forces in the province of Aceh.[191] In the same year, Talisman Energy stood accused of having participated in the Sudanese Government's efforts to commit genocide against non-Muslim Sudanese living in the area of Talisman's oil concessions in southern Sudan.[192] Even in 2015, a trade union leader from Colombia commenced a claim against BP in London, alleging the company's complicity in his kidnap and torture in 2002. The individual was employed by an oil workers' union connected to the Ocensa pipeline, which was established by one local and several multinational companies, including BP.[193]

The underlying factors behind incidents of this nature are often complicated and highly politicised. In some cases, foreign companies may become lightening rods for local grievances, or be perceived 'as local proxies for wealth and authority in remote regions where they operate [or] a surrogate government; their personnel and assets are both potent symbols and tangible targets for protest and even attack'.[194] These circumstances also underline two of the thorniest issues in the business-human rights discussion. First, when should a parent company be liable for the actions of its subsidiaries? Second,

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190 'Test case', *The Economist* 30 October 2008. Available at: http://www.economist.com/node/12522916 (accessed 18 September 2016).

191 BBC News, 'Exxon 'helped torture in Indonesia'', 22 June 2001. Available at: http://news.bbc.co.uk/1/hi/world/asia-pacific/1401733.stm (accessed 18 September 2016).

192 BBC News, 'Talisman Sudan Suit to Proceed', 20 March 2003. Available at: http://news.bbc.co.uk/1/hi/business/2868047.stm (accessed 18 September 2016).

193 Torres was abducted at gunpoint shortly after he organised a strike in protest over the murder of another union leader, by kidnappers who claimed that they were paid to protect the pipeline by oil companies. After six weeks in captivity and days of interrogation with the purpose of getting him to admit he was a member of a leftwing guerrilla group, Torres was unexpectedly handed to the Red Cross: Mary Carson et al., 'Colombian takes BP to Court in UK over Alleged Complicity in Kidnap and Torture', *The Guardian* 22 May 2015. Available at: https://www.theguardian.com/environment/2015/may/22/colombian-takes-bp-to-court-in-uk-alleged-complicity-kidnap-and-torture (accessed 18 September 2016).

194 Bennett Freeman, Maria B Pica, and Christopher N Camponovo, 'A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights,' *Hastings International and Comparative Law Review* 24(2000), pp.426-27.

when should a company be considered complicit in human rights abuses carried out by state actors?

By the end of the 1990s, the issue of security and human rights had captured the attention of journalists and international NGOs, as well as the US State Department and the UK Foreign Office. Former US State Department official Bennett Freeman, who was thoroughly involved in the creation of the VPs, usefully recounts the story of their development in several publications. He describes that officials in both the US and the UK shared a clear interest in preserving the operations and reputations of their flag companies, a desire to see those companies operate in all regions of the world, and a strong commitment to human rights.[195] The US State Department began work on the initiative in 1999, gradually building up support in various internal bureaus and the US Office of the Legal Advisor. Helpfully, UK Foreign Secretary Cook had already established a 'corporate citizenship' unit within his office that was keen to cooperate on the project. After initial meetings and phone calls, a discussion paper was drafted by the State Department, the Foreign Office, and a small number of NGOs and corporate representatives. [196]

A meeting scheduled for March 2000 included Shell, BP Amoco (now BP), Rio Tinto, Chevron, Texaco and Freeport McMoRan, in addition to two business-based corporate social responsibility groups in the US and UK (Business for Social Responsibility and the Prince of Wales Business Leaders Forum). Companies were attracted to the idea of an enterprise that might help them manage risk, stave off additional mandatory regulation, and preserve company assets and their 'social license to operate'. The NGOs involved included Amnesty International, Human Rights Watch, International Alert, Safer World and the Council for Economic Priorities. Initially, the NGOs advocated for a binding regulatory framework, hoping that resource companies could indirectly assist

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195 ibid., p.427.

196 Bennett Freeman, 'The Voluntary Principles on Security and Human Rights,' in *Case Studies of Multistakeholder Partnership: Policy Dialogue on Business in Zones of Conflict*, ed. Virginia Haufler (New York: UN Global Compact, 2002), p.8.

with the promotion of human rights standards through their interactions with host state governments and private security providers.[197] Corporations, on the other hand, pressured for voluntary guidelines.[198] A subsequent meeting two months later brought additional US companies (Enron and Occidental Petroleum) to the table.

At a third meeting, a draft prepared by legal officers within the US State Department's Office was circulated. Interestingly, Bennett notes that at this point the US State Department and the UK Foreign Office decided to limit the number of participants. Although several other companies and governments had expressed interest in joining, it was considered that raising the numbers would reduce the likelihood that agreement would be reached by the end of 2000: 'It was felt that nine companies, eight or nine NGOs, two governments – about thirty people in the room at each meeting – was all the traffic could bear'.[199] Once an initial consensus had been reached, more parties could be added at a later stage. This is an important insight into how the VPs were successfully completed.

In addition, the dialogue amongst the parties was tightly focused and concentrated on one issue in particular: how to balance the protection of human rights with the interest of corporations in maintaining security over their personnel and equipment. This meant that the goal of the project was clear from the start – to develop a set of principles that practically assisted companies to balance their security and human rights objectives. Notably, the scope of the project was limited. Freeman notes that the drafters of the VPs deliberately did not try to address all the human rights-related issues connected to extractive sector companies:

> *[T]he success achieved […] in drafting, negotiating and announcing [the VPs] owed much to the fact that the substantive focus of the original dialogue was deliberately narrow rather*

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197 ibid., p.9.

198 Chip Pitts, 'Voluntary Principles on Security and Human Rights,' in *Handbook of Transnational Governance*, ed. Thomas Hale and David Held (Cambridge: Polity Press, 2011), p.357.

199 Freeman, 'The Voluntary Principles on Security and Human Rights,' p.11.

than wide, thus allowing both for a greater potential to identify common interests and to forge a consensus around them.[200]

Second, it was decided that the process would be voluntary and non-binding. All parties, even the NGOs, eventually recognised that it would be impossible for corporations and governments to proceed on any other basis, due to the risk that legally-binding principles would be used to initiate litigation.[201]

Third, the process was carefully managed from the beginning and deliberately started with small steps. Although US and UK government officials wanted to ensure that all the major extractive companies had the opportunity to participate, it was also acknowledged that a smaller group would be more likely to reach consensus. In addition, it was considered that the US and UK-based companies and NGOs together constituted a 'critical mass of parties with global reach,' so that an agreement that including these parties could later become the foundation for a fully global standard. Until April 2006, membership to the VPs was confined to the founding members. Participation has now been opened to other extractive companies, governments and NGOs. Government participants now include Australia, Canada, Colombia, Ghana, the Netherlands, Norway, Switzerland, UK and the US.[202]

Finally, it was significant that all parties were willing to comprehensively discuss all issues. Freeman remarked that:

One of the most remarkable aspects of the process was the willingness of individuals from such disparate backgrounds, whether human rights activists or company security chiefs

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200 Bennett Freeman, 'To What Extent Can Voluntarism Provide Answers' (paper presented at the Wilton Park Conference on Business and Human Rights, 11 October 2005 of Conference).

201 Freeman, 'The Voluntary Principles on Security and Human Rights,' p.10.

202 Voluntary Principles, 'For Governments,' Available at: http://www.voluntaryprinciples.org/for-governments/ (accessed 3 February 2016). NGOs include the Fund for Peace; Human Rights Watch; International Alert; LITE-Africa; New Nigeria Foundation; Pact; Partners for Democratic Change International; Partnership Africa Canada; Pax; Search for Common Ground: Voluntary Principles, 'For NGOs,' Available at: http://www.voluntaryprinciples.org/for-ngos/ (accessed 3 February 2016).

(including a former British SAS man and a former American FBI agent), to thrash through the issues for so many hours. It may have been a clash of cultures, but there was a meeting of minds.[203]

Following final review and consideration by the parties, the VPs were announced on 20 December 2000 in a Joint US-UK Statement.[204] As discussed in further detail below, the VPs include provisions on regular consultations between companies, host governments, and local communities, issues of proportionality and use of force, improved company engagement for protection of human rights by their security contractors, monitoring of progress of investigations into alleged abuses, inclusion of appropriate provisions in contracts, and background reviews of private security groups that companies intend to employ.

However, it is notable that progress has been uneven since the scheme's inception. Unlike other MSIs such as the EITI, the VPs have not been repeatedly reviewed and revised with the objective of advancing the initiative. Often, disharmony amongst participants at the international level has held up progress.[205]The VPs are therefore also an example of how important it is that participants are able to work together amicably (or at least productively). In 2010, Freeman lamented that 'a lack of focused, energetic and accountable leadership allowed the VPs process to drift into a governance crisis, at times paralysis, from 2006 until early 2009'.[206] Oxfam expressed similar frustrations when it decided to exit the scheme in 2013:

Our decision stems in large part from our frustration at the lack of meaningful progress in independent assurance, despite more than ten years of deliberation and discussion – and

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203 Freeman, 'The Voluntary Principles on Security and Human Rights,' p.11.

204 Bennett Freeman, 'Drilling for Common Ground,' *Foreign Policy* 31(2001), p.50.

205 Interview with Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, HKS, 24 February 2015, London.

206 Bennett Freeman, 'The Voluntary Principles at 10', *IHBR Commentary* 17 March 2010. Available at: https://www.ihrb.org/focus-areas/commodities/commentary-the-voluntary-principles-at-10 (accessed 17 September 2016).

notwithstanding the commendable efforts of some companies to develop relevant indicators on the margins of the VPs. We believe that independent assurance – as a condition of membership – is essential to building and maintaining the credibility of the VPs and strongly encourage members to push for its adoption.[207]

The Chairman of the Institute of Business Ethics was also candid in his comments to the 2015 Plenary:

The thing that most strikes me about this process compared with the others, however, is its limited success in building trust and in sometimes showing understanding of the contribution and incentives of the other parties. There certainly was a tendency to test each other's patience to destruction. I hope and sense that this is now behind you.[208]

Even during these periods, however, considerable progress was made by many companies working on the ground to implement the VPs. In 2009, the Plenary committee adopted amended formal participation criteria and launched a dispute resolution process. It also introduced a stronger focus on local implementation through 'in-country processes', which are multi-stakeholder forums to support the implementation and integration of the VPs at a country level. [209]

The Voluntary Principles Framework

The governance structure of the VPs is based on participation from three 'pillars': governments, companies, and NGOs. Other organisations such as the International

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207 Oxfam America, 'Oxfam leaves Voluntary Principles for Security and Human Rights Multi-stakeholder Initiative', 17 April 2013. Available at: https://business-humanrights.org/en/oxfam-leaves-voluntary-principles-for-security-and-human-rights-multi-stakeholder-initiative (accessed 3 February 2016).

208 Keynote speech by Edward Bickham, Chairman of the Institute of Business Ethics, to the 2015 Plenary of the Voluntary Principles on Security and Human Rights:, Available at: http://www.voluntaryprinciples.org/wp-content/uploads/2015/06/Voluntary-Principles-Plenary-Opening-Remarks.pdf (accessed 6 November 2015).

209 Business & Human Rights Resource Centre, 'Voluntary Principles on Security and Human Rights,' Available at: https://business-humanrights.org/en/conflict-peace/special-initiatives/voluntary-principles-on-security-and-human-rights (accessed 6 November 2015).

Committee of the Red Cross, the IFC and the International Council of Mining & Metals (ICMM) may participate as observers but are unable to vote at meetings of the Plenary, the principal decision-making body that assembles annually to consider issues related to the budget, the annual work plan, and governance and implementation of the VPs. The Steering Committee is comprised of two members of each pillar and performs work delegated to it by the Plenary, in addition to other functions.[210]

As noted above, until April 2006 membership was restricted to founding members. Participation was then opened up to other companies, states, and NGOs.[211] The Participation Criteria were initially agreed at the 2007 meeting in Washington DC.[212] This document sets out that all participating governments, companies and NGOs are required to publicly promote the VPs, proactively implement the VPs, attend plenary, extraordinary and in-country meetings, communicate publicly on efforts to implement the VPs at least annually, prepare reports on efforts to implement the VPs, participate in dialogue with other VP Participants, and provide timely responses to reasonable requests for information from other Participants.

Summary of the Voluntary Principles

The VPs are divided into three main sections, which include: (1) Risk Assessment; (2) Interactions between Companies and Public Security; and (3) Interactions between Companies and Private Security.

(1) <u>Risk Assessment</u>

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[210] Governance Rules, Section III, Paragraph 2(b)(1).

[211] The entry criteria for companies, states and NGOs are set out in specific Voluntary Principles Verification Framework documents for Companies, Governments and NGOs respectively, all available at http://www.voluntaryprinciples.org/resources/(accessed 17 September 2016). A government that is admitted as an Engaged Government is expected to become a full Participating Government within 18 months. In order to obtain the status of Participating Government, the Engaged Government must submit a national plan that sets out how it will implement the VPs both at home and abroad, and how it will encourage extractive companies, NGOs, and other governments to join the initiative and implement the principles.

[212] Governance Rules, Appendix 2: Participation Criteria.

The first section asserts that the security of personnel and local communities, the success of corporate operations, and the protection of human rights depend on the ability to accurately assess risks in a company's operating environment. Without providing explicit benchmarks, the VPs recognise that accurate effective risk assessments should consider:

Identification of specific security risks resulting from political, economic, civil or social factors;

The potential for violence (through consultation with government representatives and other sources);

The human rights record of public security forces, paramilitaries, local and national law enforcement, as well as private security;

The rule of law, meaning the capacity of the local prosecuting authority and judiciary to hold accountable those responsible for human rights abuses and violations of international humanitarian law;

A conflict analysis that considers the root causes and nature of local conflicts, as well as key actors' level of adherence to human rights and international humanitarian law; and

Any risk associated with equipment transfers such as foreseeable negative consequences associated with the misappropriation of diversion of equipment.

(2) Interactions between Companies and Public Security

The second section has four subsections entitled: Security Arrangements; Deployment and Conduct; Consultation and Advice; and Responses to Human Rights Abuses.

Under Security Arrangements, companies are encouraged to consult regularly with host governments and local communities. They are also urged to communicate their policies regarding ethical conduct and human rights to public service providers, and express their desire that security be provided in a manner consistent with those policies and by personnel with adequate and effective training. In addition, companies should encourage host governments to permit making security arrangements transparent and accessible to the public.

Under Deployment and Conduct, it is asserted that the primary role of public security should be to maintain the rule of law (which includes safeguarding human rights and deterring acts that could threaten company property and personnel). The type and number of public security forces deployed should be competent, appropriate and proportional to the threat. Secondly, equipment imports and exports should comply with all applicable law and regulations. The VPs also encourage adhering companies to 'use their influence' to ensure that: (a) individuals credibly implicated in human rights abuses should not provide security services for companies; (b) force should be used only when strictly necessary and to an extent proportional to the threat; and (c) the rights of individuals should not be violated while they exercise the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. In cases where physical force is used by public security, incidents should be reported to the appropriate authorities and to the company. Where force is used, medical aid should be provided to injured persons, including to offenders.

Under Consultation and Advice, companies are encouraged to hold structured meetings with public security on a regular basis, and to consult with other companies, host and home governments, and civil society to discuss security and human rights. In consultations with host governments, companies are urged to take all appropriate measures to promote observance of applicable international law enforcement principles, particularly those reflected in the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms. The VPs also state that companies should support efforts by governments, civil society and multilateral institutions to provide human rights training and education for public security as well as their efforts to strengthen state institutions to ensure accountability and respect for human rights.

Under Responses to Human Rights Abuses, companies are told to record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities. Companies should also monitor the status of investigations, the use of equipment provided by the company, and ensure that information used as the basis for allegations of human rights abuses is credible and based on reliable evidence.

(3) Interactions between Companies and Private Security

The third section asserts that where host governments are unable or unwilling to provide adequate security, it may be necessary for companies to provide private security providers as a complement to public security. In this context, private security may have to coordinate with state forces or carry weapons, although this should be done only for preventative reasons. The following voluntary principles should guide private security conduct:

1.Private security should observe the policies of the contracting company regarding ethical conduct and human rights; the law and professional standards of the country in which they operate; emerging best practices developed by industry, civil society, and governments; and promote the observance of international humanitarian law.

2.Private security should maintain high levels of technical and professional proficiency, particularly with regard to the local use of force and firearms.

3.Private security should act in a lawful manner. They should exercise restraint and caution in a manner consistent with applicable international guidelines regarding the local use of force, including the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials, as well as with emerging best practices developed by companies, civil society, and governments.

4.Private security should have policies regarding appropriate conduct and the local use of force (e.g. rules of engagement), which should be capable of being monitored by the company or by independent third parties.

5.All allegations of human rights abuses by private security should be recorded and credible allegations should be properly investigated.

6.Private security should provide only preventative and defensive services and should not engage in activities exclusively the responsibility of state military or law enforcement authorities. Companies should designate services, technology and equipment capable of offensive and defensive purposes as being for defensive use only.

7.Private security should: (a) not employ individuals credibly implicated in human rights abuses to provide security services; (b) use force only when strictly necessary and to an extent proportional to the threat; and (c) not violate the rights of individuals to exercise freedom of association and peaceful assembly, to engage in collective bargaining, or other related rights of Company employees as recognised by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

8.In cases where physical force is used, private security should properly investigate and report the incident to the company. Private security should refer the matter to local authorities and/or take disciplinary action where appropriate. Where force is used, medical aid should be provided to injured persons, including to offenders.

9.Private security should maintain the confidentiality of information obtained as a result of its position as security provider, except where to do so would jeopardisethe principles contained herein.

A set of additional voluntary principles and guidelines has also been added to this section. This provides:

-Where appropriate, companies should include the principles outlined above as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and the local community. To the extent practicable, agreements between companies and private security should require investigation of unlawful or abusive behaviour and appropriate disciplinary action. Agreements should also permit termination of the relationship by companies where there is credible evidence of unlawful or abusive behaviour by private security personnel.

-Companies should consult and monitor private security providers to ensure they fulfil their obligation to provide security in a manner consistent with the principles outlined above. Where appropriate, Companies should seek to employ private security providers that are representative of the local population.

-Companies should review the background of private security they intend to employ, particularly with regard to the use of excessive force. Such reviews should include an assessment of previous services provided to the host government and whether these services raise concerns about the private security firm's dual role as a private security provider and government contractor.

-Companies should consult with other Companies, home country officials, host country officials, and civil society regarding experiences with private security. Where appropriate and lawful, Companies should facilitate the exchange of information about unlawful activity and abuses committed by private security providers.

Application of the Legalisation Framework

Obligation

As noted above, the VPs in and of themselves do not create legally binding standards. The Participation Criteria explicitly state that:

> *To facilitate the goals of the Voluntary Principles and to encourage full and open dialogue, Participants acknowledge that implementation of the Principles is continuously evolving and agree that the Voluntary Principles do not create legally binding standards and participation in, communications concerning, and alleged failures to abide by the Voluntary Principles shall not be used to support a claim in any legal or administrative proceeding against a Participant. This shall not preclude any Participant from criticizing the conduct*

of any other Participant, publicly or privately, subject to the requirement of confidentiality set forth in this document.[213]

Nevertheless, despite being a soft law instrument, the VPs have generated relatively strong obligation in a number of ways. First, the VPs have enjoyed such exceptional uptake that they now have a strong reputational pull. As recounted during an interview with Professor Ruggie, it is now 'generally expected' that all major extractive companies adopt and implement the VPs.[214] At time of writing, corporate participants included Anglo American, AngloGold, Ashanti Barrick Gold Corporation, BG Group, BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport-McMoRan Copper and Gold, Glencore, Hess Corporation, Marathon Oil, Newcrest Mining Limited, Newmont Mining Corporation, Norsk Hydro, Occidental Petroleum Corporation, Pacific Rubiales, PanAust, Premier Oil, Repsol, Rio Tinto, Shell, Sherritt International, Statoil, Total, and Tullow Oil.[215]

Second, the normative strength of the VPs has been reinforced by the fact that companies increasingly elect to make the VPs 'binding' by incorporating them into contracts with private security providers. This reflects the provision in the additional guidelines that states that 'where appropriate, companies should include the principles outlined above as contractual provisions in agreements with private security providers'.[216] This trend has been noted by Stanford academic Chip Pitts, who writes that 'a number of companies have now incorporated references to [the VPs] in contracts with security forces, thus reducing their "voluntary" nature and giving them the force of (at least) mandatory private law'.[217] This process effectively transforms soft standards

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213 Governance Rules, Appendix 2: Participation Criteria.

214 Interview with Ruggie, Berthold Beitz Professor in Human Rights and International Affairs, HKS, 24 February 2015, London.

215 Voluntary Principles, 'For Companies,' Available at: http://www.voluntaryprinciples.org/for-companies/ (accessed 3 February 2016).

216 Governance Rules, Appendix 1: Voluntary Principles on Security and Human Rights.

217 Pitts, 'Voluntary Principles on Security and Human Rights,' p.360.

into hard law, because it means that companies working with private security companies that fail to adhere to the VPs have a legal basis to either terminate the contract or sue the private security provider for breach of contract. In these circumstances, the enforcement of human rights obligations is constructed as a private law action against the relevant security provider rather than as a public law matter, as would conventionally be the case. A good example of this trend is illustrated by the fact that BP now states in its Voluntary Principles Implementation Guidelines that:

> *Contracts provide businesses with a mechanism to help ensure private security providers act consistently with applicable international standards. Contracts can help to align expectations between businesses and contractors on security and human rights performance […] BP has developed a standard set of clauses that should be inserted by businesses within new or existing contracts with private security providers.*[218]

Such clauses require contractors to provide security in a manner that is consistent with the VPs, to vet potential employees for criminal records or involvement in human rights violations, to train employees in relation to human rights standards and the use of force, and to monitor and investigate allegations of unlawful or abusive conduct. [219]

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218 BP, 'Voluntary Principles on Security and Human Rights: Implementation Guideline' (London), 2008, p.12.

219 In the case of BP, an overview of the standard key clauses states:

- **Compliance with the Voluntary Principles:** The contractor will provide security in a manner that complies with the Voluntary Principles and with the Sarajevo Code of Conduct for Private Security Companies.
- **Employment and Vetting:** The contractor will carry out pre-employment vetting for criminal records, human rights violations and records of misconduct. Unless otherwise agreed, it will recruit employees from local communities where it operates.
- **Deployment and Conduct:** The contractor will provide defensive services only, refraining from any activity that is the responsibility of public security services. It will maintain policies on standards of conduct, including on acting in a lawful manner and observing principles of proportionality and necessity in use of force. Under no circumstances will it permit employees to carry firearms.

The VPs have also taken on a harder law significance via a range of mechanisms that extend beyond private contracts. Companies may be incentivised to comply (and provide evidence of compliance) with the VPs due to requirements linked to government subsidies, industry standards, or investor demand. As Chip Pitts has noted:

> *[S]uch initiatives are often sponsored by governments; they can become the basis for rewards and punishment by governments and other stakeholders; they define industry standards and fiduciary and other duties in the eyes of courts, administrative agencies and other stakeholders; and in the event of non-compliance they can result in both legal and non-legal sanctions (in forms including boycotts, protests, adverse media publicity and divestment).*[220]

For example, the Voluntary Principles have been incorporated by the IFC into its Performance Standards on Social and Environmental Sustainability, which companies must comply with in order to receive financial support.[221] These IFC Performance Standards are also incorporated under the Equator Principles, which have been adopted by 84 financial institutions and cover over 70% of international project finance debt in emerging markets.[222]

Third, there is possibly scope for the VPs to increase the level of obligation they exert through the mechanism of investor-state agreements. Penelope Simons and Audrey Macklin argue that the VPs would be more effective if they stipulated that adhering

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- **Training:** The contractor will maintain high levels of professional proficiency through continuous training of its employees, including on relevant human rights standards and guidelines and on appropriate use of force.
- **Monitoring and investigations:** The contractor will provide any information requested to enable performance monitoring by the client, such as with respect to training records and incidents involving the use of force. It will promptly investigate any incident involving use of force and credible allegations of unlawful or abusive conduct that involve its employees: ibid.

220 Pitts, 'Voluntary Principles on Security and Human Rights,' p.361.

221 International Finance Corporation, 'IFC Sustainability Framework: Policy and Performance Standards on Environmental and Social Sustainability '.

222 International Financial Corporation, 'Equator Principles Financial Institutions'.

companies should seek written agreements with host states incorporating the VPs as a condition of investment. This is a potential response to concerns expressed by business that it can be difficult to influence government decision-making that relates to the deployment or management of government security forces.[223] Companies lobby governments on all sorts of matters, from tax concessions to subsidies to property rights – it does not seem unreasonable to argue that business could also use their (often substantial) clout to pressure for better government compliance with human rights standards. In the longer term, corporations would also benefit in obtaining some assurance from governments in relation to the protection of human rights by police and military personnel.[224]

Fourth, the level of obligation generated by the VPs may increase in the future if it becomes common for judges to use soft law guidelines to carve out the scope of a parent company's duty of care to its employees or other affected parties. The potential for soft law such as the VPs to be hardened through the process of litigation has already been illustrated in the Canadian matter of *Choc v. Hudbay Minerals Inc.*[225] In that case, Justice Brown referred to Hudbay's public statements regarding its compliance with international human rights standards, including the VPs, as one of the factors that established the existence of a duty of care between Hudbay and the plaintiffs.[226]

Precision

The VPs are more specific than purely aspirational principles, but cannot be described as particularly precise. The language is too permissive, and allows companies to comply with the lower standard even where there is a meaningful gap between the national law of the host state and international standards. Companies signing on to the VPs

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223 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.124.

224 ibid.

225 *Choc v. Hudbay Minerals Inc*.

226 ibid., [67]-[68].

'recognise a commitment' to obey the laws of the host state but need only 'be mindful of the highest applicable international standards'.[227] It is significant that companies are urged 'to promote observance of applicable international law enforcement principles' especially with regard to the use of force.[228] However, to 'promote the observance' lies some distance away from language that demands strict enforcement.

Second, the language that delineates the scope of corporate duties is vague and qualified. An examination of almost any of the guidelines illustrates this fact. Take, for example, the first principle under 'Delegation and Conduct'. This principle states that:

> *[T]he primary role of public security should be to maintain the rule of law, including safeguarding human rights and deterring acts that threaten Company personnel and facilities. The type and number of public security forces deployed should be competent, appropriate and proportional to the threat.*

Ambiguous terms such as 'rule of law' are used without definition or explication. The maintenance of the 'rule of law' encompasses 'safeguarding human rights' as well as 'deterring acts that threaten' company property, with the guideline phrased so that there is no sense of the potential tension between these two competing objectives. Furthermore, the guideline provides no meaningful way for companies to measure or assess whether the type and number of public security forces deployed are 'competent, appropriate and proportional to the threat'. Competency, appropriateness, proportionality and threat are all subjective concepts, and there is no sense from this guideline whether government officials or company management are responsible for making the relevant assessment at a moment of public emergency. Furthermore, in such cases it seems unlikely that companies would be able to influence government officials responsible for directing police and military. Borzel and Honke have remarked there 'is a very thin line between working with state security forces in particular and not

[227] Governance Rules, Appendix 3.1: Framework for the Admission of New Companies, Paragraph 2.3.

[228] Governance Rules, Appendix 1: Voluntary Principles on Security and Human Rights.

supporting extorting and repression by them'.[229] In summary, the ambiguities and potential conflicts inherent in this guideline are simply not illuminated. This is characteristic of the drafting of the entire document. It is also significant that throughout the VPs, the obligation of companies is further softened by language such as 'use [one's] influence' 'to the extent reasonable,' and 'where appropriate'.

Delegation

The weakest element of the VPs remains the lack of rigorous reporting and enforcement mechanisms to ensure that companies walk the talk. In certain respects, however, there have been improvements. First, the monitoring, reporting and verification procedures required by the VPs have substantially developed since the official launch of the scheme in 2000. Draft Reporting Guidelines were introduced before the 2010 Plenary meeting. These require that one month prior to the Plenary meeting, Participants prepare and submit to the Steering Committee a report on efforts to implement or assist in the implementation of the VPs.[230] Notably, a Participant's status will automatically become inactive if it either fails to submit an annual report that meets the relevant criteria or categorically refuses to engage in direct dialogue with another Participant.[231] Participants must report on the general implementation and promotion of the VPs, human rights and security risk assessment procedures, procedures or mechanisms for reporting and acting on human rights and security incidents, and their procedures to consider the VPs when entering into contracts with security providers. It is not

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[229] Tanja Börzel and Jana Hoenke, 'From Compliance to Practice: Mining Companies and the Voluntary Principles on Security and Human Rights in the Democratic Republic of Congo' (Berlin: SFB), 2011, p.29.

[230] Reporting Guidelines available for the Corporate, Government and NGO Pillars here: http://www.voluntaryprinciples.org/resources/ (accessed 24 September 2016).

[231] Inactive means temporary being unable to exercise one's rights as a Participant: Governance Rules, Appendix 2: Participation Criteria.

compulsory for Participants to make their reports public, but an increasing number of states and companies are publishing reports on the VP website.[232]

Second, over the last two years, efforts have been made to introduce further measures on verification and transparency. Verification Frameworks have been developed for each of the three pillars as part of an overarching Accountability Framework, requiring Participants who choose to participate to present at the Plenary meeting and be subject to a peer review process in accordance with set performance indicators.[233] It envisaged that the reports prepared by states in this process will be made publicly available on the VPs website (although governments will have the option to post a modified report rather than the one presented in the Plenary).

Third, a dispute resolution mechanism has been introduced, although it cannot be used by individuals or groups claiming to be victims of corporate human rights abuses. A Participant may raise concerns when it considers another Participant has failed to meet the Participation Criteria, or has demonstrated a sustained lack of effort to implement the VPs. The first step for a concerned Participant is to seek to resolve the issue through direct dialogue with the relevant Participant. If this process fails, a Participant may submit its concerns to the Steering Committee. If five members of the Steering Committee agree, the matter will be referred to the Secretariat. Following consultations, the matter may be presented to the Plenary for its consideration, which will consider what, if any, further action is appropriate. In the event that a Participant fails to implement the Plenary's recommendations within a reasonable period, its status will be deemed inactive.[234] Whether or not a Participant is expelled is a decision that must be

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232 Australia, the Netherlands, Switzerland, the UK, the US, Barrick Gold Corporation, BP, Freeport-McMoRan Inc, Newmont Mining and International Alert are presenting the Participants who have published Annual Reports on the VP website. See: http://www.voluntaryprinciples.org/resources/(accessed 8 February 2016).

233 'Minutes of the 2015 Annual Plenary Meeting of the Voluntary Principles Initiative', 17-18 March 2015. Available at: http://www.voluntaryprinciples.org/wp-content/uploads/2015/05/Attachment-VPI-Minutes-Annual-Plenary-Final.pdf (accessed 25 September 2016).

234 Governance Rules, Appendix 2: Participation Criteria.

taken by consensus, although this process excludes the Participant whose status is under consideration, as well as the Participant that initially raised the concerns.[235] However, the VPs explicitly stress that the approach of the Plenary should not be censorious, as 'the ultimate goal of all concerns raised with regard to performance under the Voluntary Principles should be to strengthen individual and collective efforts to implement or assist in implementing the Voluntary Principles through constructive engagement'.[236] To date, no Participant has ever been expelled.[237]

By any standard, this is a soft form of delegation. No independent body is available to hear matters concerning the failure of Participants to implement the VPs, and, as noted above, the system provides absolutely no means of recourse or forum for victims of corporate human rights violations. Even the limited scheme available has been described as 'cumbersome and slow'.[238] Finally, the system is not made any more robust by one of the most controversial aspects of the VPs: the fact that proceedings are confidential. Members agree to discuss issues on 'a nonattribution and non-quotation basis,' and the distribution of documents to non-participants is not permitted, except as required by law.[239]

Implementation

Despite the limitations of the VPs, the initiative is still young. It is another excellent example of an initiative focused firmly on implementation, and has inspired the publication of a number of complementary guidance documents and toolkits to provide

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235 Any recommendation of the Plenary, other than expulsion will be taken by a supermajority (66%) of government participants, a simple majority (51%) of non-governmental organization participants, and a simple majority (51%) of company participants represented at the Plenary session. Decisions to expel a Participant must be taken by consensus, excluding the Participant raising the concerns and the Participant about whom the concerns are raised.

236 Governance Rules, Appendix 2: Participation Criteria.

237 Simons and Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*: p.129.

238 Governance Rules, Section III, Paragraph 4(a)(1).

239 Governance Rules, Appendix 2: Participation Criteria.

parties with practical information, case studies, and even suggested performance indicators. In 2008, BP produced an Implementation Guideline that discussed seven interrelated ‘Elements’ to be considered for successful VP implementation on the ground.[240] The same year, the World Bank and Anvil Mining released a toolkit to provide guidance on how to tailor VP implementation to specific locations and needs.[241] International Alert also produced a guidance document identifying indicators to help companies assess their external VPs performance.[242] In 2010, the Fund for Peace and International Alert published a Guidance Note with the objective of supporting stakeholders initiating a national-level process to implement the VPs.[243] The following year, the IFC, the ICMM, the International Committee of the Red Cross (ICRC) and the global oil and gas industry association for environmental and social issues (IPIECA) produced ‘Implementation Guidance Tools’ focused around the four themes of stakeholder engagement, risk assessment, public security providers, and private security providers.[244] Finally, in June 2016, the ICRC and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) published a third edition of their ‘Addressing Security and Human Rights Challenges in Complex Environments’ Toolkit, which is focused on real-life security and human rights challenges faced by companies operating in complex environments.[245] The relevant website notes:

> *The Toolkit is a living document. It will be regularly updated with new good practices, tools and case studies. Through the Comment function found at the bottom of the page,*

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240 BP, 'Voluntary Principles on Security and Human Rights: Implementation Guideline'.

241 World Bank Group Multilateral Investment Guarantee Agency, 'The Voluntary Principles on Security and Human Rights: An Implementation Toolkit for Major Project Sites' (Washington DC: World Bank Group/MIGA), July 2008.

242 Salil Tripathi, William Godnick, and Diana Klein, 'Voluntary Principles on Security and Human Rights: Performance Indicators' (London: International Alert), June 2008.

243 Krista Hendry and Diana Klein, 'Voluntary Principles on Security & Human Rights: National-Level Implementation Guidance Note' (Washington DC: FFP/International Alert), August 2010.

244 International Council on Mining & Metals et al., 'Voluntary Principles on Security and Human Rights: Implementation Guidance Tools (IGT)' (London: ICMM), 2011.

245 DCAF-ICRC, 'Addressing Security and Human Rights Challenges in Complex Environments: Toolkit' (Geneva: DCAF-ICRC), June 2016.

feedback and suggestions from users are strongly encouraged in order to ensure that the recommendations and tools provided in this Toolkit are effective in addressing challenges on the ground.[246]

Finally, the VPs have been reinforced through a subsequent regulatory regime, the International Code of Conduct for Private Security Providers (ICoC-PSP), which was adopted in Geneva in November 2010.[247] This has marked the beginning of a certain degree of convergence in transnational private regulation.[248]

In conclusion, the VPs continue to face important challenges. Certainly monitoring and reporting requirements as they presently stand are insufficient. This makes it difficult to assess the extent to which the VPs have been successfully implemented on the ground. Early empirical work conducted in the DRC suggests that even when companies incorporate the VPs into their corporate policies and modified their engagement with local communities, the VPs had systemic limits 'far beyond vaguely defined performance criteria, weak enforcement mechanisms, and a narrow membership base'.[249] Critics also express concern that in their current form, compliance with the VPs (and other voluntary schemes) may permit TNCs to deflect criticisms and continue operations, thereby 'sustaining existing political regimes and economics structures' that lead to the systematic abuse of human rights.[250]

Nevertheless, the achievements of the initiative should not be underestimated. Margaret Jungk, in addressing the Annual Plenary in 2013, spoke of the impact of the VPs when

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[246] DCAF-ICRC, 'Addressing Security and Human Rights Challenges in Complex Environments,' Available at: http://www.securityhumanrightshub.org/content/toolkit (accessed 24 September 2016).

[247] Börzel and Hoenke, 'From Compliance to Practice', p.362.

[248] International Code of Conduct Association, 'The International Code of Conduct for Private Security Service Providers,' Available at: http://www.icoca.ch/en (accessed 14 September 2016).

[249] Pitts, 'Voluntary Principles on Security and Human Rights,' p.311.

[250] Börzel and Hoenke, 'From Compliance to Practice', p.29.

she compared conversations with local communities near mining operations in 2000 and 2012:

> *I think it's clear that the VPs were ahead of their time. In 2000, the VPs were already using the clear, concrete language of human rights. The VPs were also already encouraging companies and human rights organizations to meet around the same table, to talk through the tensions toward mutual benefit and clear expectations. I understand that members of the VPs are now developing indicators to provide greater internal understanding and clarity for how they are living up to the VPs. The VPs were a […] leading indicator for the changes the world was going through.*[251]

The VPs have had a positive impact in the sense of raising awareness, improving company practices in some instances, and promoting dialogue amongst various stakeholders. Companies are increasingly conducting risk assessments and preparing human rights impact reports. A collection of businesses and international organisations are collaborating to produce increasingly detailed guidance notes and toolkits to assist with implementation. And through a variety of mechanisms, the VPs in specific circumstances are beginning to take on some characteristics of hard law.

Conclusion

Table 7: Summary of Chapter 5 findings

Initiative	Obligation	Delegation	Precision	Implement'n
Kimberley Process	Low*	Low*	Low*	High
EITI	Low*	Low*	High	High
The VPs	Low*	Low	Low	High

NB: Low* denotes that these characteristics are challenging to categorise as either low or high for the reasons described in the relevant sections above.

[251] Scott Jerbi, 'Assessing the Roles of Multi-Stakeholder Initiatives in Advancing the Business and Human Rights Agenda,' *International Review of the Red Cross* 94, no. 887 (2012).

This chapter has examined three MSIs in the extractives sector to demonstrate a highly significant but previously overlooked aspect of the process of legalisation – implementation. In addition, MSIs challenge traditional OPD conceptions of 'obligation,' 'delegation', and 'precision'. This is illustrated by the green boxes in the results table above – all of the schemes possess at least one legalisation characteristic that are technically 'low' according to the traditional OPD definitions, but are in practice are far more robust.

Consider, for instance, obligation. Under all of these schemes, actors are incentivised to comply with the rules because there is an economic or reputational incentive to do so, rather than because the rules are derived from the binding normativity of international or domestic law. In the context of the Kimberley Process, governments comply because it is too costly from an economic perspective to remain outside the group. Under the EITI, countries join for reputational reasons and then are required to impose binding obligations at the domestic level on companies that operate on national territory. Finally, the outstanding uptake of the VPs illustrates that governments and companies are aware that these 'voluntary' guidelines are fast becoming compulsory, at least in the eyes of investors and governments providing foreign aid or industry subsidies. This is demonstrated by the fact that the VPs are now regularly inserted into contractual agreements and so are in effect legally binding.

The concept of 'delegation' in the context of these MSIs is similarly difficult to categorise. Participants that fail to comply with the rules are unlikely to face criminal sanctions in a domestic court, but instead may be requested to exit the relevant scheme and face the serious economic or reputational implications that this entails. Members invest substantial time and energy in these delegation-type processes, even if these processes may be relatively soft and regularly ineffective or slow in changing the behaviour of participants.

This chapter has also highlighted why conceptualising legalisation as a dynamic process is so important. As we have seen, obligation can grow over time. Voluntary rules may become more binding as they are translated into domestic legislation or incorporated in private contracts. Normatively, they may become more compelling as international consensus around them grows or they become aligned with other international standards. Precision is also a quality that may be progressively strengthened. The EITI, for instance, has expanded and become more precise as its leaders have promoted new, improved generations of rules. Delegation may also evolve as procedures are added or adjusted over time, although in the context of the initiatives discussed above this area remains the most challenging.

The MSIs discussed in this chapter also illustrated inventive approaches in relation to delegation. Peer review is often encouraged to give participants feedback on their progress and generate discussion around best practices. Participants that fail to comply with the rules are unlikely to face criminal sanctions in a domestic court, but instead may be required to exit the relevant scheme and face the serious economic or reputational consequences of doing so. Members invest substantial time and energy in these delegation-type processes, even if these processes may be relatively soft and regularly ineffective, or slow in changing the behaviour of participants.

Finally, these regimes illustrate an obvious focus on implementation. Participants that join these schemes are regularly given substantial support to assist them in the implementation of the rules. Peer review is often encouraged to give participants feedback on their progress and generate discussion around best practices. When transgressions occur, other participants may assist the transgressing member in implementing reforms rather than (or before) imposing sanctions.

This approach has its advantages and disadvantages. The tendency towards peer review and mutual assistance no doubt assists weaker states to build their capacity and increase their compliance. On the other hand, critics legitimately argue that these schemes provide no real sanction against those who repeatedly break the rules, sometimes with serious human rights consequences. This is the arena that perhaps best illustrates the potential tension between delegation and implementation, a deserving area for future research.

Conclusion

'Twenty years ago today my father and eight other Ogoni men were woken from their sleep and hanged in a prison yard in southern Nigeria. When the news filtered out, shock and outrage reverberated around the world, and everyone from the Queen to Bill Clinton and Nelson Mandela condemned the executions. What I recall of the long days and sleepless nights afterwards was the slogan that caught on with my father's devastated friends and supporters; we were united in a determination to ensure that "his death must not be in vain". So has anything changed?'

Ken Wiwa, son of Ken Saro-Wiwa (2015)[1]

This thesis has attempted to tell a story about legalisation in business and human rights and, in the process, illuminate the nature of transnational legalisation more generally. It asked two questions:

- How have agents, or legalisers, acting on national, international, and transnational levels, attempted to institutionalise the norm of corporate accountability for human rights violations in connection to the activities of TNCs?

- What do these initiatives tell us about the nature of transnational legalisation, and how legalisation should be 'framed' or conceptualised in an era of global governance? How could a new framework of legalisation assist in determining when transnational litigation and soft law initiatives are more likely to succeed?

In order to answer these questions, I identified one emerging norm − corporate accountability for human rights violations − and traced its promotion through three separate pathways of legalisation.

[1] Ken Wiwa, 'Finally it seems as if Ken Saro-Wiwa, my father, may not have died in vain', *The Guardian* no. 10 November 2015,10 November 2015. Available at: http://www.theguardian.com/commentisfree/2015/nov/10/ken-saro-wiwa-father-nigeria-ogoniland-oil-pollution (accessed 16 February 2016).

Processes of Legalisation in Transnational Litigation

First, I considered legalisation at the domestic level by examining trends in transnational litigation. I found that pursuing TNCs in national courts on an extraterritorial basis is often an uphill battle, plagued by uncertainties in both substantive and procedural rules. In jurisdictions where implementation is high, legal causes of actions are available to plaintiffs, legal aid or pro bono assistance is available, and judicial use of prudential grounds for non-exercising jurisdiction are only moderately employed. In jurisdictions where implementation is low, there may be no available causes of action, judges may be conservative in exercising jurisdiction over foreign parties, and legal assistance is unlikely to be available to plaintiffs.

The thesis demonstrated that the US and the UK jurisdictions exhibited relatively more indicators of high implementation, and, as anticipated, consequently experienced more legalisation. Canada and European states, by contrast, exhibited fewer indicators of high implementation, thus explaining why legalisation has moved more slowly in those jurisdictions. The application of FNC in Canada has proved a formidable barrier in the absence of a statutory equivalent to the ATS (although the decision in one Canadian case that held a parent corporation's duty of care might depend on its voluntary commitments suggests more cases may flow to Canada in the future). In continental Europe, the most serious obstacles to corporate accountability include the absence of class actions for human rights cases, the overriding discretion of public prosecutors, and the absence of binding documentary disclosure rules. Consequently, we saw less legalisation in European jurisdictions.

Examining transnational legalisation in domestic courts also highlighted several important themes. The first is the legal ingenuity of individuals and organisations involved in these cases. Each domestic system, with all of its particular legal and procedural barriers, constitutes a precise structure in which litigators must operate. Without the commitment and creative lawyering of human rights advocates in the most influential of cases, such as *Filártiga v. Peña-Irala*, it is quite possible that many of these matters may never have seen the light of day. Individual judges also play a vital role in deciding the outcomes of cases: how judges interpret legislation and past precedents, in addition to how they construct the precise language of any tests or standards for application in future matters, encourage nascent legal principles to develop and push their progression along particular legal and normative paths.

Second, in their efforts to advance a specific norm through a specific legal system, legalisers are in effect attempting to transform the legal structures that inform and steer the development of the law. In this way, they aim to secure a positive result for their client and also to forge new pathways for future litigants to advance transnational claims against TNCs.

Third, developments in each jurisdiction also showed that legalisation does not necessarily move in one direction. Transnational litigation in domestic courts represents a delicate interplay of structure and agency, and progress in the law will be constrained if senior members of the judiciary become more conservative in their interpretation of various legal principles, or if governments adopt legislative measures that restrict access to legal representation or reduce the damages available to claimants. For instance, we noted that following the US Supreme Court's decisions in *Kiobel v Royal Dutch Petroleum* and *Bauman v DaimlerChrysler*, plaintiffs are likely to face a more challenging legal landscape in the future and will be more likely to consider actions based on state law. In the UK, the doctrine of FNC no longer presents a serious obstacle to transnational litigants, yet statutory reforms in the areas of legal aid and costs represent two serious setbacks that may constrain legalisation in the future.

The fourth theme concerns how implementation relates to the other legalisation characteristics of obligation, delegation, and precision when applied in the domestic context. The introduction foreshadowed that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics over time. At the international and transnational levels, legalisers are generally playing a long game – they accept lower levels of obligation, delegation, and/or precision in the belief that over time these qualities will be strengthened so that the regime induces a stronger normative pull and greater compliance.

At the domestic level, however, the relationship between implementation and the other legalisation characteristics is slightly different. Ordinarily, domestic rules embody high levels of obligation, delegation, and precision. States intend for the laws that they create and promulgate to be legally binding (high obligation), to be sufficiently specific that they can guide the actions of citizens without ambiguity (high precision), and facilitate the enforcement of those laws through an independent court system (high delegation). In this system, courts play an indispensable role, most obviously through providing delegation. However, courts also play a crucial part in generating the quality of precision. Where it is unclear how a specific law – or a combination of laws – should be applied, we rely on the determination of judges to carefully delineate the law's precise parameters. It is through this process of court interpretation that opportunities may arise for transnational litigators seeking to institutionalise the norm of corporate accountability for human rights violations. In this way, legalisers may effectively boost the obligation and precision inherent in this norm if they can convince a court to extend the application of high-obligation domestic law to a new class of (corporate) individuals or circumstances.

The opportunity to do just that lies in the quality of implementation, and whether the legal system incorporates characteristics that make it possible for litigation against TNCs to succeed. In jurisdictions where implementation is low, the norm of corporate accountability will remain incompletely legalised in domestic legal systems.

This leads to several conclusions. First, states, IOs, and NGOs should encourage the development of robust domestic justice systems in all states where TNCs operate. Second, states should work towards developing more consistent rules regarding jurisdiction. Discussions on this topic should consider the normative desirability of states assuming extraterritorial jurisdiction, the circumstances in which this may be appropriate (e.g. the defendant is a corporate national of the state assuming jurisdiction), and the impact of potential solutions on victims and access to remedy.

Fortunately the UN Office of the High Commissioner of Human Rights (OHCHR) has made a start on this task by recently launching a programme that aims to give workable guidance to states in the area of access to remedy. Obtaining more information on the way corporate accountability works across jurisdictions, from obtaining clarity on legal tests for corporate accountability to overcoming financial obstacles for remedial mechanisms, is the first step in securing broader global access to remedy for individuals affected by corporate human rights violations.

Processes of Legalisation in International Organisations

The next chapter analysed the numerous attempts at legalisation that have unfolded within the UN in connection to TNCs since the 1970s. In the UN, legalisers have generally adopted relatively traditional tactics by requesting that states negotiate and agree on a particular set of guidelines, with a binding treaty being the ultimate goal. However, as exemplified by the UN Guiding Principles on Business & Human Rights (GPs), which were endorsed by the UN Human Rights Council (UNHRC) in 2011, new approaches are emerging which challenge conventional methods of legalisation. The evolution of the GPs suggests that focusing on the practical implementation of rules by states and other relevant actors is just as crucial over the long term as the extent to which a new rule initially embodies obligation, precision, and delegation. Furthermore, legalisation in this area is not only about securing the agreement and compliance of states. Corporations are also essential actors that must be engaged and actively brought under any legal regime for it to be effective.

First, the chapter considered the UN Code of Conduct for Transnational Corporations and illustrated why this initiative failed to materialise, despite many years' work. Second, the chapter examined the inception of the GC and concluded that this initiative (although voluntary and vague in its elucidation) placed a particular emphasis on implementation that has proven to be representative of new trends in legalisation. I found that the GC was innovative in that it encouraged the participation of non-state actors, and was based on the principles of consensus-building, networks and norm promotion. Significantly, the GC and its associated local networks continue to flesh out the GC principles by offering more detailed guidance to companies and industry bodies working in particular regions. Although criticised by some due to its voluntary nature and alleged potential to be used by companies to 'blue-wash' their image, supporters of the GC note that its objective was not to create enforceable principles (which would never have been supported by the international community in any case), but to start a productive discussion on the question of what makes a good corporate citizen.

Third, the chapter considered the development and demise of the Draft Norms. The Draft Norms sought to impose obligatory standards on corporations and treated them as independent actors under international law for this purpose. This was a departure from the classical international law model that viewed states (and not corporations) as true subjects under international law. Under pressure from their respective corporate citizens, governments were reluctant to support the Draft Norms and the UNCHR consequently refused to endorse them. On one view, the Draft Norms can be seen as a reversion to traditional legalisation through the conventional methods of treaty negotiations, with state parties acting as the dominant players. The process was unsuccessful in producing an agreement, and had a negative impact on the state of debate. The Draft Norms demonstrate that when demanding far-reaching and fundamental change of huge corporate entities, an emphasis on implementation (rather than the binding quality of proposed rules) must stand at centre stage.

Finally, this chapter discussed the development of the GPs, the most recent UN legalisation initiative in the field of business and human rights. In certain respects, the story of the development of the Framework and the GPs has been well documented. Nevertheless, Ruggie's background as a constructivist scholar, and the role this played in his thinking has until now remained largely unexplored. Furthermore, and as this chapter demonstrates, it is not simply the content of the norm that makes it more or less likely to succeed. The *process* of how one argues for normative change matters just as much as the characteristics or content of the norm in question. Ruggie hoped that by embedding constitutive rules in corporate culture, 'a rule-based "logic of appropriateness" may […] come to supplant a rational interest-based "logic of consequences" as the direct driver of policy action'.[2] In Ruggie's view, progress would rely on finding ways to 'make respecting human rights an integral part of business – that is, just making it standard business practice'. When he refers to 'just making it standard business practice', Ruggie is in fact referring to the endpoint of the norm life cycle, or norm internalisation.

This clearly illustrates how Ruggie imagines legalisation is best pushed forward. Rather than raising the bar by creating new or expanded legal obligations, Ruggie decided to clearly elucidate the existing principles and, in doing so, secured increased buy-in from potentially reluctant stakeholders. He assumed that by creating consensus and momentum around general and non-controversial standards, a firm foundation would be created that is conducive to further and more specific legalisation down the track.

The final section highlighted that the GPs rank low in terms of the traditional legalisation characteristics of obligation, precision, and delegation. This provides more evidence that analysing on the basis of these dimensions alone fails to capture the true extent of legalisation engendered by the GPs. As demonstrated, the GPs have had disproportionate influence for a soft law instrument, especially in light of the fact that they have existed for only four years. This influence can be explained by their focus on implementation, manifested through the establishment of a UN Working Group, the exponential growth of National Action Plans, a significant uptake of the GPs by international organisations, and the ongoing creation of standards through groups such as Shift, national human rights institutes, and national bar associations.

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[2] Melish and Meidinger, 'Protect, Respect, Remedy and Participate: 'New Governance' Lessons for the Ruggie Framework,' p.307.

The rise of the GPs clearly illustrates that legalisation in the transnational context is better explained with reference to the dimension of implementation, in addition to the characteristics of obligation, delegation and precision. Furthermore, the GPs highlight that efforts in implementation are often undertaken for the purpose of strengthening one or more other legalisation characteristics over time. In the case of both the GC and the GPs, legalisers were playing a long game, and accepted lower levels of obligation, delegation, and/or precision in the belief that over time those qualities would develop.

This section highlighted the innovative nature of Professor Ruggie's approach to generating new legal and social norms, and argued that the SRSG's methodology was grounded in his background as an IR and constructivist scholar. I demonstrated that Ruggie was willing to accept low obligation, delegation, and precision at the same time as he pushed for high implementation in advancing the GPs. In his view, this was a strategic choice because by advancing high implementation – as illustrated by broad participation (including that of non-state actors), consensus-building, and links and overlaps between neighbouring regimes – he expected that obligation, precision, and perhaps even delegation would be made stronger in the long run. The decision also reflected the fact that previous business and human rights initiatives that had pushed for high obligation had failed. Ruggie's decision appears to have paid off – obligation under the GPs appears to be becoming stronger as these principles are incorporated and translated into other, harder areas of law. This influence can be explained by their focus on implementation, manifested through the establishment of a UN Working Group, the exponential growth of National Action Plans, a significant uptake of the GPs by international organisations, and the ongoing creation of standards through groups such as Shift, national human rights institutes, and national bar associations.

Table 8: Summary of Chapter 4 Findings

Initiative	Obligation	Delegation	Precision	Implement'n
Global Compact	Low	Low	Low	High
Draft Norms	High	Low	Low	Low
UN Guiding Principles	Low	Low	High	High

Processes of Legalisation in Multi-Stakeholder Initiatives

The final chapter examined processes of legalisation in the context of MSIs in the extractive industry. The thesis discussed the Kimberley Process Certification Scheme (KPCS), the Extractive Industries Transparency Initiative (EITI), and the Voluntary Principles on Security and Human Rights (VPs), which have been selected as representative of the range of hybrid schemes increasingly developed by government and industry representatives to ameliorate the impact of TNCs on human rights. It found that in several important ways, these initiatives challenge traditional conceptions of 'obligation,' 'precision', and 'delegation' making it difficult to categorise initiatives as either 'high' or 'low' in respect of certain legalisation characteristics.

In relation to obligation, the thesis found that the traditional OPD definition of 'obligation' focused on the legally binding quality of the rule appears to be too narrow. I showed in this chapter that legally voluntary schemes exerted strong obligation on participants through a variety of mechanisms. Governments will 'jump through hoops' set by the KPCS, even unwillingly, to avoid the economic impact of permanently leaving. The EITI is ostensibly voluntary, but 51 countries have signed in its short lifespan even though the scheme compels them to impose compulsory requirements on corporations through legislation. They do so in order to for a variety of reasons, such as making domestic policy consistent with international standards, enhancing conditions for foreign investors, and securing increased aid from donors. Similarly, the VPs are voluntary but no large extractive company can afford not to sign them. Companies are incentivized to comply with the VPs due to requirements linked to government subsidies, industry standards, and investor demand. The IFC has incorporated the VPs into its Performance Standards on Social and Environmental Sustainability, which companies must comply with in order to receive financial support. These standards have now been integrated under the Equator Principles, which have been adopted by 84 financial institutions and cover over 70% of international project finance debt in emerging markets. Furthermore, the normative strength of the VPs has been reinforced by the fact that companies increasingly elect to make the VPs 'binding' by incorporating them into contracts with private security providers. Finally, the potential for soft law such as the VPs to be hardened through the process of litigation has been illustrated in the Canadian matter of *Choc v. Hudbay Minerals Inc.*

The MSIs discussed in this chapter also illustrated inventive approaches in relation to delegation. Peer review is often encouraged to give participants feedback on their progress and generate discussion around best practices. Participants that fail to comply with the rules are unlikely to face criminal sanctions in a domestic court, but instead may be requested to exit the relevant scheme and face the serious economic or reputational implications that this entails. Members invest substantial time and energy in these delegation-type processes, even if these processes may be relatively soft and regularly ineffective, or slow in changing the behaviour of participants.

Finally, these regimes illustrate an obvious focus on implementation. Participants that join these schemes are regularly given substantial support to assist them in the implementation of the rules. An enormous range of state and non-state actors are involved in the production of further guidelines, toolkits, and performance indicators precipitate by these MSIs in order to assist corporations in the implementation of the rules on the ground and in specific contexts. When transgressions occur, other participants may assist the transgressing member in implementing reforms rather than (or before) imposing sanctions.

This approach has its advantages and disadvantages. The tendency towards peer review and mutual assistance no doubt assists weaker states to build their capacity and increase their compliance. On the other hand, critics legitimately argue that these schemes provide no real sanction against those who repeatedly break the rules, sometimes with serious human rights consequences. This is the arena that perhaps best illustrates the potential tension between delegation and implementation, an important for future research.

This chapter also highlighted why conceptualising legalisation as a dynamic process is so important. As we have seen, obligation can grow over time. Voluntary rules may become more binding as they are translated into domestic legislation or incorporated in private contracts. Normatively, they may become more compelling as international consensus around them grows, or they become aligned with other international standards. Precision is also a quality that may develop over time. The EITI, for instance, has expanded and become more precise as its leaders have promoted new, improved generations of rules. Delegation may also evolve to become more robust, although the cases in this chapter demonstrate that this area remains the most challenging.

Table 9: Summary of Chapter 5 Findings

Initiative	Obligation	Delegation	Precision	Implement'n
KPCS	Low*	Low*	Low*	High
EITI	Low*	Low*	High	High
The VPs	Low*	Low	Low	High

NB: Low* denotes that these characteristics are challenging to categorise as either low or high for the reasons described in the relevant sections above.

A New Framework for Transnational Legalisation

The empirics in this thesis support the case for a new framework for transnational legalisation based on the characteristics of obligation, delegation, precision, and implementation. Using this data, we are able to identify indicators of both high and low implementation in domestic, international, and transnational arenas, as set out in the table below.

Table 10: Indicators of Implementation

Impl'n	Domestic	International	Transnational
High	Cause of action available	Consensus is prioritised	Participation is prioritised
	Transitory tort + class action available	Non-state actors involved in a substantive way	Non-state actors involved in a substantive way
	Criminal complaint mechanism available	Links with neighbouring regimes are encouraged	Participants not excluded immediately if found in breach of rules
	Parental duty of care established in common law	Practical steps taken to encourage broad support/ wide adoption (law firms, working groups, national plans).	Peer review and mutual assistance are encouraged
	FNC and jurisdictional challenges moderately applied	Rules are practical, direct, and specific	Rules are practical, direct, and specific
	Discovery available		Cooperation encouraged and prioritised
	Pro Bono /Legal Aid/NGO representation available		
Low	Cause of action not available	Consensus is not prioritised	Participation is not prioritised
	Transitory tort and/or class action not available	Non-state actors not involved in a substantive way	Non-state actors not involved in a substantive way
	Criminal complaint mechanism subject to prosecutorial discretion	No effort to forge links with neighbouring regimes	Participants excluded immediately if found in breach of rules
	Parental duty of care not established in common law	No practical steps taken to encourage broad support/wide adoption	Peer review and mutual assistance not encouraged
	FNC and jurisdictional challenges strictly applied	Rules are aspirational or binding	Conflict and non-consensus makes initiative unworkable
	Discovery not available		
	Pro Bono /Legal Aid/NGO representation not available		

Why is this important? This thesis has argued that the inclusion of implementation as a dimension of legalisation has far-reaching implications. First, an emphasis on implementation stresses that if international organisations and multi-stakeholder groups are to create effective rules that make a difference on the ground, they must create ways to facilitate the implementation of those rules. Governments and companies are likely to be more supportive of rules endorsed at the international level if they are certain of the tasks required of them and that practical assistance will be provided to assist states and business to translate those principles into practice on the ground.

Second, making implementation a central focus gives scholars and policy-makers an area to discuss, criticise, and analyse that is distinct from delegation (and, by association, enforcement). Laws created at the international and transnational level are regularly censured for not incorporating or providing for sufficiently robust enforcement mechanisms. Too often these criticisms fail to acknowledge the political reality that the rules would never have been endorsed in the first place had they included robust enforcement. Where this occurs, academic contributions may miss the point, pushing discussion into less fruitful areas of debate. By failing to acknowledge the importance of implementation, scholars overlook a vast landscape that lies between (1) obligation and precision; and (2) delegation, where international and transnational law is in fact operationalised. In this space, few serious attempts have been made to measure implementation or its practical effects on the ground. This underlines the importance of measurement, which can act as an important driver of progress. Once companies know that they are being measured they are more likely to try and race to the top. In this context, implementation, rather than enforcement, is key.

Third, focusing on implementation illuminates situations where laws are not effectively enforced but are (at least in part) operationalised through a variety of methods. Implementation also plays an important role when the concept of delegation is inadequate because it necessarily implies the involvement of an independent third party. In many transnational initiatives, the delegation-type function is carried out by participants themselves, who may assist other members in breach through pledges of mutual assistance or processes of peer review.

Fourth, implementation is important because scholars and policy-makers regularly fail to see that attempts at implementing rules may create significant benefits and capacity-building opportunities, even when initiatives overall remain poorly enforced. If we neglect to recognise implementation as a distinct dimension of legalisation, we risk subsuming the study of the operationalisation of law to a debate over enforcement that has increasingly less impact on how rules operate in the modern context.

In addition to focusing on implementation, the more dynamic understanding of legalisation advanced in this thesis has incorporated a stronger emphasis on agency, insisting that key actors are capable of influencing developments at many stages in the process. This is consistent with being less preoccupied with identifying the structural distinctions that identify law, and more concerned with examining the processes that 'constitute a normative continuum bridging from predictable patterns of practice to legally required behaviour'.[3] This thesis has told a story where the agency of its characters often drives the action – consider the role of specific lawyers in advancing transnational litigation, the creative efforts of Professor Ruggie and his team in formulating the GPs, and the unrelenting advocacy of NGOs such as Global Witness and Partnership Africa Canada (PAC) against conflict diamonds. This also reflects the fact that whilst it is a handy analytical trick to speak of dimensions as if they are structural characteristics of a specific legal institution, each dimension in fact embodies a set of processes set in train by agents attempting to generate a certain level of obligation, precision, or delegation. This has implications for how we understand law and legalisation, which 'may be much more about process than about form or product'.[4]

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3 Börzel and Hoenke, 'From Compliance to Practice', p.10.

4 Bratspies, 'Organs of Society' p.68.

If international law is 'at heart' a compromise between diverging reasons for action, legalisation is about the processes of contestation through which actors reach that compromise. In each legal arena, we see actors fighting to find a workable compromise between: (1) interests, represented by the material business prerogatives of powerful corporations (and their supporting states); and (2) the ideal, represented by a global legal regime that provides robust and consistent accountability for corporate human rights violations, wherever in the world they occur. The law that results from the efforts of legalisers can be viewed as a compromise that lies between these two points.

It is also significant that in all of these examples, agents are working to advance a specific norm through particular institutional and normative structures. Norm promotion in legal arenas is clearly a highly competitive sport. When legalisers successfully advance the legalisation of a particular norm, they transform the structures in which they are operating and create more space for future legalisation to occur. This reflects the constructivist perception of the international system as 'a historically created, and evolving, structure of common understandings, rules, norms, and mutual expectations'.[5] According to this perspective, structures are constituted and reproduced in agents' practice. Thus legalisation has a cyclical element – legalisers who successfully advance new rules also transform the legal framework through which future legalisation endeavours will be pursued.

Furthermore, because international law and transnational law are often not enforced by an overarching body, legalisers play an essential role both in implementing the law and making it increasingly obligatory, precise, and delegated over time. This means that a particular legal regime will be 'thickest' where legalisers are the most active – this may be in a particular country or in a specific industry. In the area of business and human rights, the epistemic community appears energised by the last five years of steady progress, and should continue to grow rapidly and play a powerful role in how law and rules are shaped in the future.

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5 Hurrell and MacDonald, 'Ethics and Norms in International Relations,' p.68.

Finally, how we understand legalisation is important because it reflects the complex relationship between law and power in the international system. Some of the most critical issues of our time will only be addressed through the development of regimes that facilitate cooperation between diverse actors and create incentives for compliance that lie outside the traditional domain of enforcement. The profit-driven nature of corporations is often pointed to as a key reason behind their negative human rights impact, but therein also lies the solution: this thesis shows that companies will comply with voluntary regimes where the reputational or economic consequences of non-compliance are unsustainably high, or prohibit access to international markets, private finance or government benefits.

It is also possible that the revised legalisation framework could be applied to other spheres of transnational legalisation. For instance, the findings in this thesis suggest that a more effective approach to managing climate change might involve instigating a re-framing and consensus-building approach at the UN, amending procedural rules in national courts to facilitate access for transnational environmental litigants, and encouraging business groups, governments, and NGOs in particular industries to kick-start their own MSIs. National security, international terrorism, access to natural resources, and human trafficking are just a few areas that will need to be approached from a perspective that appreciates the importance of global governance, the fact that authority is increasingly spread across a diverse range of networks, and the importance of consensus-building amongst actors. Given the importance of these issues to the entire international community, there can be no doubt that understanding transnational rule-making is absolutely crucial. A focus on implementation, it is hoped, will contribute to this goal.

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