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Transnational Corporations under International Human Rights Law: Reversing the Accountability Vacuum

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Declaration

I hereby declare that the study on 'Obligations of Transnational Corporations under International Human Rights Law: Reversing the Accountability Vacuum' is my own work and the sources used are duly acknowledged.

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Dedication

This thesis is dedicated to the memory of all victims of transnational corporate human rights abuses in all corners of the globe.

Abstract

Symbolizing the profound influence of globalization, the international community has witnessed an unprecedented proliferation of transnational corporations (TNCs) operating in every corner of the globe than at any time in the history of humanity. Associated with it, two facts emphatically attracting the attention of the international community have come to the scene. For one thing, TNCs engage in violations of human rights and freedoms, albeit their marvelous contribution in lifting the human family from deplorable to favorable life conditions. For the other, international human rights law, as it now stands, is by far inadequate in terms of its substantive, institutional and procedural aspects to ensure the compliance of TNCs with international human rights standards. That is mainly the case because the obligations it imposes are almost exclusively addressed to states while non-state actors, particularly TNCs, cause violations of human rights and freedoms roughly comparable to those usually caused by the so-called historical violators of human rights – states. As a result, TNCs are operating in the atmosphere of an 'accountability vacuum' in the kingdom of international human rights law. Aimed to put forward a new legal horizon that helps to reverse this accountability vacuum, this study adopts an innovative approach and argues for the adoption of a new international human rights treaty that imposes direct obligations on TNCs and establishes international institutional-procedural means of implementation for the same. To that end, the study first analytically uncovers the gaps in the existing international human rights law in the area under consideration and then embarks on the rationalization of the new treaty including the relations it should have with other international human rights treaties, investment treaties and agreements as well as commercial treaties.

Key Words

Human rights, international human rights law, transnational corporations, 'catch through the others' hand' approach, accountability vacuum, corporate obligation convention, direct obligation, international court of corporate justice, reversing accountability vacuum

CHAPTER ONE

INTRODUCTORY MATTERS

1.1 Background of the Study

Of the major dramatic events brought about by the phenomenon generically called 'globalization', the proliferation of TNCs is the first to reckon. There is no binding definition for the term TNC under international law. The bulk of literature written in the area of TNCs and international law (particularly international human rights law) also prefer to illuminate on the influence of these entities on human rights and freedoms than embarking on defining the term. For the purpose of this study, I adhere to the definition given to this term in the so-called United Nations draft norms on TNCs and other business enterprises with regard to human rights.[1] The draft norms, under article 20, define TNCs 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 the country of activity, and whether taken individually or collectively'.

Central to the above definition are the area of their activity, that is, 'economic' activity and the territorial scope of their activity, which is explained in terms of being transnational (not confined to a single country).

[1]. Norms on the Responsibility of TNCs and Other Business Enterprises with Regard to Human Rights,U.N.Doc. E/CN.4/sub.2/2003/12/Rev.2 (2003) The norms were adopted in 2003 by the then United Nations Sub-commission on the promotion and protection of human rights and presented before the then human rights commission (which is superseded by the United Nations Human Rights Council as of 2006) for approval.
The Commission rejected the norm in 2004 saying that it did not requested the sub-commission to develop them and further indicating that as a draft it has no legal standing and the sub-commission will take no supervisory role in relation to it. Since then, the norms could not get the chance to be re-discussed in its own sake. Even so, it is a point of constant reference point in literatures relating to TNCs and human rights. For detailed explanation on the norms, see Pavel Miretski and Dominik Bachmann, 'The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises With Regard to Human Rights': A requiem' (2012) [17] (1) Deakin Law Review 6

TNCs are not the creations of international law, but of domestic laws.[2] As such, their international status is fraught with controversies. In literature, TNCs are known by many other names such as: multinational corporations (MNCs), multinational enterprises (MNEs), transnational Companies, transnational enterprises, international corporations, global corporations or sometimes simply, multinationals or trans-nationals. With the intention to create familiarity with these multitude of names attached TNCs, I will use them interchangeably throughout this study.

The issue of the observance of international human rights standards by TNCs is one of the areas in which international human rights law is surrounded by ongoing debates both within and outside the academics. By international human rights standards I mean those basic guarantees that are provided under international human rights laws (treaties, customary international law rules and *jus cogens*.

Owing to the state-centric approach to public international law in general and international human rights law in particular, the issue of direct obligations[3] of non-state actors[4], particularly TNCs, is the area in which international human rights law suffers from noticeable gaps. As Alston and Goodman observe, 'the centrality of the states is one of the defining features of international law and the human rights system builds upon this by seeking to bind states through a network of treaty obligations to which, in the majority of cases, only states can become parties'.[5] This is due largely to the Westphalian paradigm of international law which is preoccupied with the dominant roles of states as the main actors

[2]. Regis Bismuth, 'Mapping a Responsibility of Corporations for Violations of International Humanitarian Law: Sailing Between International and Domestic Legal Orders' (2010) (38)2 Denver Journal of International Law and Policy 203

[3] For the purpose of this study, *direct* obligation refers to the following interlinked scenarios. These include, the situation whereby binding international human rights law (be it treaty or customary law…) directly impose on TNCs the obligations to respect, protect and fulfill human rights, the establishment of international monitoring organ that supervises the compliance of TNCs with such specific international human rights laws, the right of victims of TNCs to lodge their claims directly against TNCs before international treaty monitoring organ or before any other international adjudicatory organ of judicial nature (say, for instance, special international court having the power to adjudicate claims of victims of TNCs or general world court of human rights having a chamber for claims against TNCs)and the arrangement of clear procedural and remedial schemes for the enforcement of such obligations. All these scenarios are now lacking under the international human rights protection system in relation to violations caused by TNCs.

[4] . For the purpose of this study, the term non-state actors refers to all actors other than states (see Robert McCorquodale, 'Non-State Actors and International Human Rights law' (2009), available at: http://ssrn.com/abstract/=2065391, last visited on March 10, 2017)

[5] .Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics and Morals (*Oxford University Press 20013)

in the international legal order.[6] Non-state actors including TNCs are thus, by definition, placed at the margins of the resulting international legal regime.[7] This traditional state-centered approach to international legal order in general and international human rights law in particular has given rise to serious concerns attracting much attention. The problem is that while the *de facto* influence of non-state actors, in our case TNCs, is increasing both in advancing and adversely affecting human rights, the *de jure* connotation of such influence is unsettled under international human rights law mainly from the perspective of their human rights obligations. One of the main contributing factors to the increasing influence of TNCs is globalization, that is, ever increasing mobility of capital across nations and the increased importance of foreign investment flows, facilitated by market deregulation and trade liberalization that in turn put human rights and freedoms under the heavy influence of TNCs.[8] Among specific human rights that are usually violated by TNCs are: recruitment of child workers, violation of safe working condition standards, violation of environmental standards and dislocation of indigenous peoples, to name but a few. Besides, those TNCs engaging in security keeping activities and in war, commonly known as Private Military Companies (PMCs) also pose greater risks to human rights and freedoms.[9] In Iraq, for example, corporate contractors (members of PMCs) like Black water USA were accused of conspiring with US officials to humiliate, torture detainees, carrying out extrajudicial executions and being involved in a range of other practices violating human rights standards during the US-Iraqi war that broke out in 2003.[10] In short, the horizon of the activities of TNCs that either positively or negatively influence human rights is increasing from time to time.

As indicated before, there is no binding international human rights law that imposes direct obligation on TNCs because of the oppositions to this kind of notion. [11] As TNCs are one of

[6] ibid
[7] ibid
[8] .Ibid
[9] Ibid.
[10] .ibid. See also Philip Alston, ''The-Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', In Philip Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005. After indicating the violations of human rights that PMCs undertook during the US-Iraqi war, Alston reminds us 'the principal problem is that the legal situation of the contractors (under international law) and the means by which they might be held accountable is very unclear'.
[11]. John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) [101] (4), The American Journal of International Law 819

non state actors, the arguments that are commonly raised against the extension of direct human rights obligations to non-state actors in general works for arguments against the imposition of direct human rights obligations on TNCs except in some instances. Clapham summarizes into five the arguments against the extension of human rights obligations to non-state actors including TNCs. The first is the trivialization argument.[12] According to this objection, extending direct human rights obligations to non-state actors, including TNCs, trivializes human rights and ignores their historical pedigree.[13] That is, human rights obligations should be concerned only with respect to serious violations undertaken by the historical violator of human rights, the government, not in case of ordinary breaches of the law by non-state actors like TNCs. The second is the legal impossibility argument.[14] According to this objection, as human rights treaties are negotiated and ratified by states, it cannot bind non-state actors.[15] There is no clear evidence for the existence of customary law rule that impose direct human rights obligation on TNCs as well[16]. The third is the policy tactical argument.[17] As per this view, expanding direct human rights obligation to non-state actors would pave a way for states to escape their human rights obligations by redirecting it to non-state actors. States might simply blame non-state actors for the violations of human rights rather than taking the issue as their own. The fourth is the legitimatization of violence argument.[18] This argument is particularly targeted against the extension of human rights obligations to non-state armed groups. The idea is that making non-state armed groups directly accountable for human rights violations would bestow them unnecessary legitimacy before the international community and sends the unnecessary message that they have the right to use violence/force similar to states. The fifth is rights as barriers to social justice argument.[19] This is the view that imposing human rights obligations on private entities distorts the historical condition in which states use human rights as a tool for intervention in society and bring social justice for those private entities themselves by protecting them

[12] Andrew Clapham , *Human Rights Obligations of Non State Actors (*Oxford University Press 2006*)*
[13] ibid
[14] Ibid 35
[15] ibid
[16] ibid
[17] Ibid 41
[18] Ibid. 46
[19] Ibid 53

against the public sphere (public power).[20] Imposing human rights obligation on the private entities that were once enjoying human right protection (but not historically bearing human rights obligation) contravenes the status quo and amounts to barring social justice. Of the above five objections raised by Clapham, all are generally relevant to the objections against the imposition of direct human rights obligations on TNCs except the fourth objection which is specifically the opposition against the extension of human rights obligations to non-state armed groups.

Apart from the above objections applying to non-state actors in general, there are also objections that are specific to TNCs that oppose the extension of direct human rights obligations to these entities and above all, the adoption of hard law (treaty) imposing direct human rights obligations on them. The main ones are the following. The first is that the move towards the imposition of direct obligation on this business entities, mainly through the adoption of hard law (treaty) is viewed by some as anti-business agenda, that is, the fear that these entities might restrict their activities for fear of accountability for potential violation of human rights.[21] The second one is the controversial issue of legal personality of TNCs under the international law. The issue is that as they are purely the creations of domestic legal systems, it is argued that TNCs do not have international legal personality/cannot be subjects of international and as such international human rights law cannot directly impose obligations on them.[22] The others are what some call conceptual barriers.[23] The first conceptual barrier is the view that TNCs could be right holders, not duty bearers.[24] The idea is that, in terms of historical significance, the first right to be recognized after the struggle of the rights claimants against monarchies is the natural right of individual human beings to property and this right is extended to legal persons – corporations, under international human rights law. This made them to be artificially analogized with natural human beings to be right holders, but extending human rights obligations to them appears to be conceptually ungrounded. The legacy of the cold war ideological divide (between the

[20] ibid,
[21] . John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) [101] (4), The American Journal of International Law 819
[22] . Ole Kristian Fauchald and Jo stigen, 'Corporate Responsibility Before International Institutions' (2009) 40, George Washington International Law Review 1026
[23]. Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' (2001) 77 (1), Royal Institute of International Affairs 31, 32
[24] ibid

West and Eastern blocs) on human rights is also viewed as one of the other conceptual barrier hindering the extension of direct human rights obligations to TNCs.[25] That is, as pro capitalists uphold the rights of Corporations, not their duties, extending human rights obligations to these entities are viewed as anti-capitalism strategy.

As a consequence of the above (one may add others) factors, the existing international human rights law does not impose direct binding obligation on TNCs, irrespective of their profound record of human rights violations throughout the world. On the other hand, the existing international human rights law, which relies on the obligations of states to protect human rights against abuses emanating from non-state actors, in our case TNCs, is inadequate in its substantive, institutional and procedural terms to do this immense job. As a result, TNCs are enjoying an accountability vacuum – they end up with impunity. The need to hint international legal mechanism of ameliorating this gap underlies the essence of the present study.

1.2 Statement of the Problem

Along with the proliferation of TNCs with enormous economic and technological power, two demonstrable facts that attract the attention of the international community emerged. The first is that, albeit their tremendous importance in improving the life conditions of the human family all across our world, TNCs are causing serious violations of human rights and freedoms. The second is that international human rights law, as it now stands, is normatively, institutionally and procedurally inadequate in holding these entities accountable for their engagement in the transgression of human rights. This inadequacy is explained by two scenarios. The first scenario is the inadequacy of the state-centered international law to ensure the observance of international human rights standards by TNCs. The second is the absence of binding international law that imposes direct human rights obligation on TNCs. International human rights instruments like the International Covenant on Civil and Political rights (ICCPR)[26], International Covenant on Economic, Social and

[25] Ibid.

[26]. Adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entered into force on 23 May 1976

Cultural Rights (ICESCR)[27], Convention on the Rights of the Child (CRC)[28] and others do not impose adequate direct obligation on TNCs. They impose direct obligation only on states. However, whether the obligations incumbent upon states under these international human rights law embraces extraterritorial duty to protect human rights against the overseas activities of their corporations is not clearly provided. Besides, the states that host TNCs are sometimes unable and sometimes unwilling to take measure to protect human rights against TNCs operating in their territories. On top of that, the emerging soft laws on TNCs and human rights which pretend to address the adverse impacts of TNCs on human rights and freedoms are not capable of ameliorating the gap just mentioned. They are neither comprehensive enough nor do they have legally binding force to ensure the observance of international human rights standards by TNCs. As a consequence, TNCs are availing the accountability vacuum and acting with impunity at the expense of the human rights of individuals and communities in which they operate. This is a great legal gap and uncertainty that hampers international human rights protection system with respect to the infringements emanating from multinational enterprises.

Even though many studies were conducted on the issue of TNCs and human rights to hint solutions to the above mentioned lacuna, the present researcher finds them inadequate in hinting an appropriate solution that fits the magnitude of the problem. They do not clearly argue for the adoption of a binding instrument that fill the legal gaps and uncertainties in the existing international human rights law in relation to direct obligations of TNCs. Even those very limited researches that hint the new treaty on direct human rights obligations of TNCs do not justify and argue for its adoption and they do not firmly indicate the possible contents that this instrument should come up with. [29] They merely make a passing reference to such hard law and express their doubts in the success of such endeavor by estimating the possible

[27] . Adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entry into force 23 May 1976

[28] .Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entry into force 2 September 1990

[29]See, for instance, Oliver De Schutter, 'Towards a Legally Binding Instrument on Business and Human Rights' (2015) 1(1) Business and Human Rights Journal, Cambridge University Press 41. In this particular work, Schutter merely offers his assessment of four alternative possibilities of the nature of binding instrument to be adopted in relation to TNCs and human rights rather than proposing the type of instrument he thinks best and the justification thereof. His work give rise to more questions necessitating further studies than it resolves in relation to the issue under the present study

resistance from states and the business community than developing consolidated justifications for the adoption of such essential instrument.

Therefore, given the seriousness of the challenge that TNCs are posing to human rights across countries and further given the inherent limitation of the previous researches in offering sufficient justifications for the necessity of adopting a new treaty imposing direct human rights obligations on TNCs and in indicating the nature and scope of the obligation and the categories of rights to be incorporated therein, it necessitates further study that articulately fills the gap. The current study will make an attempt to fill the gaps left by those prior works and as far as possible it will make an endeavor to come up with comprehensive arguments in favor of the adoption of binding treaty imposing *direct* human rights obligation on TNCs. It will also indicate the institutional, procedural and remedial backups that have to be included in the new treaty. Concomitantly, the study will indicate the tactics to overcome the possible resistances laying a head of the struggle for the adoption of such innovative treaty.

1.3 Objectives of the Study

1.3.1 General Objective

The general objective of this study is to uncover the gaps in the existing international human rights law in ensuring the compliance of TNCs with international human rights standards and then to argue for the necessity of adopting a new international human rights treaty that imposes direct obligations on TNCs so as to fill those gaps.

1.3.2 Specific Objectives

The study has the following specific objectives

i. To uncover the gaps in the existing international human rights law in ensuring the compliance of TNCs with international human rights standards.
ii. To build arguments that justify the adoption of a new international human rights treaty that imposes direct obligation on TNCs to fill the gaps in the existing international human rights law in ensuring the compliance of these entities with international human rights standards,

iii. To indicate the nature of obligations that TNCs should bear and the categories of rights they should observe under such new treaty and,

iv. To indicate institutional, procedural and remedial schemes for the implementation of such new treaty.

1.4 Research Questions

The study is aimed to answer the following basic questions;

i. What are the gaps in the existing international human rights law in ensuring the compliance of TNCs with international human rights standards?
ii. Do these gaps justify the adoption of a new international human rights treaty that imposes direct obligations on TNCs?
iii. What would be the nature of obligations and categories of rights to be included under such new treaty?
iv. What would be the institutional and procedural scheme of implementing such new treaty and what remedy will have to be available for the victims of TNCs?

1.5 Significance of the Study

Upon completion, the study will be significant to create common understanding within the academic community and outside on the current status and the directions that must be held in future in the realm of international human rights law with respect to the accountability of TNCs. That is, as it reviews prior literatures in the area and also suggests an innovative solution with respect to the accountability of TNCs under international human rights law, it broadens the stock of knowledge in this particular area of interest. This marks the academic significance of this study.

Besides the above mentioned academic significance, the study also has strategic significance. It serves states, international organizations such as the United Nations and different lobbying groups as a guiding tool in their overall endeavor for the construction of rules of international law that regulate the adverse impacts of TNCs on human rights in general and in the struggle for the adoption of a kind of a treaty that hold TNCs directly accountable under international human rights law in particular. Likewise, it is helpful for corporate officials in order to make an informed decision to inculcate the idea of human

rights protection into their general corporate policy and their day to day corporate activities so that they do not violate human rights and operate at the risk of losing their reputation and competitiveness in front of the world of consumers.

The study is also significant for individuals and communities to make a knowledge-based peaceful struggle to protect their rights and freedoms against the intrusion of TNCs.

1.6 Scope of the Study

This study is limited to direct human rights obligation of TNCs under international human rights law. Any reference to the issues of human rights obligation of states and other non-state actors will be to buttress the core subject of this study. Besides, human rights obligation of TNCs under regional and domestic human rights framework are also outside the scope of the study except when they are referred to for the purpose of enriching the matters that directly fall within the ambit of this study. Furthermore, the accountability of TNCs that will be considered in the study does not embrace the criminal responsibility of these entities before international courts and tribunals, but their civil responsibility only.

1.7 Research Method

This study is doctrinal legal research; not empirical legal research. It is a research into laws and legal concepts. Therefore, the most appropriate research method for this study is analysis of legal documents. The contents of international human rights law instruments (both hard and soft laws), will be analyzed for the purpose of identifying the gaps in the existing international human rights laws with respect to the regulation of the detrimental effects of TNCs on human rights and freedoms that warrant adoption of a new treaty to fill the gaps. Relevant concluding observations of international treaty monitoring bodies will also be analyzed to enrich the discussions of this study. Likewise, relevant case laws of international and national adjudicatory organs will also be critically reviewed for the same purpose. Relevant documents of the researches previously conducted with respect to TNCs and international human rights law will also be thoroughly analyzed for the clear indication of the gaps under the current international human rights law that necessitate the adoption of a new international human rights treaty imposing direct obligation on TNCs.

1.8 Sources of Data

Because of the method that this study employs – doctrinal legal research method, the following sources of data will be used. The primary sources of data include different international human rights treaties, soft international laws, concluding observations (recommendations) given by different international human rights treaty monitoring organs and relevant judicial pronouncements (case laws) of international adjudicatory organs like ICJ. National and regional laws will also be considered to buttress the core aim of this study. Besides, the study uses secondary sources of data such as different journal articles, books, case notes, conference papers and working papers that have relevance to the subject of this study.

1.9 Limitation of the Study

Inherent to any doctrinal legal research, the findings of this study , the analyses it makes and the conclusion it arrives at and the solution it suggests might not be essentially replicated in other studies of this kind. As a doctrinal legal researcher, it might not be possible to avoid some sort of subjectivity while analyzing relevant legal rules, legal principles, legal standards and legal doctrines. This represents the limitation of the present study.

1.10 Method of data Analysis

As this study is doctrinal legal research, qualitative method of data analysis is the most appropriate method for it. Therefore, the data or facts obtained through the review of relevant legal instruments and jurisprudences of courts and concluding observations of international human rights treaty bodies will be analyzed qualitatively in the light of the objectives of the present study and in light of the central questions it seeks to answer. The data that will be obtained from review of relevant literatures will also be analyzed qualitatively to buttress the analysis of relevant legal documents..

1.11 Literature Review

"If I have seen further, it is by standing on the shoulders of the giants" (Sir Isaac Newton)

Some studies were conducted on the issue of human rights and TNCs in the sphere of international human rights law. Even though much of them find the inadequacy of the existing international human rights law in addressing the impunity of TNCs, they do not

firmly and clearly hold the position taken in the present study. That is, even though very few among them hint the adoption of a treaty directly binding TNCs for human rights as one possibility among many alternatives for ending transnational corporate impunity, they do neither hold a clear stand on the necessity of such treaty and nor do they embark on its rationalization. These prior studies will be presented herein below along with their limitations that trigger the present researcher to conduct the present study. To begin with, De Schutter, in his study titled *"Towards a legally binding instrument on business and human rights"*[30], tries to explore the possible nature of the future binding treaty on business and human rights that might be adopted pursuant to resolution 26/9 of the United Nations Human Rights Council which mandates the Intergovernmental Working Group (IGWG) to elaborate on an international legally instrument on TNCs and other business enterprises with respect to human rights.[31] He explores four alternative possibilities on the nature of the future treaty on business and human rights. These alternatives are: 1) a treaty that provide detailed definition of states' duty to protect human rights by regulating TNCs 2) a framework convention on business and human rights that impose on states the duty to adopt national action plans or strategies on business and human rights and to report on the progress they made in this respect 3) a treaty that directly hold corporations liable for human rights violations 4) a treaty that establishes legal mutual assistance between states so as to cooperate in the effort to regulate the activities of TNCs with regard to human rights. Even though he offers a treaty that directly binds TNCs as one alternative, his conclusion favors the first and the fourth of the above alternatives. As such, he failed to solidly justify a treaty that directly binds corporations for international human rights standards. Indeed, he rejects such an option by expressing his skepticism as to the acceptability of such scheme before states and business community. This is the shortcoming of his study as it does not suggest the solution that sufficiently addresses the magnificent challenges that TNCs brings to the enjoyment of human rights and freedoms. That is, his study does not suggest the preferable

[30] Oliver De Schutter, 'Towards a Legally Binding Instrument on Business and Human Rights' (2015) 1(1) Business and Human Rights Journal, Cambridge University Press 41.

[31] Resolution 26/9 was adopted in June 2014 by the United Nations Human Rights council and it gives mandate to the Open ended Intergovernmental Working Group (IGWG) on TNCs and other business enterprises with respect to human rights to elaborate on an international legally binding instrument on TNCs and other business enterprises with respect to human rights. The resolution was adopted following the speech of the delegation of Ecuador to the 24 th session of the council in September 2013 recommending the need for a legally binding instrument on the regulation of the activities of TNCs with respect to human rights.

way of filling the current devoid in the international human rights law – the problem emanating from virtual absence of direct human rights obligations for non-state actors, in the present case, TNCs. Likewise, Fernandez Sixto, in his study titled *"Business and human rights: A study on the implications of the proposed treaty",*[32]tries to answer the question of the nature of a future treaty that might be adopted pursuant to the above mentioned resolution 26/9 of the United Nations Human Rights Council. Even though his study indicates the possibility of adopting binding treaty that directly impose human rights obligation on transnational corporations as a means to curb the impunity of TNCs, it does not argue for such treaty. It rather prefers a treaty that elaborates on extraterritorial human rights obligations of states than the adoption of a treaty that impose direct human rights obligation on TNCs. As the attempt to indirectly regulate the human rights impacts of TNCs through the hands of states alone (in the absence of direct international legal-institutional mechanism for it) is already proven inefficient in ending transnational corporate impunity, Sixto's study does not answer the core issue, that is, the quest for a treaty that directly bind corporations for international human rights standards. In similar vein, De Brabandere, in his study titled, "*non-state actors and human rights: Corporate responsibility and the attempts to formalize the role of corporations as participants in the international legal system",*[33] clearly finds the absence of hard international law imposing direct obligation on transnational corporations. However, rather than insisting on the necessity of adopting a treaty imposing direct human rights obligation on these entities (except the passing indication for the international criminal responsibility of corporations), he simply explores the attempts of easing corporate impunity through *domestic* legal measures like the United States Alien Tort Claims Act. As human rights are not a mere domestic issue and as TNCs are becoming key international actors (in *de facto*), mere domestic regulation of corporate behavior does not substantially solve the tragedy that TNCs are posing to human rights and freedoms throughout our world and throughout their operations. Thus, the above study failed to answer the immediate need for international treaty directly addressing TNCs for human rights obligations with international institutional and procedural scheme of

[32]. Fernandez Sixto, 'Business and Human Rights: A Study on the Implications of the Proposed Binding Treaty' (LLM thesis, University of Essex 2015)

[33] De Brabandere, 'Non-State Actors and Human Rights: Corporate Responsibility and the Attempts to Formalize the Role of Corporations as Participants in the International Legal System' (2011), available at http://ssrn.com/abstract=1992937 , last accessed on 10 March 2017.

enforcement. Besides, Saulius Katuoka and Monika Dailidaite, in their study titled *"Responsibility of transnational corporations for human rights violations: Deficiencies of international legal background and solutions offered by national and regional legal tools,*[34] correctly find the inadequacy of the existing international human rights law in addressing corporate human rights abuses. However, rather than arguing for the necessity of rectifying the deficiency of the international legal tool through the adoption of international treaty law binding TNCs for human rights, they shifted the course of their arguments to the national (like the US Alien Tort Claims Act)) and regional (like through the European Union) mechanisms of addressing the conundrum. The present researcher finds that, as it is explained earlier, such national and regional legal tools which Katukoa and Dailidaite argues for do not adequately fill the gaps in the international human rights law and they do not adequately address transnational corporate impunity. After all, mere domestic regulation of human rights impacts of the activities of TNCs will not bring consistent practices that promote the idea of 'universality' of human rights. The gaps in the international human rights law, which is symbolized by the absence of direct obligations for TNCs and the inadequacy of the existing regime has to be ameliorated by new international human rights instrument that underscores the essentially universal nature of human rights and the corollary universal obligation it commands. The other relevant study in the area at hand is the one conducted by Professor John G. Ruggie. In his study titled *"Business and human rights: The evolving international agenda"*,[35] he rightly indicates the gap in the existing international human rights law in addressing the issue of business and human rights. However, he does not argue for and do not firmly justify the urgency of a binding treaty on direct human rights obligations of TNCs. He rather seems to prefer soft international laws and home states *voluntary* initiative to take measures extraterritorially to regulate the relation between TNCs and human rights. Indeed, despite some of its achievements (in formulating soft laws regulating TNCs-human rights nexus) , Ruggie's study and report on the area is criticized by other researchers as well for it seems to shift the course of business

[34] Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University 1301

[35]. John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) The American journal of international law 819

and human rights debate from the movement towards hard law to fragile soft laws and national policy measures.[36]

Another study in the area is the one jointly undertaken by Daniel Augenstein and David Kinley. The researchers, in their` study conducted under the title of "*When human rights responsibilities become duties: the extraterritorial obligations of states that bind corporations*",[37] articulately explain the limitation of the Westphalian paradigm of the international legal order in addressing human rights violations perpetrated by non-state actors in general and TNCs in particular.[38] However, the authors merely argue for the exercise of extraterritorial jurisdiction by home states to regulate human rights impacts of the activities of TNCs and they do not argue for the adoption of new international treaty imposing direct obligation on TNCs. As such, they failed to answer the issue of direct accountability of TNCs for human rights under the matrix of international human rights law. As such, their study does not provide a viable alternative that address the pressing need for consistent regulation of the activities of TNCs in relation to international human rights standards.

Another study worth mentioning is the one conducted by Surya Deva. In his study titled, *"Acting extraterritorially to tame multinational corporations for human rights violations: Who should "bell the cat?",*[39] he finds the problematic issue of holding multinational

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[36] . Carlos Lopez, '*The 'Ruggie process': From Legal Obligations to Corporate Social Responsibility*?' (Cambridge University Press 2013)

[37]. Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' Become 'Duties': The Extra-territorial Obligations of States that Bind Corporations' (2013), Cambridge University Press, 271.

[38]. By the Westphalian view of international law I am referring to the international legal order as rooted in the legacy of the Peace of Westphalia (1648) that ended the war between the European states that devastated the continent for three decades. Among other things, the treaty underlines the sovereignty of states, exclusive territoriality, legal equality of states and non-intervention in the internal affairs of other states and presents states as the only/dominant actors in international matters. The views developed through time on this treaty is that only states are eligible to engage in international relations, only they can negotiate and make international law to regulate their relations *inter se.* Though recent developments pose a challenge to the Westphalian international legal order by admitting the role of actors other than states at least in its negotiation and enforcement of the obligations it imposes, Westphalianism is still dominating or at least pretends to dominate this international law. This is truly the case with respect to international human rights regime which is hesitant to impose direct binding obligation on non-state actors. The case in point is its grudging move towards articulating direct human rights obligation for TNCs and other business enterprises (see A. Claire Cutler, 'Reflection on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (201) 27 Review of International Studies, British International Studies Association) 133

[39].Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?(2004) 5, Melbourne Journal of International Law 37

corporations for human rights standards and he recommends extraterritorial jurisdiction of home states as one means of solving this challenge. Importantly, he also suggests that this exterritorial measure alone is inefficient and it should be augmented by 'international regulatory framework'. However, he failed to offer the details of what he meant an 'international regulatory framework'. He merely says, international regulatory framework' and he offers even no sentence in explanation of this idea. As such, it is not clear whether he is referring to the existing international soft and hard laws or whether he is proposing the adoption of new treaty remains unanswered.

The above are not the only studies conducted in the area of international corporations and human rights. There are others too. For instance, Justine Nolan, in his study titled *"Refining the rules of the game: The corporate responsibility to respect human rights",*[40] finds that more regulatory rules relating to transnational corporate human rights accountability are emerging than ever before. He appreciates the existing soft laws like the 2011 United Nations Guiding principles on business and human rights.[41] However, his study neither asserts the existence of adequate and binding rules nor it suggests the adoption of such binding rules on the direct human rights accountability of TNCs. As such, it does not indicate adequate international legal solution to the problem of transnational corporate impunity.

In short, in spite of the number of prior studies conducted in the area of international human rights laws and TNCs, neither they sufficiently justify the necessity of adopting new treaty imposing direct human eights obligation on TNCs nor do they indicate with necessary details the nature of obligation and the content of rights as wells the means of enforcement of such future instrument. The present study is aimed to fill the gaps left by the above studies by indicating the way to reverse or at least minimize the impunity of TNCs through the adoption of international treaty law that directly binds these entities to international human rights standards.

[40].Justine Nolan, 'Refining the rules of the game: The Corporate Responsibility to Respect Human Rights' (2014) 30 (78), Utrecht Journal of International and European law 7.

[41] . See, Guiding principles: Implementing the United Nations 'respect, protect and remedy framework', report of the special representative of the secretary general on the issue of TNCs and other business enterprises with respect to human rights, A/HRC/17/31

1.12 Structure of the Study

To meet the objective it has in view, this study is organized into five chapters. The successive chapter will essentially build upon and it will be logically connected with the preceding chapter (s). As indicated before, the first chapter covers introductory matters that lay a groundwork for the continuing chapters. It begins with the background of the study and covers issues like statement of the problem, general and specific objectives of the study, research questions, significance of the study, scope of the study, method of the study, limitation of the study, data analysis method and literature review. Then will follow chapter two, which examines the place of non-state actors under the matrix of international human rights law and the detrimental effect this position has on human rights and freedoms. In so doing, it uncovers the root cause of the conundrum – the root cause leading to the atmosphere of 'accountability vacuum' for TNCs under the international human rights protection system. Chapter three critically uncovers the inadequacy of the 'catch through the others' hand' approach or the 'indirect horizontal effect' of human rights as an avenue for ensuring the accountability of TNCs for international human rights standards. The fourth chapter embarks on justifying the adoption of a new international human rights treaty that could reverse or at least minimizes the accountability vacuum that TNCs are enjoying under the existing international human rights law. To that end, the chapter first illuminates on the evolving soft laws with regard to TNCs and human rights and then draws from them necessary lessons that could substantiate the innovative idea of this chapter – the urge for new international treaty imposing direct human rights obligations on TNCs and establishing international institutional and procedural scheme of enforcement previously not existing. It also addresses many issues relating to this new proposal (treaty) such as the hierarchical position it should assume in relation to other international human rights instruments and investment and commercial treaties and agreements. Besides, it illuminates on the place of states in relation to the suggested treaty. It also offers the tactics that have to be employed to overcome the challenges laying a head of the new treaty that this study suggests. The fifth chapter finalizes the study by a way of conclusion and recommendations.

CHAPTER TWO

UNCOVERING THE GENESIS OF THE CONUNDRUM: THE POSITION OF NON-STATE ACTORS UNDER INTERNATIONAL HUMAN RIGHTS LAW AND ITS DETRIMENTAL EFFECTS ON HUMAN RIGHTS

2.1 Introduction to the chapter

This chapter is devoted to two inextricably linked issues. The first is to uncover the place of non-state actors in general under international human rights law in terms of bearing obligations. Having full understanding on this issue is essential because the problem related with the place of TNCs (entities that are archetypes of non-state actors) under international human rights law in terms of their obligations could be better appreciated only in the context of the place of non-state actors in general under this branch of international law. Thus, as I unearth the position traditionally ascribed to non-state actors under international human rights law in terms of their obligations, I put the main concern of this study (the issue of the obligations of TNCs under international human rights law) in its proper context. In so doing, I will be able to reveal the genesis of the conundrum – the general root cause for the absence of viable accountability scheme for TNCs under international human rights law.

Once the chapter uncovers the position generally attributed to non-state actors under international human rights law, it goes to illuminate on the detrimental effects that the place traditionally ascribed to non-state actors under this area of law has on human rights and freedoms. In other words, it answers the vital question: What are the detrimental effects that the position generally ascribed to non-state actors (in terms of their obligations) under international human rights law has on the international protection of human rights? This marks the second main issue of this chapter.

2.2 The position of non-state actors under international human rights law

As indicated in the introductory part of this chapter, my main concern in the present context is related to the obligations of non-state actors under international human rights law, not on the issues of the rights they might enjoy under it. Before directly moving to explain the position given to non-state actors under this particular body of international law, it is worthwhile to see what ‘non-state actors’ are. There is no unanimously agreed definition for

the term non-state actors. Different authors provide different definitions. For instance, Josselin and Wallace (as cited in Philip Alston), define non-state actors as all *organizations*:

> Largely or entirely autonomous from central government funding and control; emanating from civil society, or market economy, or from political impulses beyond state control and direction; operating as or participating in networks which extend across the boundaries of two or more states – thus engaging in 'transnational' relations, linking political systems, economies, societies, acting in ways which affect political outcomes, either within one or more states or within international institutions – either purposefully or semi purposefully, either as their primary objective or as one aspect of their activities.[42]

No doubt, the above definition is wide enough to embrace many entities under its domain. However, two of its limitations are fatal from the point of view of international human rights protection. The first apparent problem in this definition, especially from the point of view of human rights protection, is the criterion of engagement in 'transnational relation/activities'. The issue is that from human rights protection point of view, it does not matter whether their activities are confined to a particular country or geographical area, but whether they can potentially torment human kind (violate their rights and freedoms) and therefore should be placed under the regulatory framework of international human rights laws. Thus, from the vantage point of international human rights protection, excluding certain entity from the definitional domain of non-state actors for want of engagement in "transnational activities" is potentially dangerous as non-state organizations that operate locally, but abuse human rights might be left outside the direct reach of international human rights law. The second limitation in the above definition is that, as being an 'organization' is the basic criterion for a given entity to qualify as 'non-state actor', it excludes 'individuals' from its ambit. That is, individuals by no means qualify the criterion of being an 'organization'. This exclusion also seems to be unwarranted from the perspective of international human rights protection as individuals also violate the rights and freedoms of their fellow individuals and peoples just like the organizations do. That is why the international community devised the scheme of

[42] . Philip Alston, 'The-Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005) (footnote omitted)

individual criminal responsibility at the international level.[43] Accordingly, even though the above definition unambiguously embraces the entities which are the focus of this study, that is, TNCs, I found it not preferable for the present study for its inherent limitations I just mentioned. My aim here is not to look for a definition that best suits the narrow area of my present study – TNCs only, but also to see beyond the fence and adhere to the definition that better buttress the general idea of international human rights protection. Having that in view, I will, for the purpose of this study, adopt Robert McCorquodale's definition of non-state actors because of it is all encompassing capacity both in the type of entities it identifies as non-state actors and in terms of the geographical scope where they might operate. He defines non-state actors as 'all individuals, groups and organizations (whether or not composed of states), when acting within or beyond territorial boundaries'.[44] In other words, it includes all actors other than states irrespective of the territorial scope of the reach of their activities. As per this definition, many entities such as individuals, business entities like TNCs, non-state armed groups, non-governmental organizations, international organizations like the United Nations could be considered as non-state actors. Although this definition is subject to critic from the outset for being a negative definition[45] as it defines non-state actors as actors other than states, its inclusiveness (both in the nature of the actors and space where they are acting) is worthy of importance. Especially from the point of view of human rights protection, what matters is their adverse impact on human rights and freedoms and the legal strategy to ameliorate it, not whether their activities are limited to certain geographical scope or not. Unquestionably, this definition embraces the entity which is the main focus of my present study – TNCs.

[43] .See for instance, Rome statute of the International criminal court, adopted on 17 July 1998 and entry into force 1 July 2002

[44]. Robert McCorquodale, 'Non-State Actors and International Human Rights Law' (2009), available at: http://ssrn.com/abstract/=2065391, last visited on March 10, 2017

[45] . Alston Criticizes such negative definition as an equivalent of identifying (defining) a cat as an animal that is 'not a rabbit' rather than exactly describing the cat with its own essential and particular features. His concern is that, generically defining all actors other than states as 'non-state actors' obscures the essential characters , negative impacts and positive impacts of each of the non-state actors and this in turn complicates the process of constructing international regulatory framework that best fits each of them (see . Philip Alston, 'The-not-a-cat syndrome: Can the international human rights regime accommodate non-state actors?' in Philip Alston (ed.) *Non-state actors and human rights* (Oxford University Press 2005)

Having attempted to define non-state actors, it is time to discuss on the issue of their place under international human rights law. The long lasting state-centered approach to public international law profoundly infiltrates international human rights law (which is a branch of public international law). That is, the existing international human rights law does not impose direct and binding obligation on non-state actors. Because of the inextricably linked conceptual background between the above two (non-state actors under public international law and non-state actors under international human rights law), it is worthwhile to have a concise note on the place of non-state actors under public international law in general before going to the relatively narrow area of the place of non-state actors under specific branch of international law – international human rights law. As recently as 20011, Jean d'Aspremont eloquently remarked that:

> Even though the current legal system can accommodate more of the contemporary developments than what we often suggest, it is true that non-state actors' activities (and the normative outcomes of their actions) cannot entirely be caught by the net that international legal scholars have fabricated to catch reality, and definitely do not fall under the existing formal categories of the discipline of international law.[46]

The above extract is a succinct explanation of the position of non-state actors under public international law. It tells us that public international law does not adequately address those entities generally called non-state actors. This is another way of saying that public international law is still heavily influenced by Westphalian view of the international legal order (centrality of states).

Regarding the general understanding on the place of non-state actors under the particular body of international law, that is, international human rights law, Alston and Goodman offer us a good starting point while they observe:

> The centrality of the state is one of the defining features of international law and the human rights system builds upon this by seeking to bind states through a network of treaty obligations to which, in the vast majority of cases, only states can become parties.

[46] . Jean d'Aspremont, 'Non-State Actors and Human Rights: Oscillating Between Concepts and Dynamics'(2011), ACIL Research paper no.2011-05, available at: http://ssrn.com/abstract=1843248 , last visited on March 11, 2017

> Non-state actors are thus, by definition, placed at the margins of the resulting legal regime. The problem is that actors such as TNCs, civil society groups, international organizations and armed opposition groups, to name just the most prominent among a wide range of potentially important non-state actors, have all assumed major roles (in *de facto*) in relation to the enjoyment of human rights, especially in recent years.[47]

The above excerpt teaches us the following essential points. First, it echoes Aspremont in affirming the dominant place given to states under public international law which otherwise means that non-state actors are given a relegated position under it. It then clarifies how the state-centrism that reigned over public international law got its way into the realm of international human rights law. Accordingly, it divulges two contradictory realities revolving around international human rights law in relation to non-state actors. On the one hand, as a matter of fact (the legal gaps being as they are), non-state actors are increasingly affecting human rights, both negatively and positively. On the other hand, international human rights law, as it now exists, does not put direct obligation on non-state actors. In other words, it does not embrace direct horizontal effect of human rights. This is one area in which international human rights protection system exhibits manifest infirmity. This infirmity of international human rights law is recurrently diagnosed by other observers, too. For instance, deeply concerned with the gap in the international human rights law in directly addressing human rights violations caused by non-state actors, McCorquodale wrote that:

> Non-state actors cannot breach international human rights law. Actions by any organization, group or individual that is not a state, irrespective of the severe impact that those actions may have on the human rights of others, cannot cause a violation of international human rights law. This disturbing situation arises because international

[47]. Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics, and Morals* (Oxford University Press 2013) (emphasis added). Cf Jordan J.Paust, 'Non-state Actor Participation in International Law and the Pretense of Exclusion' (2010) 51 Virginia Journal of International Law 977. In this essay, unlike other authors, Paust argues that the traditional international law does not exclude non-state actors. He asserts that, for centuries , there have been vast numbers of formally recognized actors in the international legal process other than the state, although far too many assume incorrectly that traditional or classical international law had been merely state-to-state and that under traditional international law individuals and various other non-state actors did not have rights or duties based directly in international agreements or customary international law. Even today, invidious consequences occur when judges cling to clearly ahistorical (not historical) assumptions about international law and rule erroneously that customary international law is created only by achieving universal recognition and acceptance as a norm in the relations of states *inter se* and that international law has never extended the scope of liability to corporation".

human rights law has been created to place the sole legal obligations on states, and states alone.[48]

Self-evidently, the above piece divulges the limitation of the international human rights law – the failure to clearly and adequately govern the issue of direct accountability of non-state actors for the violation of binding international human rights standards. In the above context, when McCorquodale asserts that 'non-state actors cannot breach international law', he does not meant that these entities does not violate human rights as a matter of fact. It is rather meant that as a matter of law (international human rights law), these breaches are not directly attributed to these actors. With almost similar expression to the above authors, Vandenhole also shares the view that the traditional approach to international human rights law is to impose obligation only on states without extending them to non-state actors.[49]

At this juncture, one might wonder why the international human rights law fails to address the direct human rights obligations of non-state actors in the face of the serious threat they are posing to human rights across the globe. As I have also presented in the background to this study, perhaps, Clapham has offered the most comprehensive and coherent analysis of the reasons why the international community failed to directly and adequately expand international human rights obligations to non-state actors than other authors on the topic. He identifies five objections (which he calls them 'old objections') that impede the imposition of judicially enforceable human rights obligations on non-state actors. The first is the trivialization argument.[50] According to this objection, extending direct human rights obligations to non-state actors, including TNCs, trivializes human rights and ignores their historical pedigree.[51] That is, human rights obligations should be concerned only with respect to serious violations undertaken by the government, not in case of ordinary breaches of the law by non-state actors like TNCs. The second is the legal impossibility argument.[52] According to this objection, as human rights treaties are negotiated and ratified by states, it

[48] . Robert McCorquodale, 'Non-State Actors and International Human Rights law' (2009), in Sarah Joseph and Adam McBeth (eds.), *International Human Rights Law (*Edward Elgar 2009)
[49] Wouter Vandenhole, '*Contextualizing the State Duty to Protect Human Rights as Defined in the United Nations Guiding principles on Business and Human Rights' (*Revista de Estudios Juridicos 2012*)*
[50]. Andrew Clapham , *Human Rights Obligations of Non State Actors (*Oxford University Press 2006*)*
[51] ibid
[52] Ibid 35

cannot bind non-state actors.[53] There is no clear evidence for the existence of customary law rule that impose direct human rights obligation on non-state actors as well.[54] The third is the policy tactical argument.[55] As per this view, expanding direct human rights obligation to non-state actors would pave a way for states to escape their human rights obligations by redirecting it to non-state actors. The fourth is the legitimatization of violence argument.[56] This argument is particularly targeted against the extension of human rights obligations to non-state armed groups. The idea is that making non-state armed groups directly accountable for human rights violations would bestow them unnecessary legitimacy before the international community. That is, it sends the unnecessary message that they have the right to use violence/force similar to states. The fifth is rights as barriers to social justice argument.[57] This is the view that imposing human rights obligations on private entities distorts the historically rooted condition in which states use human rights as a tool for intervention in society and bring social justice for those private entities themselves by protecting them against the public sphere (public power).[58] Imposing human rights obligation on the private entities that were once enjoying human rights protection (but not bearing human rights obligation) contravenes this historical course and the status quo and amounts to barring social justice.

So far, I have explicated on the position of non-state actors under international human rights law as expounded in different legal literatures. Now is a time to buttress all those assertions with legal provisions in international human rights instruments and recommendation of treaty monitoring bodies. With trivial exceptions, the international bill of human rights such as the Universal Declaration of Human Rights (UDHR)[59] International Covenant on Civil

[53] ibid
[54] .ibid
[55] Ibid 41
[56] Ibid 46
[57] Ibid 53
[58] ibid
[59]. Adopted by the United Nations' General Assembly on 10 December 1948; The operative part of the declaration does not provide duty of non-state actors except in Article 16 that provides the too vague duty of the society towards the family and Article 29 that provides for the imprecise duty of the individual to the community. The other is the last preambular paragraph of the declaration which provides the duty of "every organ of society" to promote respect for the rights recognized therein.

and Political Rights (ICCPR),[60] the International Covenant on Economic, Social and Cultural Rights (ICESCR)[61] do not involve provisions dealing with obligations of non-state actors. That is, they do not impose direct horizontal obligation on non-state actors. The view of the human rights committee (an organ that monitors the implementation of the ICCPR) also seems to affirm this stand. While explicating on the nature of state duties under article 2 of the covenant in its general comment no. 31, the human rights committee indirectly indicated the position of non-state actors under this instrument while it observes:

> The article 2, paragraph 1, obligations (obligations to respect and to ensure the rights to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant) are binding on States [Parties] and do not, as such, have *direct horizontal effect* as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The covenant itself envisages in some articles certain areas where there are positive obligations on state parties to address the activities of private persons or entities. For example, the privacy related guarantees of article 17 must be protected by law. It is

[60] . Adopted by the General Assembly of the United Nations on 19 Dec 1966 and entered into force on 23 March 1976. Article 2(2) of the covenant imposes obligation on states and nowhere it impose obligation on non-state actors except in Article 23(1) where it speaks of the duty of the society towards protection of the family.

[61] . Adopted by the General Assembly of the United Nations on 19 Dec 1966 and entered into force on 23 March 1976. Article 2(2) of the covenant imposes obligation on states and nowhere it impose obligation on non-state actors.

> also implicit in article 7 that states parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.[62]

Though the above opinion is given not directly on the position of non-state actors, the committee has, while it clarifies the obligations of states parties, incidentally shown the place of non-state actors under the covenant. The committee did so by indicating the absence of direct horizontal effect (direct accountability of non-state actors for human rights) under international law.

Under the foregoing discussions, I have made a succinct examination of the place of non-state actors in general under international human rights law in terms of their obligations. That is the place that all non-state actors commonly share under this body of international law. However, the above general position of non-state actors under this field of law must not obscure the specific issues that are raised with respect to the position of each of the non-state actors under it. Particularly, in the case of TNCs, there are some arguments that are forwarded against the imposition of direct international human rights obligation on them. The first point is the controversial issue of their international legal personality. Fauchald and Jo stigen explain the conceptual link between international legal personality and obligation of TNCs while they observe:

> 'Some scholars suggest that international law cannot impose obligations on corporations because corporations do not possess international legal personality'.[63]

Simply put, the idea in the above excerpt is that only those entities having international legal personality are subjects of international law that only those entities having such international status could bear international obligation and enjoy international rights, and that as corporations (in our case TNCs) do not have that status, they cannot bear international

[62] .Human Rights Committee, General Comment no. 31(2004) on Article 2, the Nature of the General Legal Obligation it Imposes on States Parties to the Covenant, Paragraph 8.
[63]. Ole Kristian Fauchald and Jo stigen, 'Corporate Responsibility Before International Institutions' (2009) 40, George Washington International Law Review 1026 (foot note omitted)

human rights obligations. Problematic on this side of assertion is that there are no settled rules of international law according to which non-state actors, in our case, TNCs, could attain international legal personality on *a priori* basis so that international human rights obligation could be directly addressed to them. Of course, in the absence of pre-existing clear 'international law of persons' unlike domestic legal systems having a branch of law called 'law of persons', some authorities attempted to devise a method of establishing international legal personality of corporations based on what they call 'participants' conception of international personality.[64] This innovative idea is that as corporations (for stronger reason TNCs) are becoming influential participants in the international affairs, they are *ipso facto,* becoming international legal persons. Apart from the question of international legal personality, there are also who relate the opposition to the imposition of human rights obligation on TNCs with some historical phenomena. Among these historical Phenomena, two of what Muchlinski considers the 'conceptual barriers' to the extension of human rights obligation to multinational enterprises are logically plausible. The first, as he observes, is the traditional 'protective approach' to the relationship between corporations and human rights, that is, recognizing the property right of corporations rather than prescribing their obligations.[65] The idea is that, in terms of historical significance, the first right to be recognized after the struggle of the rights claimants against monarchies is the natural right of individual human beings to property and this right is extended to legal persons – corporations under international human rights law. This made them to be artificially analogized with natural human beings and extending human rights obligations to them is seen to be conceptually unfounded. Second, Muchlinski relates the legacy of the cold war ideological divide on human rights as one of the factors hindering the extension of direct human rights obligations to TNCs. That is, as pro capitalists uphold the rights of corporations, not their duties, extending human rights obligations of these entities are viewed as anti-capitalist move. With a hilarious expression, he wrote that:

[64]Ibid.
[65] . Peter T. Muchlinski, 'Human Rights and Multinationals: Is there a Problem?' (2001) 77 (1) Royal Institute of International Affairs 31, 32

> 'The cold war rules our discourse from its grave, as does a residual consciousness of imperial supremacy. It is this that in part underlies arguments opposed to the extension of human rights responsibilities to MNEs'.[66]

On the other hand, Marxists (the other party to the Cold War rivalry) believes that corporations violate human rights so that there could be a mechanism of dismantling corporate power in favor of the public domination. Echoing Muchlinski from the opposite side of the spectrum, Ratner wrote that:

> 'Claims that various kinds of corporate activity have a detrimental impact on human welfare are at least as old as Marxism, and have always been a mantra of the political left worldwide'.[67]

The problem is that whether it is because of lack of international legal personality or legacy of the cold war or other reasons or the combination of all the imaginable reasons, one thing remains noticeable – the existing international human rights law does not impose direct binding obligation on TNCs.

2.3 The detrimental effect of the position of non-state actors under international human rights law on human rights

The final issue worth addressing under this chapter is that: what detrimental effects does the absence of binding direct human rights obligation for non-state actors, mainly TNCs, under the international human rights law, has on international human rights protection system as a whole? The answer to this question is not only complicated, but also varies based on the views that one holds on the issue. What is generally true is that the traditional state-centered approach to international law (which some call it the Westphalian international legal order) has been facing tremendous criticism for its failure to directly address the practical influence of non-state actors on human rights and freedoms. To borrow a phrase from A. Cutler, State centered approach to the international legal order is facing 'legitimacy crisis.' This legitimacy crisis is visible in relation to international human rights law as it fails to

[66]. ibid 34
[67] . Steven R. Ratner, 'Corporations and Human Rights : A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443

adequately address the ever growing adverse impacts of non-state actors, mainly TNCs, on human rights and freedoms. The relevant part of Cutler's analysis reads:

> The fields of international law and organization are facing a legitimacy crisis relating to fundamental reconfiguration of global power and authority. Traditional Westphalian inspired assumptions about power and authority are incapable of providing contemporary understanding, producing a growing disjunction between the theory and the practice of the global system. The actors, structures and processes identified and theorized as determinative by the dominant approaches to the study of international law and organization has ceased to be of singular importance. Wesphalian inspired notions of state centricity, positivist international law, and public definitions of authority are *incapable of capturing the significance of non-state actors*, informal normative structures and private economic power in the global economy.[68]

Needless to repeat, the central message of the above extract is that the failure of international law to adequately embrace all potential influential international actors is a manifestation neglecting the reality on the ground. A typical failure is its inability to directly and adequately address the 'human rights obligations' of non-state actors in the face of human rights violations in which these entities are taking part. As Ratner remarks, 'A system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights'.[69] That is, the state-centered international human rights law does not fit the dynamics of our time in which non-state actors are causing violations of human rights and freedoms almost comparable to those caused by the so called "historical violators of human rights" – states. Recalling both the growing impacts of non-state actors on human rights and the inadequacy of the existing international human rights law frame work in effectively handling the issue, Alston wrote with an advice entailing expression that:

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[68] .A. Claire Cutler, 'Reflection on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (201) 27 Review of International Studies, British International Studies Association 133 (*emphasis adde*d)

[69]. Steven R. Ratner, 'Corporations and Human Rights : A Theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443, 448

> Today, however, at least a sub-set of non-state actors has suddenly became a force to be reckoned with and one which demands to be factored into the overall equation in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime's aspiration to ensure the *accountability of all major actors* (one of the major actors he writes about being TNCs) will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors. In practice, if not in theory, too many of them currently *escape the net cast by international human rights norms and institutional arrangements.*[70]

As already explained, non-state actors influence human rights and freedoms both positively and negatively. However, as Alston rightly reminds us, their impact could not be sufficiently dealt with under the current international human rights law setting and as such they might end up with impunity. The inability of the existing international human rights law to ensure the observance of human rights and freedoms by non-state actors is what I mean the detrimental effect on human rights protection – it is heartbreaking conundrum. As already indicated, this detrimental effect is consequent to the insignificant position given to non-state actors under international human rights law in terms of bearing obligations. As such, international human rights law currently in existent is heavily criticized for following a path which scholars in the area usually refer to it as a "one-size-fits-all" approach – the assumption that the state obligation under international human rights law alone is sufficient to protect human rights against all entities without the need to extend direct human rights obligation to non-state actors. In particular, a mounting criticism against the state-centric international human rights protection system stems from the systems' failure to directly and adequately subject the central figures of economic globalization (TNCs) to international human rights standards. This particular issue is observed by Augenstein and Kinley when they assert:

[70]. Philip Alston, ''The-Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?', In Philip Alston (ed.) *Non-State Actors and Human rRghts* (Oxford University Press 2005) (emphasis added).

> Economic globalization poses significant challenges to the Westphalian *paradigm of human rights protection* under national-constitutional and *international law* that allocates human rights *obligation* within and between sovereign states. Patterns of economic cooperation and competition across national-territorial borders are creating greater gaps between the operational capacities of global business entities and the regulatory capacities of territorial states.[71]

TNCs, albeit their creditable work in lifting human beings from destitution to dignified life conditions, have proven records of human rights violations.[72] For instance, the disastrous environmental impacts of the operations of the Dutch and British oil companies – Royal Dutch Petroleum and Shell, respectively, to the Ogoni community of Nigeria, violation of labor standards by Unocal – California based oil giant in Burma (now Myanmar), the complicity of many TNCs such as Barclays bank and oil companies like Rio Tinto with the apartheid regime of South Africa in repressing the people could be named. However, the position given to non-state actors under international human rights law fails to sufficiently and directly regulate these kinds of adverse effects of TNCs on human rights.[73]

The detrimental effects explored earlier, more to the core, the inadequacy of the existing binding international human rights norms in ensuring the observance of international human rights standards by multinationals trigger the so called "business-human rights debate", that is, a call to subject global corporations to human rights standards.[74] The debate is ongoing.

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[71] .Daniel Augenstein and David Kinley, 'When Human Rights Responsibilities Become Duties': The Extraterritorial Obligations of States that Bind Corporations (2013), Cambridge University Press 271 (emphasis added)

[72] . Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics, and Morals* (Oxford University Press 2013). See also Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem? (2001) 77 (1), Royal Institute of International Affairs 31

[73] . Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics and Morals (*Oxford University Press 20013); See also Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem? (2001) 77 (1), Royal Institute of International Affairs 31

[74]. Ibid. See also Daniel Augenstein and David Kinley, 'When Human Rights Responsibilities Become Duties': The Extraterritorial Obligations of States that Bind Corporations (2013), Cambridge University Press 271. According to these authors, the notion of business-human rights debate is said to have begun/ at least begun to earn a concerted international attention during the 1970 s as part of the support for the so called New International Economic Order (the demand by developing nations for the equitable use of global wealth) when the United Nations begun to prepare a draft code of conduct for the regulation of the conduct of TNCs. The draft was prepared in 1977 and completed in 1983 but finally abondoned1992 because of the reasons that could be attributable to both industrial and developing nations. From the perspective of industrial nations, they appear to favor the protection of their companies overseas than subjecting them to the demanding idea of

Even though different concerned bodies – United Nations, non-governmental organizations, individual human rights defenders, victims of transnational corporate human rights abuse and even some states add a fuel on the already heating debate in the area, the achievements fall short of what the situation truly demands. That is, no binding treaty imposing direct human rights obligations on trans-nationals and subjecting them to international institutional supervision is ever achieved. As it will be presented in detail under the following chapter, reliance on the international obligations of states (as hinted in the international human rights instruments) in making sure that the activities of TNCs conform to international human rights standards is the frequently echoed option both in laws and literature, but this scheme is well known for its inadequacy in safeguarding human rights and freedoms from appalling impacts of TNCs.

2.4 Conclusion

Generally, public international law has long been viewed as a law regulating the relations of states *inter se* and non-state actors are put outside its ambit. As such, it is characterized by its state centric approach (also called Westphalian international legal order).

International human rights law is not free from the dominant view of state-centrism in relation to the obligations it imposes. This is explained, in the present context, in terms of the absence of direct obligation for non-state actors under it. Particularly, it does not impose direct obligation on TNCs and this has created an accountability vacuum. This is a great conundrum in relation to international protection of human rights against non-state actors in general and TNCs in particularly. The genesis of this conundrum is rooted in the position given to non-state actors under international human rights law.

human rights obligation. From the perspective of developing nations, they appear to have been trapped in 'race to the bottom' – competing for Foreign Direct Investment even at the expense of the rights talk.

CHAPTER THREE

THE AVENUE FOR THE COMPLIANCE OF TNCS WITH INTERNATIONAL HUMAN RIGHTS STANDARDS: THE 'CATCH THROUGH THE OTHERS' HAND' APPROACH AND ITS INADEQUACY SYNDROME

3.1 Introduction to the chapter

The ever increasing adverse impacts of TNCs on human rights and freedoms across the world emphatically call upon the international community to look for solutions. The predominant mechanism currently in place and to which frequent reference is made is the reliance on the international human rights obligations of states to hold TNCs indirectly accountable for international human rights standards.

The objective of this chapter is to uncover the inadequacy of the indirect human rights obligations of TNCs as found within the fabric of binding international human rights law in ensuring the compliance of these entities with international human rights standards. This 'indirect obligation' model, as its naming indicates, does not impose direct binding human rights obligations on TNCs, but relies on the international human rights obligations of home and host states so as to trap these entities in the network of international human rights laws. That is why, for the purpose of this study, I would like to call it the 'catch through the others' hand' approach; the others simply referring to home and host states. In this sense, international human rights law aspires to use the regulatory hand of states to catch TNCs to make sure that they act in harmony with the standards it sets. Thus, it must not be confused that the references I make to home and host states based regulations of 'TNCs-human rights relations' in this chapter, and in this study, for that matter, is not from the perspective of analyzing the status of their unilateral domestic measures *per se* in response to the plight of human rights abuses emanating from TNCs. Nor do I aim undertaking a comparative study of the domestic responses of different countries in regulating the observance of human rights by TNCs. It is rather from the perspective of showing the inadequacy of the measures that home and host states take to regulate TNCs-human rights nexus as part of their duty under the international human rights law to protect human rights against third parties (third

parties now being TNCs). The mention I make to specific countries and their specific laws has to be understood in this sense.

The essence of this chapter, and the essence of this study as a whole, is not the total denial of the relevance of the '*catch through the others' hand'* legal strategy in ensuring that TNCs live up to internationally set human rights standards. It is rather to say that owing to the complex web of issues that this legal strategy fails to tackle, it is, as it now stands, is inefficient to address the demonstrable human rights abuse perpetrated by TNCs in almost all corners of our globalized world. This inadequacy syndrome will be elucidated with examples. In so doing, I will indicate how the inadequacy of the catch through the others' hand approach in addressing the adverse human rights impacts of TNCs coupled with the absence of binding direct human rights obligations for these entities within international human rights law structure pave the way for the creation of human rights accountability vacuum for TNCs**.**

3.2 The 'catch through the others' hand' approach and its inadequacy syndrome

Thus far, actors (private actors like multinational MNEs) could not be held directly responsible for violations of human rights[75]. Rather, they could cause the state to be held responsible on the basis that it had neglected (failed to act with 'due diligence') to control the activities of the non-state actor which have led to the violation of the human rights of another private party.[76] This is an indirect way of attempting to ensure the observance of human rights standards by TNCs – the 'catch through the others' hand' approach. International human rights law, as it now stands, does not have its own institutional and procedural devises that directly hold TNCs accountable for the transgression of its basic guarantees.

The obligation of states parties (to international human rights instruments) to ensure the observance of and respect for the human rights of individuals and communities within their territory or otherwise subject to their jurisdiction is generally stipulated under the

[75] Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem?' (2001) 77 (1) Royal institute of International Affairs 31. In this article, he explores the absence of hard international law directly binding MNEs for human rights violations.
[76]. Ibid.

international human rights instruments.[77] This embraces the states duty to make sure that non-state actors, in our case, TNCs, observe human rights standards even though almost all of international human rights instruments do not make explicit reference to the state duty to regulate the violations of human rights caused by non-state actors in general and trans-nationals in particular. To put this obligation into effect, states have to take legislative, executive, judicial and any other appropriate measures. The United States Alien Tort Claims Act (ATCA) of 1789 (as shaped by case laws of the nation's supreme court) and the 1968 Brussels Convention (as revised by regulation n0.44/2001) are often claimed as the archetypal indicators of holding TNCs accountable for violations of international human rights standards through domestic laws and forums.[78] The ATCA is enacted in 1789 by the United Congress as part of the judiciary act. Section 1350 of the act provides that United States federal courts have jurisdiction to entertain tort claims lodged by aliens (non-Americans) for violations of the law of nations or treaty of the United States. Whether the ATCA is capable of enabling the United Sates to ensure indirect human rights accountability of TNCs under the international human rights instruments to which the United States is bound or not will be revealed in my later discussions under this section when I make the general evaluation of the 'catch through the others' hand' approach. Suffice to say for now that the ATCA is an example of domestic legal measure (leading to judicial measure) to implement international human rights obligations of states to protect human rights against third parties like TNCs. With respect to the 1968 Brussels Convention (as revised by regulation no44/2001), here after, Brussels Regulation) some argue that it represents a European 'Foreign Tort Claims Act' counterpart of the United States ATCA.[79] However, it must be underscored that the Brussels Regulation is itself not a domestic law of any single member country of the EU, but a regional treaty between member states of the

[77]. See International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entered into force on 23 May 1976 Article 2 of the covenant stipulates that: Each state party to the present covenant undertakes to respect and ensure to all individuals within its territory and subject to it jurisdiction the rights recognized in the present covenant, without distinction of any kind such as, race, color, sex,, language religion, political or other opinion, national or social origin, property, birth or other status. However, the phrase 'within its territory and subject to its jurisdiction' is imprecise to indicate extraterritorial obligations of state such as the home states obligation to control the overseas activities of their corporations to be in harmony with human rights and freedoms of the individuals and communities in the host states and it is subject to controversy.

[78] Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European Law'(2004), Center for Human Rights and Global Justice Working Paper Number1,2004.

[79] Ibid.

union so that we must take care of while comparing it with the United States ATCA which is a law of a single nation. It merely provides a basic principle that the courts of the members states of the union in which the defendant is domiciled has the jurisdiction to hear the claim regardless of the defendants' nationality including corporate defendants. This jurisdictional clause alone is inadequate to ensure the compliance of TNCs domiciled in the member states of the union with international human rights standards. For one thing, as already explained, the member states of the union has no a law comparable to the ATCA which directly talk about the claims that could be brought under international laws or treaty of the United States. Second, even if the victims might resort to domestic tort laws of the member states of the union in which a given TNC is domiciled, tort law- based suits can neither replace 'human rights suits' that have to be lodged in their own right in human rights terms nor are they adequate to ensure the observance of international human rights standards by TNCs.[80]

As indicated in the introductory section of this chapter, my references to specific legal systems, the instances of the present references to the United States and the European Union member states, is to see whether the domestic measures they are taking is adequate enough to put into effect their duty to protect human rights against third parties (here, TNCs) under international human rights laws to which they are bound.[81] It is not for the mere appreciation of the domestic measures they are taking in this regard nor to study them in comparative way. It is to draw examples for the purpose of indicating the limitations of the inadequacy of the 'catch through the others' hand approach.

As opposed to the greater trust attached to it for the purpose of controlling the adverse human rights impacts of the activities of multinational enterprises, the catch through the

[80] . Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University 1301

[81] . United States is a party to international human rights instruments like ICCPR, ICESCR and CEDAW. It has also voted in favor of the universal declaration of human rights during its adoption, indicating its willingness to follow its stipulations and above all as this instrument has, arguably, attained the status of customary international law, it is bound by it. As such, it has an obligation under these instruments to protect human rights and freedoms set in them against third parties, in our case TNCs. Whether the ATCA is really enabling the nation to do this job is what matters for the purpose of evaluating the indirect horizontal effect.

others hand approach, or to borrow a phrase from Danailov, an 'indirect horizontal effect,'[82] is far from being sufficient in reversing or reducing transnational corporate impunity for violations of international human rights standards. There are multifaceted gaps left by international human rights laws which in turn contribute to the insufficiency of the indirect horizontal effect it has in view. The reasons for the ineffectiveness of the home and host states based mechanisms of ensuring the accountability of TNCs to international human rights standards could be seen from two sides: the first is to discern the problem from the side of the home states of TNCs while the other is from the side of host states of TNCs. The reason why I will be discussing the impeding factors that obstructs the 'catch through the others' hand' approach is primarily not to empirically study the gap between the law and practice in relation to the implementation of this strategy. It is rather to indicate that the existing international human rights law, which puts the indirect horizontal effect in place, does not provide provisions that could limit the devastating impacts of all the following impeding factors to its effectiveness in regulating the adverse human rights impacts of TNCs. Indicating those gaps will be the core point that will be underscored. I will be discussing these issues under the following separate sub-headings.

3.2.1. From the side of home states

From the perspective of home states, there are factors that hinder the smooth functioning of making their corporations (corporations incorporated under their law or domiciled in their territory) comply with international human rights standards to which they are bound. The first challenge is the controversial issue of extraterritorial application of international human rights law (which could simply be referred to as the 'extraterritoriality challenge'). The position of international human rights law on the extraterritorial obligations of states is both unclear and subject to an intense debate. For instance, article 2(1) of the 1976 international covenant on civil and political rights (ICCPR) provides that:

> Each States parties to the present covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language,

[82] Silvia Danailov, 'Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations' (1998) Berne, Switzerland.

religion, political or other opinion, national or social origin, property, birth or other status.[83]

It is not clear whether the phrase 'subject to its jurisdiction, as provided in the above sub-provision embraces extraterritorial jurisdiction/extraterritorial human rights obligation of states or not. With virtually similar wordings, article 2(1) of the 1989 Convention on the Rights of the Child stipulates that:

States parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

More confusingly, some international human rights instruments are totally silent as to the territorial scope of their application. The International Covenant on Economic, Social and Cultural Rights (ICESCR)[84] and Convention on all forms of Discrimination against Women (CEDAW)[85] are examples of this kind. Whether the silence of these instruments on the issue of territorial scope of their application is to confine human rights obligations of states to their conventional national territory or whether it is meant to recognize the territorially unlimited nature of the scope of the obligations of the states parties is not clear. The truth is that this great impreciseness poses what is called the 'extraterritoriality challenge' to the 'catch through the others' hand' approach with respect to the home states of transnational corporations.

The issue of extraterritoriality challenge has to do with sovereignty and its associated precept of non-intervention in the internal affairs of other states (other states in the present case being the states that host TNCs). The issue is that, if a given home state dictates what ought or ought not to be done in the host states territory under the guise of human rights

[83]. Convention on the rights of the child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990 (emphasis added).
[84] . Adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entry into force 23 March 1976
[85].Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1989 and entry into force 3 September 1981

protection, it might entail interference in the internal affairs of those states.[86] Indeed, it is common to come across the expression "states are jealous of their sovereignty". This kind of fear is clearly observed from the second *amicus curiae* brief submitted by the United States government of the Obama administration to the Supreme Court of the nation with respect to the *Kiobel* case.[87] In this brief, the US government implicated that extraterritorial measure that is taken by US courts to protect human rights overseas might distract the United States foreign policy (foreign relation) so that it has to be restricted.[88] Even though this example alone is not enough to detect the stand of all states, what could be drawn from it is how the notion of sovereignty of states and its attendant principle of non-intervention in the internal affairs of other states might create hesitance in states from exercising extraterritorial jurisdiction to protect human rights abroad. The critical question is, therefore, whether home countries human rights obligations under international human rights treaties obliges them to take an extraterritorial measure to make sure that their corporations operating abroad comply with international human rights standards. Indeed, states could put limit to their sovereignty through treaties and this seems to be more so in human rights treaties. However, as I have indicated earlier, the problem emanates from the impreciseness of the international human rights instruments on the extraterritorial obligations of states parties. In the backdrop of such legal imprecision and controversy on the issue, some human rights treaty monitoring organs and international tribunals boldly upheld the extraterritorial human rights obligations of states in some circumstances.[89] Of course, some scholars also give relentless support to

[86] .Indeed, non-intervention in the internal affairs of other nations is one of the core guiding precepts of the United Nations Charter (see article 2(7)).

[87] *Kiobel v Royal Dutch petroleum Co*, 569 – (2013) (US Supreme Court, Docket No.10-1491). Indeed, as Weschka tells us, this kind of amicus curiae brief has been submitted to the court during the Bush Administration too. Even worse, the Bush Administration has been marching for the total abolition of the ATCA (see Marion Weschka, 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 Zao RV 625

[88] . See Jonathan Kolieb, 'Kiobel v Royal Dutch Shell: A challenge for Transitional Justice' (2014) 13 Macquarie Law Journal 169

[89] .Committee economic, social and cultural rights (2000) general comment no.14 on the highest attainable standard of health on article 12 of the international covenant economic, social and cultural rights, para. 39. Besides, regarding the legal consequences of the construction of wall by Israel in the occupied Palestinian territory including East Jerusalem (known as the 'wall opinion') (2004) in which the International Court of Justice (ICJ) had to opine, among other things, whether the obligation of Israel under the ICCPR and ICESCR extends to the occupied territory, the court opined that Israel's obligation under these covenants extends to the occupied Palestinian territory for it is exercising effective control over these territories as a result of occupation. Even though it might not essentially fall within the ambit of state control over foreign activities of its corporations, this opinion supports extraterritorial human rights obligation of states in case of occupation. The court used control test to reach at this opinion. From this, it is possible to argue that since home states

the existence of extraterritorial human rights obligation justifying it as a corollary of 'universality' of human rights and prominent among them is professor Skogly.[90] It is the idea that the recognition and promotion of the universality of human rights might not be full and meaningful unless backed by the idea of universal obligations. However, this progressive view is not without its detractors. Regrettably, one of the retarding approaches to the extraterritorial human rights obligations of states is the one reflected in the 2011 United Nations Guiding principles on business and human rights, an instrument which is deemed the most comprehensive international instrument currently in place regarding transnational corporations and other business enterprises with respect to human rights.[91] It is not the guiding principles *per se* that hold back the extraterritorial human rights obligations of states, but the commentary given to them by the Special Representative of the Secretary General on TNCs and other business enterprises with respect to human rights (SRSG).[92] Keep in mind that the SRSG was the person who developed these guiding principles along with their commentaries and they are approved by the United Nations Human Rights Council). For clarity, the relevant principle, that is, principle number 2 of the guiding principles will be reproduced below together with the commentary given to it by the SRSG:

> 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human right *throughout their operations*'.[93]

Of course, the last phrase in the above principle, that is, '*throughout their* operations*'* could be construed to include the overseas operations of those business enterprises. However, the commentary given by the SRSG to this principle dramatically restricts this kind of construction while it asserts that:

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have control over the overseas activities of their corporations through the parent companies domiciled in their territory, they have extraterritorial obligation to make sure that their corporations not violate human rights abroad. However, the imprecision is still in existant.

[90] . See for Instance, Sigrun I. Skogly, 'The Rights to Adequate Food: National Implementation and Extraterritorial Obligations (2007) 11 Max Plank Year book of United Nations Law 339

[91]. Olive De Schutter, 'Accountability of Multinationals for Human Rights violations in European Law'(2004), Center for Human Rights and Global Justice Working Paper Number1,2004.

[92] . Guiding principles on business and human rights: Implementing the united nations "protect, respect and remedy framework, report of the special representative of the secretary general on the issue of human rights and transnational corporations, John Ruggie, A/HRC/17/31.

[93] ibid

> At present, states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.[94]

The above commentary provides a dangerous explanation on the debatable issue of the extraterritorial human rights obligation of states under international human rights laws. It unnecessarily implicates that states are not bound under the international human rights law to look after the observance of international human rights standards by their corporations operating abroad unless they do it voluntarily.

Citing the ATCA, some also hold the view that extension of states' jurisdiction to encompass extraterritorial jurisdiction is tantamount to new imperialism or legal imperialism.[95] For those who oppose to extraterritorial human rights jurisdiction, there is no reason why any law comparable to the ATC A might not be considered as imperialist notion.

The second challenge to the effectiveness of home states-based regulation of adverse human rights impacts of TNCs is home states preference to create favorable conditions for their corporations investing abroad than subjecting them to rigorous scrutiny for compliance with international human rights standards.[96]Augenstein and Kinley describe this as the home states policy to maintain a 'level playing field' for their corporations operating overseas.[97] The driving force for this phenomenon is the fact that the home states of TNCs get remittances that make meaningful contribution to their national economy from the investment that their companies undertake abroad.

The third challenge to home states is the doctrine of *forum non convenience.*[98] This obstacle is manifested in the case of claims coming before the United States federal courts pursuant

[94] ibid
[95] Rock Grundman, 'The New Imperialism: Extraterritorial Application of United States Law' (1980) 14(2) International Lawyer, American Bar Association 257
[96]. Daniel Augenstein and David Kinley, 'When Human Rights Responsibilities Become Duties': The Extraterritorial Obligations of States that Bind Corporations (2013), Cambridge University Press 271
[97] Ibid.
[98] . Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional

to the ATCA.[99] For instance, in the case of *Wiwa v Royal Dutch petroleum Co. and Shell Transport*, in which the plaintiffs brought before the United States district court the claim for reparation for the damages they suffered as a result of the support of the Shell Nigeria for the human rights abuses committed in the Ogoni Community. The plaintiffs were the next of kin of Ken Saro-Wiwa (Nigerian play writer and environmental activist) and of John Kpuinen, members of the nine Ogoni environmental activists who were executed in November 1995 by the then Regime of President Sani Abacha for charges of inciting murders of pro-government officials during the Ogoni protest against the devastations of their environment by oil Companies. The home state of Royal Dutch Co. is the Netherlands while that of Shell Transport is the United Kingdom. Shell Nigeria is a subsidiary company jointly owned by the above two defendants (parent companies). In this case, the United States District Court ruled that the suit has to be dismissed for the plaintiffs could have brought their case in the *United Kingdom without causing inconvenience* to the defendants even though the December 14, 2000 ruling of the United States court of appeals for the second circuit reversed that ruling for the practical impossibility for the plaintiffs to sue in the alternative forum. After a protracted trial that lasted for 13 years, shell and other codefendants settled the case in 2009 (on the eve of trial) for a settlement that includes 15.5 million US dollar payment to the Saro-Wiwa family. As it is shown in the above case, the rationale for the district court to dismiss the case was the procedural issue of *forum non convenience* as the court reasoned that the case would have been lodged in United Kingdom as the Shell Transport is domiciled there. Thus, what can be discerned from the *Wiwa* case for now is how the issue of forum non convenience hampers the realization of protection against transnational corporate abuse through the instrumentality of the ATCA and hence, in turn, impeding indirect accountability model for TNCs under the international human rights laws to which the United States is bound.

Legal Tools' (2012) 19 (4) Jurisprudence 1301. A s these authors tell us, *forum non convenience* is a doctrine prevalent in the common law countries that the court of a nation before which a claim is brought has to decline jurisdiction if there is the possibility of another forum before which the defendant can conveniently defend the case brought against him/her/it.

[99]. Olive De Schutter, 'Accountability of Multinationals for Human rights Violations in European Law'(2004), Center for Human Rights and Global Justice Working Paper Number1,2004.

The fourth challenge is choice of law (determination of the law applicable law to the case) doctrine. [100] In a sense, the choice of law problem creates what the private international law lawyers call *renvoi* (referral of cases from country to country). Nevertheless, as Shutter reminds us, unlike in the cases of EU member states that has to apply domestic tort laws of different countries (usually *lex loci delicti*) while exercising extra-territorial (human rights) jurisdiction pursuant to the 1968 Brussels Convention (as revised by regulation no.44/ 2001), the choice of law challenge does not detract the case to be brought before the United States courts under the ATCA as the United States courts have to apply international laws, not domestic tort laws of different countries.[101]

The fifth challenge is the notion of 'corporate veil', an idea connected with designedly complicated structure of multinational enterprises in the form of parent-subsidiary.[102] The principle of corporate veil (also known as the principle of 'limited liability') is the idea that shareholders or employees of corporation are not liable for the wrongful activities or debts of the corporation. This rests on the long cherished precept of company law that corporations have distinct legal personality different from persons investing in it (shareholders) that as companies are administered by board of directors (not by shareholders), they (shareholders) have no sufficient reach to control the everyday activities of the corporation and as such holding them liable to the debts of the company is both unfair and retards mobilization of capital. This notion poses a challenge to the home state to control through the parent corporation the oversea activities of its companies investing abroad. Let me explicate this concept by a way of example. Suppose that a given corporation (parent company), which is domiciled, say, in state 'X' (home state) forms a subsidiary having distinct legal personality in state 'Y' (host state). Then, the parent company invests in the subsidiary (which is in state 'Y' as a shareholder). By the benefit of

[100] . Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University, 1301. See also Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European Law'(2004), Center for Human Rights and Global Justice Working Paper Number1,2004).

[101]. Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European Law'(2004), Center for Human Rights and Global Justice Working Paper Number1,2004)

[102]. Philip Alston, 'The "Not –a-Cat "Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors? (2005), in Philip Alston (ed.) *Non-State Actors and Human Rights (*Oxford *University* Press *2005)* 3-36.

the principle of corporate veil, the parent company which is based in state 'X' is not accountable for the misdeeds of its subsidiaries abroad for it invests in it as a shareholder**.** In a sense, the principle of corporate veil is a defense for the parent corporation not to be accountable for the malignant conducts of its subsidiaries operating abroad – the acts of the subsidiary will not be imputable to the parent corporation. In the present context, this indicates that as parent company is not accountable for the human rights violations caused by its subsidiaries operating in different countries around the world, it is difficult for the home states to ensure the human rights compliance of its foreign corporations through its parent company which is incorporated under its law or domiciled in its territory.[103] International human rights law has no clear guide to get rid of this challenge.

The sixth challenge is difficulty of enforcement of judgments.[104] This kind of challenge is not difficult to understand as the decisions are given in the home states while the property of the corporation against which a decision might be rendered to redress the victims is found elsewhere in the host state. Now, especially if the host state does not fully cooperate with the home state for the enforcement of that decision, it is hard to give it a practical significance. It is undeniable that enforcement of foreign judgments is a real problem in the practical world and this is likely to be more so in case it is passed against TNCs. The problem is that the decision is given in given home state and the property of the corporation

[103]. However, an appreciation of the 'corporate veil' challenge requires a caveat for two reasons. First, parent-subsidiary (with distinct legal personality) relation is not the only corporate structure through which a given parent corporation invest in overseas territories. For instance, the parent corporation might open its branch or have an agent abroad through which it undertakes its overseas activities. In such case, as the doctrine of distinct legal personality of the branches or the agents could not be an issue, the acts of the branch or the agent could be attributable to the parent corporation. This means that the home state in which the parent corporation is based take measure against the parent corporation with a view to ensure the compliance of its overseas branches or subsidiaries with human rights standards. Second, it is also argued that even when the relationship between the parent corporation and its foreign affiliate is structured as the parent-foreign subsidiary having distinct legal personality, corporate veil could be pierced by different standards like the amount of shareholding of the parent in the subsidiary and the *de facto (if not legal)* influence of the same over the subsidiary. That is if the shares of the subsidiary is hundred percent owned by the parent company or substantially owned by the same or if the parent company exercises substantial control over the subsidiary, the doctrine of corporate veil has to be set aside. For these views, see Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European Law'(2004), Center for Human Rights and Global Justice working Paper Number1,2004). However, as the business world is inclined towards escaping accountability than taming themselves to it and as it is foreign to the general notion of corporate liability and governance, the above moderate view is not incorporated in the international human rights law rules.

[104].Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University 1301

against which the decision is passed is elsewhere in the host state.[105] More problematic is that if the corporation against which the judgment is passed is the one investing in developing host nations that render much weight to their economic development through Foreign Direct Investment (FDI) than to human rights protection, it can simply refuse to cooperate in the execution of such judgment simply by referring to the contradiction of the decision to its fundamental economic policy. International human rights law has no clear answer to this mystery.

3.2.2. From the side of host states

From the perspective of host states too, there are challenges that make for them difficult to make sure that foreign corporations operating in their territories are adhering to international human rights standards to which these states are parties. One of such challenges is inability (lack of required capacity) to take action. I can simply call it the 'challenge of power imbalance'. My aim here is not to show empirically the gap between law and practice that is caused by power imbalance as such, but to indicate that the provisions of the existing international human rights laws are not developed in a way that address this puzzle. This challenge of power imbalance lies in the fact that most TNCs are economically[106] and technologically powerful than the developing host nations that the latter do not have the necessary financial and institutional strengths and technical expertise to make the former accountable to the dictates of human rights laws.[107] As Augenstein and Kinley rightly observe, economic globalization, which runs by TNCs as its main vehicles, has resulted in a dramatic change with regard to the institutional and regulatory setting in which corporations operate as it has brought about increasing gaps between the operational capacities of TNCs and the regulatory capacities of states.[108] Postponing my proposal on the amelioration of this

[105].Ibid

[106]. For example, as cited in Alston, in 2003 alone, the annual sales of Wal-Mart, the world's giant retail business corporation based in Bentonville, Arkansas, United States, was 256 US dollar and was larger than the economies of the whole nations of the world except thirteen developed nations. See Philip Alston 'The-Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Philip Alston (ed.) *Non-State Actors and Human Rights* (Oxford University Press 2005). Then, the logic is that, if such surpassing entity engages in human rights violations in host nations, they might be hindered by the overwhelming power of the corporations.

[107].Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics, and Morals* (Oxford University Press 2013)

[108].Daniel Augenstein and David Kinley, 'When Human Rights Responsibilities Become Duties': The Extraterritorial Obligations of States that Bind Corporations (2013), Cambridge University Press 271

regulatory gap to the next chapter, suffice to say for now that TNCs (nicknamed by De Shutter as the 'New Leviathans') are getting out of the control of states and for stronger reason they are getting out of the control of weak host states. Fauchald and Jo Stigen assert that weakness of their judiciary is one of the institutional limitations that epitomizes the incapability of many host states to hold multinationals accountable for the non-observance of international human rights laws. Abate concurs with Fauchald and Jo Stigen while he observes institutional weakness as one barrier to the prospect of ensuring the accountability of TNCs for violations of human rights in Federal Democratic Republic of Ethiopia (a country typical of developing nations hosting many TNCs).[109] The second and perhaps the more dangerous concern that obstruct the host countries from strictly following the harmony of the activities of TNCs with human rights norms is unwillingness or to use Alston and Goodman's expression, 'race to the bottom'.[110] The fact is that as developing nations are craving for fast economic growth to lift their people from the plight of abject poverty, they compete to attract foreign direct investment (FDI) through less stringent laws even at the expense of human rights of their people. The fear (and also the fact) is that as the saying goes, 'investors are migrants' and they are more likely to invest in countries having less stringent human rights compliance requirements than the opposite. That is why many host nations fail to take measure against TNCs. The failure of the Nigerian Government to take adequate measure to prevent human rights abuse by Oil Companies operating in the Ogoni community during the 1990's is a better example of home states unwillingness to take measure. Ironically, the Nigerian government brutally repressed environmental activists and executed their top members like the famous writer and environmental activist Ken Saro-Wiwa. In similar vein, the Burmese Military government not only silently observed when Unocal (California-based oil giant) uses forced labor to construct the Yadana pipeline that runs through Burma (now Myanmar) to Thailand, but also supported the company by forcing people to work for the pipeline.

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[109] .Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A cursory Review of the Ethiopian Legal Framework' (2016) 4, Mekelle University Law Journal 37

[110] . Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics, and Morals* (Oxford University Press 2013)

So far, I have examined the factors that prevent both home and host states from ensuring the indirect human rights accountability of TNCs to international human rights standards. In the midst of these, it is essential to examine what I like to call it a 'worsening scenario'. That is the case when the problems from the two sides combine – the instance when the home state is unwilling to take measure and the host is at the same time unwilling or unable to do the same. This is where the accountability vacuum is observed in its true and full sense. This scenario is succinctly and explained by Augenstein and Kinley when they remark:

> It is argued that the traditional state-based paradigm *fails where it is most needed*: for the benefit of individuals in *weak host states* of corporate investment which lack the capacity (and at times also the willingness) to protect human rights against business corporations conducted with the active support or passive connivance of strong home state governments.[111]

The above quote is an indication of the situation when the victims have no one to turn their eyes to for redress; it is a sorry affair. As De Shutter observes, one possible example for the above 'worsening scenario' is TNCs domiciled in member states of the European Union (EU) and investing in developing nations, as no member country of the EU has the counterpart of the United States ATCA under which victims can lodge their claims before the courts of the EU member states.[112] The only avenue for these victims is the inadequate and remote possibility to resort to the ordinary tort laws of these nations (under the guidance of civil and commercial 'jurisdictional' provisions in the 1968 Brussels Convention as revised by the 2001 Brussels Regulation) and to claim redress for the egregious violations of their rights and freedoms.[113] The relevant part of De Shutter's analysis reads:

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[111]. Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' Become 'Duties': The Extraterritorial Obligations of States that Bind Corporations' (2013), Cambridge University press, 271.

[112]. Benoit Frydman and Ludovic Hennebel, 'Translating Unocal: The Liability of TNCs for human rights violations', available at: http://ssrn.com/abstract=192218 , last visited on 4 May 2017. See also Olive De Schutter, 'Accountability of Multinationals for human rights violations in European law'(2004), Center for human rights and global justice working papernumber1,2004.

[113]. Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University, 1301. They also argue that transformation of human rights into domestic torts is inappropriate as it might not fully redress human rights violations since the victims claim may or might not satisfy the definitional elements of each tort law provision of the country where they lodge their claim.

> Multinational enterprises domiciled in the member states of the European Union may generally be said to benefit from a *complete impunity* when they commit human rights violations abroad. This is especially true in the typical situation in which they invest in *developing countries* either by extending their activities in those countries or by the creation of subsidiaries having distinct legal personality, because of the lack of interest local governments may have in the protection of human rights or, more often, because of their inability to ensure that protection effectively. The impunity of multinational enterprises is a reality, whether these enterprises are directly responsible for human rights violations or whether their responsibility is more indirect, for instance because their presence in certain jurisdictions facilitate or encourages human rights violations by governments.[114]

The above quote reveals a very disastrous state of affair with respect to the fate of victims of human rights violations caused by TNCs domiciled in the member countries of the EU as they have no one to turn to for redress.

As it is also raised earlier, one practical example in which the connivance of home states and the unwillingness of host states is observed in taking measure against TNCs in the violation of many interrelated rights of people is the devastation of the Ogoni land in Nigeria by Royal Dutch Petroleum (Dutch Oil Company) and Shell Oil (United Kingdom based oil company) irrespective of the protest by the native Ogoni community and condemnation by human rights advocates like Human Rights Watch. Both companies are domiciled in member countries of the EU – the Netherlands and the United Kingdom, respectively.

Owing to all the above reasons (one may add more), what is regrettably true is that the 'catch through the others hand' approach is inefficient to overcome the impunity of TNCs for the human rights violations they engage in. Especially with respect to the ATCA also known as Alien Tort Statute (ATS) – the statute often cited as model law for home state based mechanism of holding TNCs accountable for international human rights standards, one has to remember three specific issues (apart from the general problems of the indirect

[114]. Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European law'(2004), Center for Human Rights and Global Justice Working Paper number1,2004.

horizontal effect mentioned before) that diminish its effectiveness in ensuring the accountability of TNCs for international human rights standards. The first is that, as the supreme court of the nation argued in *Sosa v. Alvarez-Machain* case, there has to be 'minimum contact' between the United States and the claim brought before US courts under the ATCA, to establish personal jurisdiction over it.[115] Examples of minimum contact might be a scenario when the subsidiary of the foreign corporation sued before the US courts is investing in the US, the situation when the claimants are domiciled in the US. Thus, because of the 'minimum contact' requirement, all victims whose rights are violated by a given TNC somewhere in the world cannot successfully lodge their case before US courts. The second specific requirement that restricts the adequacy of the ATCA, as argued in the abovementioned *Sosa* case is the criteria of 'universal, 'specific' (definable) and 'obligatory' rules of international law pursuant to which a cause of action might be created to lodge a claim before the US courts under the ATCA.[116] The court ruled that the claim that could be lodged before US courts under the ATAC has to be based on present day international law that is specific, universal and obligatory. This criterion raises a great concern in case the defendant is a TNC. That is, as there is yet no specific, universal and obligatory international law rules imposing direct obligation on TNCs, it is difficult for victims to lodge their claims before the courts of this nation unless the court relaxes this requirement in its latter decisions. The third and the harsh specific problem to the operation of the ATCA is the recent decision of the United States Supreme Court in the case of *kiobel* v *Royal Dutch Co*. (2013).[117] This ruling, unlike in the case of *Doe v. Unocal*[118] in which the applicability of the ATCA to corporate defendants was upheld, restricts the applicability of the statute to corporations.[119] For a better understanding of the facts of the case and the decisions thereon as well as its repercussions on the issue of ensuring indirect accountability of TNCs for international human rights standards, I will narrate the facts and the decision thereon as follows:

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[115] . Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University 1301

[116] Ibid.

[117] Kiobel V Royal Dutch Co. 569US – (2013) (US Supreme Court, docket file no. 10-1491 , decided on 13 April 2013)

[118] . Doe I v Unocal Corp., 963 F.supp.880 (C.D.Cal.997)

[119] .ibid

> The original claim in *Kiobel V Royal Dutch Petroleum* was filed in 2002 by the families of Dr. Barinem Kiobel and eleven other Nigerian activists who were campaigning against the environmental degradation of the Niger Delta allegedly caused by the ongoing operations of global oil giants Royal Dutch Petroleum and Shell Oil, and their local Nigerian subsidiary. The claimants were seeking compensation under the ATS, alleging that the companies had, amongst other things, aided and abetted the unlawful detention, torture and extrajudicial killings of these activists (in 1995) by the Nigerian military. In 2010, the United States Second Circuit Court of Appeals dismissed the suit, deciding that ATS did not apply to corporations. The claimants petitioned the US Supreme Court, requesting the court review the question of the ATS' applicability to corporations as well as natural persons. Certiorari was granted and, and oral hearings were held, in February 2012. However, in an unusual move, a week later the Supreme Court requested additional arguments be presented (and ordered new briefs submitted) on a separate and distinct legal issue: the extent of *the extraterritorial scope* of the ATS. Re-argument in the case was held in October 2012, and it was on this question of law that the court ultimately made its decision, handed down in April 2013. The nine justices of the Supreme Court were unanimous in dismissing the case.[120]

What is understood from the above case is that the trust put on the ATCA to enable victims (non- US citizen victims) of TNCs to lodge their claims before US courts based on this statute and obtain justice is curtailed by the decision as it excludes extraterritorial applicability of the statute to corporations.[121] It should also be remembered that as the US is a common law country, the decision of the Supreme Court of the nation creates *precedent.* As such, the effect of the *Kiobel* decision is not only *inter partes*, but also governs future similar cases that might be lodged before US courts of any level. That is why, after *Kiobel* decision, some argued that the ATCA is dead.[122] The ruling that the supreme court of the nation made after *kiobel* in relation to other similar cases before it has relied on the authority of *Kiobel* decision and this is taken as an indication of the death of the statute. For instance,

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[120]. Jonathan Kolieb, 'Kiobel v Royal Dutch Shell: A Challenge for Transitional Justice' (2014) 13 Macquarie Law Journal 169 (emphasis added).
[121] Ibid.
[122]. Odette Murray and co. 'Exaggerated Rumours of the Death of an Alien Tort?: Corporations, Human Rights and the Remarkable Case of *Kiobel'* (2011) 12 Melbourne Journal of International Law *57*

the Supreme Court remanded the *Sarei v. Rio Tinto*[123] case to the lower court to review it in light of the *Kiobel* decision. Accordingly, the US Court of Appeals of the Ninth Circuit finally dismissed the case relying on *Kiobel* authority after it run for thirteen years and the Bouganvilleans' pursuit for justice was cut back.[124] Bouganvilleans are the community group from Bougainville village of Papua New Guinea who were affected by the operations of Rio Tinto.

In the foregoing discussions, I have identified many challenges that contribute to the inefficiency of the 'catch through the others' hand' approach from both the home and host states of TNCs. Now, I want to make a very critical remark. That is, the reason why I discussed all the above impeding factors is primarily not to empirically study the gap between the law and practice in relation to the implementation of the indirect horizontal effect. It is rather aimed to indicate that the existing international human rights law, which is almost exclusively addressed to states (in terms of the obligations it impose) does not provide provisions that could limit the devastating impacts of all the above problems. They are not merely practical challenges to the existing international human rights protection system, they are equally legal challenges – they represent the gaps in the existent international human rights law in tackling all these hindrances. That is why Katuoka and Dailidaite remind us:

> Regardless of the abundance of international human rights instruments ranging from conventions to declarations, when the abuser of human rights is a TNC, these instruments fail to offer more effective and feasible solution. As the international human rights instruments are addressed to states, TNCs escape responsibility for human rights violations, and a wide interpretation of these instruments so as to include TNCs lacks international recognition.[125]

In sum, the indirect horizontal accountability model that is relied upon under the international human rights law to protect human rights against TNCs, as it now stands, is

[123] . Sarei v Rio Tinto PLC, 02-56256, United States court of Appeals of the Ninth Circuit, 2013)
[124] . Jonathan Kolieb, 'Kiobel v Royal Dutch Shell: A challenge for Transitional Justice' (2014)13 Macquarie Law Journal 169 (emphasis added).
[125]. Saulius Katuoka and Monika Dailidaite, Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools' (2012) 19 (4), Mykolas Romeris University 1301

noticeably insufficient to address the puzzle because of multitude of gaps that make it dysfunctional. That is what the examples I offered earlier show us.

The inefficiency of the catch through the others hand approach coupled with the absence of direct and binding human rights duty on TNCs have given birth to the 'accountability vacuum'/'obligation gap' for TNCs.

3.3. Conclusion

What I can rightly deduce from the discussions made in this chapter is that the indirect accountability of TNCs under the binding international human rights law matrix is inadequate to solve the rapidly increasing human rights violations that multinational enterprises are causing to human rights in all corners of the globe, mostly in developing host nations.

The brief examples I indicated under this chapter are testimonies of the inadequacy of the 'catch through the others' hand' approach in responding to the human rights infringements caused by multinationals. The ATCA is limited in its application – its application to corporations is curtailed. This is so because of the *Kiobel* judgment. Even assuming that the ATCA is not limited in its application to corporations, it cannot be a potential response to all violations of human rights caused by all TNCs in all nations of the world in the absence of comparable legal and practical tool in other legal systems. The United States is not a universal state destined to ensure the protection of the rights of every person in every part of the world nor it is practically possible for it to do so. Indeed, as Weschka correctly puts, it cannot be the duty of a single national jurisdiction to solve the whole world community's problems regarding human rights and globalization. Nor is the domestic tort laws of the European Union member countries, working under the guidance of the jurisdictional clause of the 1968 Brussels Regulation is sufficient to protect human rights against violations by the TNCs of member states of the union or of other countries of the world. The 'catch through the others' hand' approach, known for its one-size-fits-all approach, is really unfit to ensure the observance of international human rights standards by TNCs.

CHAPTER FOUR

NEW HORIZON: RATIONALIZING THE IMPORTANCE OF INTERNATIONAL HUMAN RIGHTS TREATY IMPOSING DIRECT OBLIGATION ON TNCs

4.1 Introduction to the chapter

This chapter is aimed to hint an innovative international legal set up that rectify the profound limitations of the international human rights law that were explicated in the previous two chapters. Accordingly, it will be embarking on the essential task of forwarding a new horizon on the way to reverse or at least lessen the human rights accountability vacuum that the 'New Leviathans' are now enjoying under the international human rights law setting. By this new horizon I mean not something abstract but it is the need to adopt a new international treaty (which I hereafter call it 'Corporate Obligation Convention') that imposes direct human rights obligation on TNCs and subject them to international institutional supervision. More to the point, the corporate obligation convention (COC) will not include the issue of international criminal responsibility of multinational enterprises before international courts and tribunals for violations of international human rights standards, but their civil responsibility only. Moreover, the COC is intended not to replace the human rights accountability mechanisms of TNCs that are already in place at any level and within any system but to supplement them by rectifying their loopholes.

To connect the core idea of this chapter with the emerging trends and to draw some lessons from them for my current endeavor for the rationalization of the COC, I will begin this chapter by illuminating on the soft law developments in the area of TNCs and human rights and then I will be embarking on the task of justifying the COC.

4.2 Soft laws on TNCs and human rights: Drawing lessons from their weaknesses and strengths

With reasonable expectation, I imagine that some might ask: why the soft laws were not subsumed under chapter three which talks about the 'catch through the others' hand' approach than being the subject of separate discussion under the present chapter. The reason is that unlike the binding international human rights laws that devise the indirect horizontal accountability of TNCs, the soft laws, at the first glance, appears to impose direct

human rights obligation on TNCs though in a very circumscribed manner. In this sense, they have some direct relationship with the COC. It should also be clear from the outset that my discussion on soft laws is not intended for mere historical curiosity, but to draw some lessons both from their strengths and weaknesses for the substantiation of my arguments for the adoption of the COC.

As the growing influence of TNCs on the rights and freedoms of the human family begun to emerge as a visible concern for the international community and as the inadequacy of the already existing international human rights law is felt in tackling the conundrum, different attempts have been undertaken to devise some mechanisms that could strengthen the compliance of these entities with international human rights standards. The harvest of these efforts, as things now stands, are the so called 'soft international laws' that are meant to regulate the responsibility of international corporations to international human rights standards while some of the efforts appears to end up in futile. Soft laws, as they are generally known, are non-binding international norms but usually (if not always) serve as precursors to the binding instruments of their kind that later come to the scene on the subjects covered under them. Providing the detailed history of all these soft laws will superfluous for the present analysis so that I will illuminate on them only to the extent necessary to buttress the core aim of this chapter. Even so, I will be exhaustive in presenting all those soft laws as being selective might hide necessary information over the trajectory of the evolution of norms regulating international corporations and human rights. As the center of attention of this study is on the account of the obligations of TNCs under international human rights law than its regional and national counterpart, my analysis will emphasize on those soft laws that evolved at the general level (within the United Nations system) and those attempts made at the same level but ended without viable fruit.[126]

To begin with, the first attempt to devise regulatory rules for TNCs at the United Nations level started during the 1970's as parts of the responses to the quest for the New

[126] . This is not to deny the contribution of soft laws developed outside the auspices of the United Nations on the regulation of the nexus between multinational enterprises and human rights. For instance the 1976 (as revised in 2011) Guidelines for multinational enterprises and other business enterprises developed by organization for economic cooperation and development (OECD) is vital in the development of the business-debate and rules relating to the issues of transnational corporations and other business enterprises with respect to human rights.

International Economic Order (a demand by developing nations for the equitable use of world wealth).[127] Accordingly, the draft code of conduct for TNCs was prepared in 1977 and discussions continued for long years, but it is dropped out of the agenda during the 1990's owing to the shift of attitude of the developing nations from the need for firm regulatory rules for TNCs to the competition for Foreign Direct Investment (FDI). The resistances of the business community and those nations sending their corporations to invest in overseas territories were the other contributing factors for the rejection of the draft code.[128] As such, the effort ended fruitless without leading to the final adoption of the draft code and hence, the code cannot be strictly so called 'soft law'. Let us now turn to those efforts that brought about the kinds of the so called soft international laws except one that shares the fate of the above discussed code of conduct. One of such soft laws that is initiated within the functional structure of the United Nations (hence somehow claims a universal level) and which is as old as the aborted UN draft code of conduct is the 1977 Tripartite declaration of principles concerning multinational enterprises and social policy of the International Labor Organization (and its latter updates (here after ILO principles).[129] Even though this attempt has merits in inculcating the notion of the policy guidelines that TNCs might follow throughout their operations, especially while investing in developing host nations, it is by any measure insufficient to reverse the accountability vacuum that TNCs are enjoying under international human rights law. One of its limitations is that the ILO principles are much concerned with labor standards and they do not adequately and generally address all human rights and freedoms that could be potentially abused by TNCs. In fact this has to do with the area of focus/competence on which the ILO as an organization emphatically works upon – the issue of setting international labor standards than other areas of human rights.[130] Second, the ILO principles are crafted in overly broad language of the general policy objectives that the tripartite organs: governments, workers and employers might voluntarily follow and it does not provide for specific rules of obligations for the

[127] . Oliver De Schutter, 'Towards a legally binding instrument on business and human rights' (2015) 1(1) business and human rights journal, Cambridge University press 41.
[128]. Ibid
[129] . See International Labor Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, International Labor Office, Geneva, Office Bulletin, Vol. LXXXIII, 2000, Series A, N0.3).
[130] . Marion Weschka, 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 Zao RV 625

entities it seeks to govern. Just to give one example in which the ILO principles directly, but too broadly provide the obligations of multinational enterprises, principle number 10 provides that:

> Multinational enterprises should take fully into account established *general policy* objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate. To this effect, consultations should be held between multinational enterprises, the government and where appropriate, the national employers' and workers' organizations concerned.[131]

It is difficult to exactly figure out specific obligation for multinational enterprises from the above principle. Indeed, if one adheres to the jurisprudential /conceptual differences between and among the concepts such as 'legal principles', 'legal rules' and 'legal standards', principles are of little help in telling us the exact right and duty of certain organ as they are too general as compared to rules and standards. Legal principles are good to guide the implementation of specific rules in particular circumstances, but standing alone, they are not as such suitable for practical application.

The next soft international law worthy of mentioning in the area of TNCs and human rights is the 1999 Global Compact that is developed under the auspices of the then United Nations secretary general, Kofi Annan, and sets nine principles which corporations can voluntarily observe.[132] By the 2004 revision made to the compact, one principle, regarding corruption, is added to the already formulated nine principles, making them grow to ten. The companies that voluntarily accept these principles are expected to support these principles in their

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[131]. ibid

[132] .For the knowledge of those ten principles of the compact, visit the global compact guide, available at www.unglobalcompact.org, last visited on 1May 2017. These ten principles are the following: 1) Businesses should support and respect the protection of internationally proclaimed human rights within their 'sphere of influence' 2) Businesses have to make sure that they are not complicit in human rights abuses 3)Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining 4)the elimination of all forms of forced and compulsory labor 5) the effective abolition of child labor 6)the elimination of discrimination in respect of employment and occupation 7)duty of businesses to support precautionary approaches to environmental challenges 8) they should undertake initiatives to promote greater environmental responsibility 8)businesses should encourage the development and diffusion of environmentally friendly technologies and 10)businesses should work against all forms of corruption, including extortion and bribery (knowledge of these principles,visit the global compact guide, available at www.unglobalcompact.org, last visited on 1May 2017.

'sphere of influence'.[133] One very general and obvious criticism against the compact is that its observance is up to the will of each TNC. In this sense, its legal force is a diminished one. Second, it is troubled by vague standard – what constitute the 'sphere of influence' is not clearly defined. Principle 1 of the compact merely stipulates that:

> 'Businesses should support and respect the protection of human rights within their 'sphere of influence.'

The above stipulation offers no guidance as to what constitute 'sphere of influence'. More problematic is that as the notion of 'sphere of influence' is first introduced into the vocabulary of the corporate social responsibility (CSR) discourse and into the idea of human rights accountability of TNCs as a whole, for that matter, it is even difficult to find the meaning of this term from relevant outside sources.[134] Thirdly, as principles, not specific legal rules, the global compact shares the limitation of the ILO principles, that is, they are incapable of providing specific legal obligations that the corporations should comply with.

The other soft law deserving attention is the so called 'United Nations draft norm on the responsibilities of TNCs and other business enterprises with respect to human rights (here after the 'draft norms')'.[135] Even though the bulk of literature refer to the draft norms as a

[133] According to John Ruggie, the term "sphere of influence" is first introduced into the vocabulary of the corporate social responsibility discourse by the very global compact. This indicates the absence of prior conceptual and practical understanding of this notion in the legal instruments and legal literatures, posing difficulty of eliciting its meaning (See John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 (4), American Journal of International Law 819.

[134] . Ibid 819

[135] . The 'UN Norm' was adopted by the then UN sub-commission on the promotion and protection of human rights on August 13, 2003 by resolution no. 2003/ 16 and presented for adoption before the then United Nations human rights commission (which is revitalized as UNs Human rights council as of 2006). However, the commission rejected the norm by resolution 2004/116 of 20 April 2004 alleging that it has not requested the sub-commission to prepare them (the norms) that as a draft it has no legal standing that the sub-commission will not take any monitoring task with respect to them and it (the commission) recommended (allegedly to save the total dismissal of the business-human rights regulation issue from the agenda of the UN) that the Economic and social council (ECOSOC) shall request a report from the office of the high commissioner from human rights (OHCHR). Accordingly, upon request by the ECOSOC, the OHCHR presented its report (to the UN human rights commission) in 2005 indicating some criticism against the norms and recommending the appointment of a special rapporteur on the issue of TNCs and other business enterprises with respect to human rights. See Commission on human rights, Resolution 2004/116, Responsibilities of transnational corporations and related business enterprises with respect to human rights, adopted on 20 April 2004. Since its rejection by the commission, the norms did not get the chance of being discussed again within any of the United Nations system except the fact that reference to them is constantly made in literature.

more comprehensive beginning[136] on the march towards the evolution of international regulatory schemes with respect to the urgent issue of human rights and TNCs, the norms suffered from many predicaments leading to the polarization of views towards its status and significance. Four of its handicaps are crystal clear. For one thing, as it is an aborted project, that is, as it lacks the blessings of the then human rights commission before which it was presented by the then sub-commission for endorsement, its legal status remains downgraded. Whether it is 'soft' law or 'not law' at all is questionable. Indeed, as the human rights commission has noted upon rejecting the norm, it has no legal standing.[137] Second, the norms offer no viable and specified international supervisory mechanism except the general provision under article 16 which stipulates that TNCs are subject to periodic monitoring and verification by the United Nations and other international mechanisms with respect to its application. The very simple question is as to which organ of the UN is charged with the task of monitoring and verifying the observance of the TNCs with the norms? What does periodic monitoring mean? Does it mean periodic reporting? If yes, on what intervals of time? These all issue are not hinted in the norm. Third, even though the title of the norms renders the impression that human rights obligation of TNCs and other business enterprises are its point of focus, its content seem to swing between the innovative and, in fact, timely notion of direct human rights obligations of TNCs and other business enterprises on the one hand and that of states on the other. I am not arguing that it is wrong to provide human rights obligations of business entities and states in one document. What I am saying is that its provision is crafted in a way that confuses the obligation of state on the one hand and that of TNCs and other business enterprises on the other. The relevant provision, principle number 1 stipulates that:

> States have the primary responsibility to promote, secure the fulfillment of respect, ensure respect of, and protect human rights recognized in international as well as national law including ensuring that TNCs and other business enterprises respect human rights. Within their sphere of activity and influence, TNCs and other business enterprises have

[136] See Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European Law' (2004), Center for human rights and global justice working papernumber1,2004.
[137]. John Gerard Ruggie, 'Business and Human rights: The evolving international agenda' (2007) [101] (4), The American Journal of International Law 819

> the obligation to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law including, the rights and interests of indigenous peoples and other vulnerable groups

Even though the remaining substantive provisions of the norms prescribe the obligations of TNCs only, the first paragraph of the above article creates a problem as it confusingly merges the notion of indirect horizontal effect and direct horizontal effect without clearly indicating how they could operate in parallel. It is not clear how the obligations are to be apportioned between states on the one hand and TNCs and other business entities on the other. As the target of the norms is imposing direct obligations on TNCs, it would have been more meaningful if the first paragraph of the above article is deleted and only the first two paragraphs of article 19 are maintained (the third paragraph of article 19 of the norms is problematic and I will provide it later as the fourth defect of the norm). The full version of article 19 provides that:

> Nothing in these norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of states under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, *nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibility of TNCs and other business enterprises in fields other than human rights*.[138]

The fourth defect of the norms is the stipulation found in the last paragraph of the above cited article. It maintains other commitments of TNCs and other business enterprises in fields other than human rights. As the stipulation is clear, there is no need to interpret it. As it stands, this might include the instances where those other commitments of TNCs and other business enterprises set in the norms itself and in other international human rights instruments contradict with international human rights standards. This defeats the purpose of the norms itself – ensuring the observance of human rights by TNCs because in most cases agreements that TNCs make with other entities, for instance, investment agreements they conclude with states (mainly with developing host states), usually contradict with

[138] .Norms on the responsibility of TNCs and other business enterprises with regard to human rights,U.N.Doc. E/CN.4/sub.2/2003/12/Rev.2 (2003), article 20 (emphasis added)

international human rights standards[139] and giving precedence to these kind of agreements undermines the idea of imposing human rights obligations on TNCs. In this sense, I am not afraid to argue that the norms has provided a blatant mistake laying a ground work for its own disregard, had it been adopted and amenable for enforcement unless modification is made to paragraph iii of the article 19 .

Another set of international soft law rules relating to TNCs and human rights is the 'protect, respect and remedy' framework (hereafter 'UN framework') that is adopted by the UN human rights council in 2008 after the report of the special representative for the United Nations' secretary general on the issues of business and human rights (here after 'SRSG)').[140] The UN frame work is founded on three pillars: the state duty to protect human rights against any entity (including TNCs), the corporate responsibility to respect human rights (to the 'due diligence' standard of care) and effective remedy (access to

[139]. Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework' (2016) 4, Mekelle University Law Journal 37

[140] .It is in April 2005, following the recommendation of the office of the High commissioner for human rights, that the then United Nations human rights commission (which is superseded by the UN human rights council as of 2006) adopted resolution 2005/69 which suggests the appointment of a special representative for the UN secretary general on the issues of business and human rights (SRSG) to clarify on the development of international law with respect to human rights obligations of TNCs and other business enterprises and to clarify concepts like corporate 'sphere of influence' and corporate 'complicity' in human rights violations. Accordingly, John Gerard Ruggie, professor of international affairs at John F. Kennedy School of government, Harvard University and affiliate professor of international legal studies at Harvard Law School, was appointed (by the then United Nations secretary general, Kofi Annan) to that post on 28 July 2005 with a special mandate to clarify on the development of international law with respect to human rights obligations of TNCs and other business enterprises and to clarify concepts like corporate sphere of influence and corporate complicity in human rights violations, just as asked in resolution 2005/69 of the council. In 2007, in his first report to the council on his accomplishments, the SRSG presented the abuses that businesses pose to human rights and short hand explanation of the current status of corporate responsibility in relation to human rights as found in corporate criminal liability scheme, CSR and others. This marks the first phase of his mandate. Then, the council extended his mandate for one additional year asking him to offer recommendations on the way to solve the business-human rights challenge that he indicated in his first report. In his June 3, 2008 report to the council on the progress of the works of his second phase mandate, he presented (as recommendation to solve the issue) the Protect, respect and remedy framework and the frame work is welcome and adopted by the council in the same year by resolution 8/7. The council extended the mandate of the SRSG for another three years (which was about to expire in 2011) with the mandate of 'operationalizing' and 'promoting' the framework (to devise implementation mechanisms for the framework). During this third phase of his mandate, the SRSG developed the Guiding principles on business and human rights (along their commentaries) which were aimed to put the UN framework into action and presented them to the human rights council in his 2011 report. The council endorsed the principles in June 2011 and the formal mandate of the SRSG ended at that point though he is continuing to offer his personal views from outside on the direction of the business-human rights matters.

justice) for victims of corporate human rights abuses. [141] However, the framework failed to address many pressing issues. For instance, it unnecessarily implies that the duty of TNCs for human rights is the duty to respect only, short of the duty to protect and fulfill. Second, even with regard to the stipulations it makes on state duty to protect human rights against TNCs, it failed to tackle the perennial debate on extraterritorial human rights obligations of states.

The other relevant soft law and whose evolution is inextricably linked with and necessitated by the UN framework is the UN Guiding principles on business and human rights (GPs) adopted by resolution 17/14 of the UN human rights council in June 2011 after the report of the SRSG (during the third phase of his mandate that lasted from 2008-2011). The GPs were intended to put the UN framework into action. Some observe that the GPs are the most authoritative statement of the human rights responsibilities of states and corporations currently in place at the level of the United Nations.[142] However, the inherent failures in the GPs should not be overshadowed by its perceived qualities. Both the UN framework and the GPs are far from answering the need for hard laws that ensure the compliance of TNCs with international human rights standards. Two of the deficiencies of both the framework and the GPs are highly discouraging. The first is that the overall process that the SRSG followed for the developments of both the framework and the GPs is said to have been defective.[143] It is defective because it shifted the business-human rights debate from the need *for binding legal obligation* (as pointed to in the so called the UN draft norms discussed earlier) to the old notion of *corporate social responsibility (CSR*) that lived for so long but proven insufficient to redress corporate human rights abuses.[144]According to Lopez, CSR could be explained as a set of social rules and principles compliance with which is optional for businesses.[145] It is long known belief (social expectation) that corporations voluntarily take into account the socio-environmental and ethical effects of their activities on the community in which they operate. The point is that, as social (not legal) rules and principles, CSR lacks

[141]. Ursula A. Wynhoven "The Protect-Respect-Remedy" Framework and the United Nations Global Compact' (2011) 9 Santa Clara Journal of International Law 81
[142] See Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' Become 'Duties': The Extraterritorial Obligations of States that Bind Corporations' (2013), Cambridge University press 271.
[143] . Carlos Lopez, '*The 'Ruggie process': From Legal Obligations to Corporate Social Responsibility*?' (Cambridge University Press 2013) (emphasis added)
[144] . ibid
[145] Ibid

the quality inherent in law (bindingness) and as such it can hardly ensure the compliance of the 'New Leviathans' to international human rights standards. Accordingly, adopting a CSR character and failing to prescribe positive duties that corporations can directly bear, the contribution of the GPs to the already existing system in answering the recurrent quest for corporate human rights accountability is rather too fragile. The second pitfall of the framework and the GPs is their failure to firmly advocate the extraterritorial obligations of states in controlling the overseas activities of their corporations to be in consonance with international human rights standards. As I indicated under chapter three, the issue of extraterritorial human rights obligations of states is yet unsettled under the existing international human rights law. Thus, if the GPs were to bring real progress in the area of the accountability of TNCs under international human rights law, they should have filled this gap by advocating the existence of extraterritorial human rights obligations of states. However, they deny the existence of extraterritorial human rights obligations of states unless the states exercise it with their own will. The GPs, under principle 2, provides for the state duty to clearly set out the expectation that all business enterprises domiciled in their territory and/jurisdiction respect human rights throughout their operations. Of course, the last term 'throughout their operations' as provided in the above principle, could be construed to embrace the overseas operations of these business enterprises, but the commentary forwarded on the GPs by SRSG (under whose mandate they were developed) severely limits the overseas reach of this principle when it asserts:

> At present states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises within their jurisdiction. There are strong *policy reasons* for home states to set out clearly the expectation that businesses respect human rights abroad, especially where the state itself is involved in or supports those businesses. These reasons include ensuring predictability

for business enterprises by providing coherent and consistent messages, and preserving the *states own reputation* [146]

The above commentary reveals two self-evident and terrible assertions with respect to the GPs. First, it unnecessarily implies that states, home states for that matter, has no international legal obligation (unless they act out of their own will) to control the overseas operations of their corporations to enhance the harmony of their activities with international human rights standards. The second terrible assertion and which is the extension of the first is that even in case states are willing to exercise extraterritorial jurisdiction over corporation, it is based on their policy preference/policy reasons. A closer scrutiny of the last sentences of the above commentary reveals something troublesome. That is, the components of the policy reasons (on which bases states exercise extraterritorial jurisdiction) as indicated in the commentary do not clearly embrace human rights protection based policy reason, but policy rationales geared towards the assurance of predictability for businesses and for the protection of the reputation of states. This kind of assertion sends to the home states a message (which is disastrous to victims abroad) that if 'exercising extraterritorial measure over your corporation operating abroad under the guise of human rights protection has the potential to harm the predictability of the operation of your corporations or if it harms your reputation, you can refrain from taking measure.

Even though it might not be grouped under the umbrella of business-human rights related soft laws in its own sake, there is one resolution worth mentioning. It is the UN human rights council resolution 26/9 of June 26, 2014.[147] It is a resolution that establishes an open ended intergovernmental working group (IGWG) to elaborate on international legally binding instrument on TNCs and other business enterprises with respect to human rights and

[146] See, Guiding principles: Implementing the United Nations 'respect, protect and remedy framework', report of the SRSG on the issue of TNCs and other business enterprises with respect to human rights, A/HRC/17/31, principle no. 2 and its commentary.

[147]. The adoption of this resolution was initiated by the submission of the representative of the government of Ecuador at the 24th session of the UN human rights council, 13th Sep, 2003 , Geneva, requesting for the adoption of an international legally binding instrument on the issue of transnational corporations and other business enterprises with respect to human rights. The representative of government of Ecuador made that statement representing the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador. The statement of Ecuador, which led to resolution 26/9 has again brought back the business human rights debate to the UN agenda after the endorsement by the council in 2011 of the GPs on business and human rights.

to report its progress to the human rights council. The profound relevance of this resolution rests in its indication for the urgency of a binding legal instrument in the area of TNCs and human rights. However, two things must be underlined about this resolution First, even though it calls for binding law (treaty), it does not specify whether this future treaty will be the one that imposes direct judicially enforceable human rights obligations on TNCs and other business enterprises or the one that further strengthens the states' obligations under the international human rights law to firmly regulate the conformity of the activities of TNCs and other business entities with human rights standards or whether it will be of some other kind than the two above. Elaborating the option that the new treaty might follow is left to the IGWG. Thus far, the IGWG has, after conducting two sessions, made two reports to the council on the progress of its work yet it has not offered clear options it would follow.[148] Thus, as opposed to the clear dimension taken in the present study, that is, the urge for a kind of treaty that impose direct human rights obligations on TNCs, the above resolution lacks precision and its end result is yet to be seen.

Alongside the shortcomings specific to each of the above soft laws, there is a common challenge that characterizes all of them – lack of binding force.

[148] . Until now, the progress of the IGWG looks like the following. The IGWG, after conducting two sessions in which it collected the views of different stakeholders on the matter, has made two reports to the UN human rights council. The report contains both similar and contradicting views of different stake holders and no clear and final option on the nature of the future treaty is indicated. Some suggests a treaty that strengthens state obligation to control extraterritorial activities of their corporations while some few have suggested the imposition of direct obligation on TNCs. For the view contained in the report of the IGWG, see report on the first session of the IGWG on business and human rights with the mandate of elaborating international legally binding instrument, A/HRC/31/50, at the thirty first session of the human rights council, 15 Feb, 2016 , Geneva. See also report on the second session of the IGWG on business and human rights with the mandate of elaborating international legally binding instrument, A/HRC/34/47, at the thirty fourth session of the council, 4 Jan 2017, Geneva. The third session of the IGWG is to be held in October 2017. In short, we are now unaware of what will be the outcome of the work of the IGWG. The agenda is still open for debate. To give one example of the views of stakeholders on the issue, Franciscans International, an international NGO advocating human rights at the international level, suggested to the IGWG that the direction that the IGWG should follow has to be to come up with a treaty that further strengthens states obligation in international human rights law with respect to human rights abuses committed by business enterprises, including TNCs (See the submission of Franciscans international to the first session of the IGWG on TNCs and other business enterprises with respect to human rights , Geneva, 22 June 2015. Indeed, immediately after the adoption of resolution 26/9 of the human rights council that mandates the IGWG to elaborate on legally binding instrument on TNCs and other business enterprises with respect to human rights, authors begun the task of contemplating as to the possible options that the new treaty might follow. Prominent among them is Oliver De schutter who provides four options(see De Schutter , 'Towards a New Treaty on Business and Human Rights' (2015), 1(1), Business and Human Rights Law Journal 41

So far, I have attempted to clarify both the criticisms and merits of the relevant soft laws. What remains at this juncture is to illuminate on the lessons that could be drawn from all the weakness and strengths of these soft laws for the endeavor I make in this study to justify the 'COC'. The following lessons could be drawn from those soft laws.

First, these they are testimonies of the inadequacy of the already existing international human rights system in guaranteeing the observance of international human rights standards by TNCs. As a direct extension of the above point, they also imply the need to devise extra-legal back up to fill the lacunae. That is, had the already existing system that I called the 'catch through the others' hand' approach together with the CSR been enough to tackle the impunity of multinationals, these soft laws might not have been desperately needed.

Second, those soft laws indicate, though grudgingly, the possibility as well as the need for the imposition of *direct* human rights obligations on multinational enterprises at the international level. It is essential to concretize this assertion with tangible provisions of those soft laws. For instance, principle number 1 of the 1999 United Nations global compact provides that:

> 'Businesses should support and respect the protection of international human rights within their sphere of influence.'

Needless to say, the above principle is crafted in a language that impose direct obligation on business entities like TNCs. In similar vein, the second paragraph of article 1 of the UN draft norms stipulates that:

> Within their sphere of activity and influence, TNCs and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law including, the rights and interests of indigenous peoples and other vulnerable groups.[149]

In fact, with the exception of paragraph 1 of article 1, all the remaining substantive provisions of the draft norms are crafted in a language that imposes direct obligation on

[149]. Norms on the responsibility of TNCs and other business enterprises with regard to human rights, U.N.Doc. E/CN.4/sub.2/2003/12/Rev.2 (2003), article 20

TNCs and other business enterprises. Besides, the global compact and the draft norms, principle 11 of the GPs prescribes that:

> 'Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[150]

Third, these soft laws themselves are, in addition to being non-binding, full of flaws and far from solving the perennial corporate-human rights tension because of their limitations we saw earlier. All of the above lessons serve as propelling forces for the COC that I am attempting to justify. Among others, though its fate was rejection, the UN norms was said to have pointed towards an international treaty-based system of human rights obligations directly enforceable against private actors.[151] The Claim that soft laws that are developed in certain field of international law serve as forerunners of binding treaties of their kind is historically sound. It is true that the bulk of human rights treaties that are currently in place are preceded by soft laws (declarations) of their kind. For instance, it would have been difficult, if not impossible, to come up with the twin international human rights covenants: International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) without the antecedent declaration upon which they were built – the 1948 Universal Declaration of Human Rights (UDHR). Similarly, the 1969 American Convention on human rights was preceded by the 1948 American declaration on the rights and duties of man and the examples continue.

In sum, the soft laws have, unlike the binding international human rights regime, hinted the possibility of imposing direct human rights obligations on TNCs though they have done this in a very circumscribed way. However, in many respects, these soft laws fall back into the 'catch through the others' hand' accountability model' and into the notion of CSR. Even so,

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[150]. See, Guiding principles: Implementing the United Nations 'respect, protect and remedy framework', report of the SRSG on the issue of TNCs and other business enterprises with respect to human rights, A/HRC/17/31

[151] . Daniel Augenstein and David Kinley, 'When human rights 'responsibilities' become 'duties': the extraterritorial obligations of states that bind corporations' (2013), Cambridge University press, 271. See also Pavel Miretski and Dominik Bachmann, 'The UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises With Regard to Human Rights': A requiem' (2012) [17] (1) Deakin Law Review 6

they provide the lesson that there has to be more legal back to international human rights law if it is to really ensure the compliance of TNCs with international human rights standards. This takes me to the core issue of this chapter, that is, justifying the new international human rights treaty and this will be the task of the immediately following sub-section.

4.3 Rationalizing the 'Corporate Obligation Convention' (COC)

As it is understood from my previous discussions, there are some legitimate debates as to the way of responding to the formidable threat which TNCs are posing to human rights and freedoms all across the world. Just to make a quick reminder of the other views (other than the one proposed in this study) forwarded to reverse the impunity of TNCs, they include: re-vitalizing what I have called earlier the 'catch through the others hand' approach through additional treaty, reliance on corporate voluntary initiatives (CSR) and soft law based accountability model. The questions worth answering at this point in time are, therefore, on what grounds, will the COC be justified in the presence of other schemes. The general answer to these questions is that the inadequacy of all the above alternatives and their combinations in reversing or significantly reducing human rights abuses caused by TNCs put the international community in stark choice: either to subject these entities to direct human rights obligations under hard law (which is yet not the case) or to insist on the other alternatives which were tested for decades but proven inefficient to solve this mounting problem. The first one of these two choices is preferred in the present study, that is, the need to subject TNCs to direct international human rights obligations through the adoption of COC. This will be the preferable legal response that the international community has to make to limit the severe consequences of globalization (which has TNCs at its heart) on the human family. Indeed, as Wettstein skillfully advises us, we might not be able to undo globalization and even it is not wise to try so, but we can shape and direct it in a fundamentally different direction than it is heading now.[152] It is true that shaping and directing globalization is itself a demanding task but we have no choice than acting – either we direct it in a way the human race can be better-off it or we fail to shape it in that way and

[152] .Florian Wettstein, *Multinational Corporations and Global Justice*: *Human Rights Obligations of Quasi-Governmental Institutions* (Standford University press 2009)

continue to live under its misery. In the context at hand, shaping globalization requires making sure that multinationals should and will not operate under the law of the jungle, but under the law of human rights. This generally symbolizes the raison d'être of the COC. Accordingly, bearing all the above foundational rationales of the COC in mind, I will move on to specifically address the reasons for its importance.

4.3.1 Filling the loopholes of the 'catch through the others' hand' approach

As it has been revealed under chapter three, the predominant view under the existing international human rights law, which puts its trust in the regulatory power/obligation of home and host states in controlling the malicious conducts of global corporations on human rights, is found to be full of flaws and inadequate. As Ratner rightly figures out, 'a system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights'.[153] The absence of consolidated binding international legal framework on the human rights obligations of non-state actors, in our case TNCs, is a great legal gap in the international human rights protection system. The way to fill this gap is by devising a kind of binding supranational law (to be implemented by supranational institutions) that entails direct accountability of multinational enterprises for international human rights standards. That supranational law, as I now propose, is the COC. The COC catches TNCs directly, not merely through the others' hand. The adoption of COC benefits both the victims of TNCs and the home and host states as well. From the perspective of victims, it enables them to directly claim their rights against the TNC that violates or participates in the violation of their rights before neutral supranational institutions (these institutions will be indicated below) without absolute need for the intermediacy of the self-anointed high priests of international law – states. The neutrality of such international institutions lies not in their total indifference to the way globalization has to be shaped, but in the usual belief that they stand for universal interests than the subjective and sometimes rapacious interests of individual nation or group of nations. In more practical terms, the benefits of COC for the victims of TNCs imply that unlike the scenarios prevalent under the home and host sates based accountability model, their claims will not be hampered by the challenge of extraterritoriality and that they will not be troubled by the doctrine of '*renvoi'* (referral of

[153]. Steven R. Ratner, 'Corporations and Human Rights : A theory of Legal Responsibility' (2001) 111(3) Yale Law Journal 443,

cases from countries to countries). Besides, victims claims will not be resisted by the defense of corporate veil (limited liability of parent corporation investing as a shareholder in the foreign subsidiary) as it could enable the victims to directly lodge their claims against the actual tormentor of their rights (the subsidiary) without the need to chase after the parent company. Of course, if the victims can trace the parent company, they will not be prohibited from lodging their claims against the 'transnational group' pursuant to the COC'.[154] In short, the COC will not recognize the defense of corporate veil. Apart from victims, the COC also benefits the home and host states. First, let us see from the perspective of home states. Some home states might be more enthusiastic than others in protecting individuals and communities against their corporations that invest trans-nationally. Meanwhile, such home states will be confronted with the long lasting and deep rooted international law principle of non-interference in the internal affairs of other states –the principle usually referred to as the bedrock of the charter of the United Nations as provided under article 2(7). As overlooking this celebrated principle and taking unilateral extraterritorial measure (without solid legal basis under international law) concerning the human rights conformity of the activities that their companies undertake abroad might be severely reproached by host nations that prefer economic development to strong human rights protection, they quit to take action.[155] In spite of their benevolence, those generous 'human rights protection minded' home states might be condemned by the human rights champions for the human rights violations undertaken by the acts or complicity of their multinational enterprises operating in overseas. As such, these states become *scapegoats.* If COC is adopted, this kind of state of affairs will be reduced as the victims, as a matter of principle, direct their fingers towards the actual violator – the TNC than to the benevolent home state. This way, the COC not only saves the international moral standing/integrity of such generous home states against undue criticisms, but also maintains its relations with host states undisturbed. From the perspective of the host states, the adoption of the COC (which sets common international minimum standard of protection) enables them to be somehow relieved of the fear of taking unilateral measure

[154] .Parent company and its foreign subsidiaries are together called transnational group or transnational corporate group (see John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) [101] (4), The American Journal of International Law , 819)

[155] . Grundman argues that that the United States ATCA is an epitome of legal imperialism – an instance whereby the it exerts its influence abroad (see Rock Grundman, 'The new imperialism: The extraterritorial application of United States law (1980) 14 (2), American Bar Association 257

against TNCs operating in their territories. Host states afraid of taking unilateral measures basically for two reasons. The first is the fear that the corporation might leave their country to other countries having less regulatory framework.[156] This emanates from the common assumption that investors are migrants. The second is the fear of the possible disturbance of their relations with the corporation's home states (as home states also have greater interest in the protection of the interests of their corporations abroad).[157] The merit in adopting the COC is, therefore, what host nations cannot do separately (this is especially true for weak host states), they can do jointly with other host nations and the international community as a whole. In this sense, the COC somehow neutralizes growing concern of the power imbalance between host states and TNCs that is brought about by the shift of economic and technological power from many nations of the world to private entities (TNCs) as it has been elucidated under the preceding chapter.

4.3.2 Filling the drawback of soft law based regulation

Previously, I have shown the defects of soft law based regulations – both the defects common to all soft laws and defects peculiar to each of the soft laws that were within our special emphasis. In so doing, we have seen that the efforts that those soft laws that are aimed at lessening the accountability vacuum that the current international human rights law has left with regard to human rights infringements perpetrated by trans-nationals could not hit enough to their target. To fill this gap, the international community has to adopt the COC that provides direct and binding minimum international human rights obligation on TNCs. The COC, as binding international law, solves (legally speaking) the inherent common drawback of soft laws – the problem of being nonbinding. Besides, the COC also lessens the specific problems that were identified in relation to every soft law as I have expounded them earlier on. Among them are, the absence of sufficient institutional and procedural avenues for victims to vindicate their rights. The COC should also clearly define, as far as possible, the concepts like sphere of influence that are vaguely stipulated in the soft laws. I will elaborate more on what it mean 'sphere of influence, in the context of the COC in future

[156] . Philip Alston and Ryan Goodman, *The successor to International Human Rights in Context: Law, Politics and Morals (*Oxford University Press 20013

[157]. Carlos Lopez, '*The 'Ruggie process': From Legal Obligations to Corporate Social Responsibility*?' (Cambridge University Press 2013) (emphasis added)

discussion concerned with the nature of obligations that have to be incorporated under the COC.

4.3.3 Filling the defect of CSR-based accountability model (voluntary self-regulation)

As I have indicated earlier as part of the discussion 'soft laws', the notion CSR – the belief/ social expectation that corporations voluntarily restrain the adverse impacts of their activities on the community is not a new phenomenon. It has been believed in for decades but it its success in reducing corporate human rights abuse has been not so impressive.[158] Deva offers a succinct explanation of the inadequacy of CSR (which he calls it internal self-regulation) while he notes:

> Though internal or self-regulation would seem to be the most desirable and most efficient way of ensuring that multinational enterprises respect human rights, it has proved to be an inefficient mechanism of regulation and hence the search for an efficacious method of external regulation continues.[159]

By any measure, I am not alleging that CSR is a totally futile endeavor in the march towards the regulation of the human rights impacts of global corporations. CSR is also the alternative that the business world support over the other means of regulatory mechanisms as its realization is entirely dependent on their wish than on external legal-institutional influence. Of course, it would have been better if corporations voluntarily live up to their expectations without the need for external pressure. What I am saying, however, is that due to the nature of corporations – as they are private entities primarily driven by profit making intent, they might not sufficiently subject themselves to the costly idea of human rights protection. This is what the practical world shows us. Only an ideal benevolent corporation can truly live up to that expectation. At a time, some influential personalities, notably Milton Friedman, the Nobel Prize laureate American economist, have even suggested an irresponsible view regarding CSR stating that 'the only social responsibility of corporations is to realize profit gain for their shareholders and nothing else.'[160] The remoteness of the

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[158]. Surya Deva, 'Acting Extra-territorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?' (2004) 5, Melbourne Journal of International Law 37

[159] . ibid.

[160] . Milton Friedman, 'The social responsibility of business is to increase its profits' *New York Times*(New York, 13 September 1970)

practicability of CSR (to use Baker's expression, the 'toothless vise') engenders a huge distrust in the community who are actually and potentially at the risk of corporate human rights abuse. On top of that, it has been observed that the home and host state based and soft law based regulations are proven inadequate to ensure the compliance of international corporations to international human rights standards. If so, where is the remedy? The remedy is to devise a mechanism of external regulation of the TNCs-human rights issues that backs up the internal regulation (CSR). There might be many possibilities of external regulatory mechanisms on TNCs. The one I am now proposing is the adoption of the COC that entails external regulation of the observance of human rights by TNCs from the international plane.

4.3.4 Advancing the idea of 'universality' of human rights

Prior to the development of the international human rights protection system currently in place, the issue of handling human rights was almost nothing more than a domestic affair of each sovereign nation.[161] This was especially true until the Second World War which left inexpressibly horrible legacy of violations of the rights and freedoms of human kind.[162] Thus, the turning point in the 'internationalization' of human rights is this tragic war which has absolutely proven to the international community that domestic laws and institutions alone can neither sufficiently protect human rights nor it brings consistent practice. This led to the development of the understanding that human rights are innate rights that universally apply to all members of the human family by virtue of their inherent dignity[163] that is rooted in being members of the human race irrespective of the territorial boundaries in which they live. This understanding culminated in the construction of international human rights protection system.[164] By international human rights protection system I mean the laws,

[161]. Marion Weschka, 'Human Rights and Multinational Enterprises: How Can Multinational Enterprises be Held Responsible for Human Rights Violations Committed Abroad?' (2006) 66 Zao RV 625

[162] .ibid

[163] .Nicolas Carrillo Santarelli, 'Non-State Actors' Human Rights Obligations and Responsibility Under International Law (2008) 15 Revista electronic Estudios Internacionales 1

[164] . However, we do not mean that the development of the international human rights protection system on the bedrock of the universality of human rights concept has totally solved the issue of universalism and cultural relativism debate nor will the COC totally solve this debate. Even the 1993 Vienna Declaration and Program of Action (VDPA), which invigorates the idea of universality of human rights has, though grudgingly and ambiguously, appears to give some room to the relativist view while it stipulates that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be "borne

institutions and procedures that are in place at the international level for the observance of the rights and freedoms of human kind. Thus, the idea of international protection of human rights has its roots in the idea of the 'universality' of human rights. Implicit in the term 'international' protection of human rights is, therefore, the term 'universal' protection of human rights. It is in vindication of the 'universality' of human rights that the drafters of the UDHR preferred the designation 'universal' declaration of human rights to 'international' declaration of human rights. Any endeavor for the protection of human rights, therefore, has to promote the notion of universality of human rights as rooted in the inherent dignity of human kind, not retard it.

Having the above conceptual underpinning in mind, the strategic question that has to be answered is whether the COC furthers the idea of 'universality' of human rights or not. I argue that the COC furthers the notion of universality of human rights as it adds up a system of *international* (universal) protection of human rights rather than letting the issue of business-human rights talk to mere national regulation and corporate voluntary self-regulation. Thus, the COC has the potential to inculcate the idea of respect for the inherent dignity of human kind everywhere in the business world without being confined to the narrow territorial area in which TNCs operate.

4.4 The questions of doctrine and practicability: The parties to the COC?

Earlier, I have tried to offer the rationales for the COC. Now is a time to address some associated issues – the questions of doctrine and practicability/achievability that could reasonably be raised in relation to this new proposal.

It is common to expect that anyone who is familiar with the *modus operandi* of public international law in general and international human rights law in particular and who reads this study from the beginning to the present or even who reads the current chapter alone asks for or seeks an answer for one vital question: who will be the parties to the COC? This question is likely to come from the long standing approach to international law that only

in mind" in the protection and promotion of human rights system' (See paragraph Vienna declaration and program of action, adopted at a world conference on human rights, Vienna, 25June 1993, para. 5

states[165] (and exceptionally international organizations[166]) could be parties to international treaties. In a sense, it is a question of doctrine/theoretical underpinning. My answer is not different from this mainstream view – the parties to the COC shall be states and states alone, not TNCs. This answer again gives rise to another question: If the parties to the COC are states and states alone, what is new with this new treaty or how it differs from the already existing international human rights system? This issue will be made clear as I continue discussing on the issue. What matters most and what is new with the COC is that unlike other human rights treaties that are almost neutral on the *direct* human rights obligations of non-state actors, in our case TNCs, the COC will impose direct and binding minimum obligation on TNCs. I understand from the outset that proposing TNCs to be parties to the COC will engender the following theoretical and practical controversies leading to deadlock and makes its adoption more unlikely. First, let us see the theoretical challenge. As the mainstream view in international law rests upon the notion that it is made by states, suggesting TNCs to be parties to the COC could be attacked as theoretically ungrounded. As I have indicated under chapter two, States resist the idea of allowing non-state actors to be parties to international treaties for the common fear that it sends the message of putting those actors on equal footing with states in the international domain of life. It is to avoid such kind of doctrinal complexity that I suggest only the states to be eligible to be parties to the COC. The other doctrinal question and which is also related with the above explained doctrinal question is the question of international legal personality of TNCs. Before offering my assertion in this regard, I prefer to first recite the observation of Fauchald and Jo stigen that reads:

> 'Some scholars suggest that international law cannot impose obligations on corporations because corporations do not possess international legal personality'.[167]

The message of the above extract is crystal clear. It tells us the argument raised against the imposition of obligations on corporations based on the idea that they are not international

[165] . As to the issues of the treaties between states, see the Vienna Convention on the Law of treaties, concluded at Vienna on 23 May 1969

[166] As to the treaties between states and international organizations and between international organizations *inter se,* see the Vienna convention on the law of treaties between states and international organizations and between international organizations *inter se*, concluded at Vienna in 1989.

[167]. Ole Kristian Fauchald and Jo stigen, 'Corporate Responsibility Before International Institutions' (2009) 40, George Washington International Law Review 1026 (foot note omitted).

legal persons. It is true that TNCs are, at the first glance, the creations of domestic law of each country, not the creations of international law and as such establishing the international legal personality of these entities will not be an easy task. Then, the question comes, how can the COC impose direct obligations on TNCs in face of controversial issue of their international legal personality? Before rushing to answer this critical question, I opt to derive a lesson from the already existing international accountability regime that is set for two non-state actors – the 'individual' and non-state armed groups. Today, the individuals bear obligation under international law, particularly under international criminal law. The recent and more comprehensive example is the international criminal responsibility of individuals as prescribed under the Rome Statute of the International Criminal Court.[168] This indicates that individuals attain international personality or become subjects of international law though in a limited fashion. Similarly, non-state armed groups, which are prototype of non-state actors, bear direct obligation under international humanitarian law pursuant to article 3 common to the four Geneva Conventions of August 12, 1949 and the 1977 additional protocol II to them. [169] These indicate that the individual and non-state armed groups are becoming international persons/ become subjects of international law at least in limited fashion. Basing my assertion on the lesson that I can draw from these two scenarios, I suggest that the fact the COC will impose direct obligation on TNCs has to be understood that at least in limited scenarios that the COC has in view, TNCs attain international legal personality or become subjects of international law. This is a pragmatic approach rather than looking for solutions in the myriads of theoretical debates regarding the international legal personality of TNCs.

That much being said about doctrinal questions relating to the signatories to the COC, let me delve into the question of practicality/achievability. Suggesting TNCs to be parties to COC appears to be impracticable for many reasons. Firstly, unlike states, TNCs are not permanent

[168] . See Rome statute of the international criminal court, adopted on 17 July 1998 and entry into force 1July 2002

[169]. The first Geneva convention for the amelioration of the condition of the wounded and sick in armed forces in the field of 12 August 1949; the second Geneva convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea of 12 August 1949; the third Geneva convention relative to the treatment of prisoners of war of 12 August, 1949; the fourth Geneva convention relative to the protection of civilian persons in time of war of 12 August 1949. See also protocol II additional to the Geneva conventions of 12 August 1949 relating to the protections of victims of non-international armed conflict of 18 June 1977

– they are subject to dissolution and wind up for different reasons as per the legal system under which they are created. Secondly, identification of the TNCs eligible to be parties to the COC from hundreds of millions of TNCs operating around the globe is a very cumbersome process. Thirdly, as the preoccupation of TNCs is profit making than the concern for the public, it unlikely that they agree on international human rights instrument that meaningfully guarantees protection of human rights against their business interests. Fourthly, complete detachment of the TNCs accountability system from the state system is not practically feasible. It has to be the states that lay a groundwork for the accountability of TNCs at international level and the way to do so for them is by ratifying the COC. However, to assure the democratic nature of international law making process in relation to the COC, the business community (mainly those operating trans-nationally) should be offered the chance to forward their views during the negotiation processes. This increases the legitimacy of the new instrument.

4.5 The question of hierarchy: The COC vs other commitments of states and TNCs

Earlier, I suggested that states and only states could be eligible to be parties to the COC. This sub-section is devoted to the question of 'hierarchy between the COC and some other commitments of states and TNCs under other legal instruments'. In the practical world, states enter into a multitude of international treaties that sometimes involve contradictory commitments. The most relevant ones to the present discussion is that states (mainly developing host nations) enter into investment treaties[170] and quasi international agreements[171] that potentially contradict with their obligations under international human rights law. This contradiction is expressed in the sense that those investment treaties and agreements underscore the protection to be guaranteed for the investors (TNCs) without providing guarantees for the protection of the rights of individuals and communities of the

[170] Investment treaties refers to treaties entered between or among states for the purpose of enabling the companies of one state (here home state) to invest in the territory of another state (host state). It could be bilateral or multilateral though bilateral investment treaties are more prevalent.

[171] .Quasi international agreements, also called internationalized contracts or host government agreements (HGAs), refer to the agreements (contracts) entered between host states and the TNCs investing in their territory (see Fernandez Sixto, 'Business and Human Rights: A study on the Implications of the Proposed Binding Treaty' (LLM thesis, University of Essex 2015). See also Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework' (2016) 4, Mekelle University Law Journal 37 (footnote omitted), John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) The American journal of international law 819, 824

host nations against these TNCs.[172] In such situations, even when the host nations feel to take measures to protect their people against the abuses of TNCs, they (host nations) soon realize that they are trapped in those contradictory commitments which in turn lead them to hesitate to take actions. Even in case they boldly go forward and take corrective measures against TNCs, they do it at the risk of facing arbitration proceeding and binding decision before international arbitration tribunals.[173] The problem of the kind mentioned above occurs not only in the context of investment treaties and contracts but also in other business-related treaties like free trade agreements.[174] Now let us take the issue to other way round. As it has been indicated earlier, even if the parties to the COC have to be states, its primary addresses are TNCs – it imposes direct substantive obligations on them. In a situation that resembles different commitments that states enter into, TNCs also inter into investment agreements (host government agreements[175]) with host states or into business contracts with any other entities other than states.

That much being said, the question worth addressing now is what will be the hierarchical relationship between the COC on the one hand and different investment treaties and agreements and trade deals that states parties to the COC might have already entered into or possibly enter into in the future? Second, what will be the hierarchical relationship between the COC and any investment agreement that a given TNC make with host states or any other contracts it makes with any other entity other than states? Is the ordinary rule of legal interpretation – the *lex specialis derogat lex generalis* offer a full guidance on this critical subject? There is no ready-made answer to this question under the international legal milieu. Indeed, first one of the above issues – different treaties that states enter into with other states or with international organizations is part of the emerging problem of 'fragmentation' of international law that is symbolized by the proliferation of different special body of international laws and institutions that sometimes involve contradicting

[172] . Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A cursory Review of the Ethiopian Legal Framework' (2016) 4, Mekelle University Law Journal 37

[173]. See Guiding principles on business and human rights: Implementing the United Nations "Protect, respect and remedy framework", report of the special representative of the secretary general on the issue of trans-national corporations and other business enterprises, John Ruggie, A/HRC/17/31 (21 March 20011). See particularly commentary to principle no. 9.

[174] .ibid

[175]. Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A cursory Review of the Ethiopian Legal Framework' (2016) 4, Mekelle University Law Journal 37

normative contents.[176] Coming to the point at hand, of course, some human rights advocates tend to suggest the supremacy of human rights treaties over other international commitments of states, mainly commitments relating to commercial and investment matters.[177] The business world might not quickly welcome this stance. However, for pragmatic importance this position seems to be plausible. Therefore, I argue that, the COC should enjoy supremacy over other investment treaties and agreements that states parties to the COC are parties to. From the perspective of TNCs that potentially fall under the COC too, the above scheme should apply. That is, the host government agreements and any other contracts they conclude with entities other than states has to be inferior to the COC in case of contradiction. The only treaties and host government agreements to which the COC has to surrender its supremacy should be those providing more human rights protection than the COC itself. This should be the case because as the COC provides only basic guarantees, any instrument that offers more protection has to be positively reinforced as it adds on human rights protection than endangering it. One may legitimately question the wisdom of the present assertion – the supremacy of the COC. Presumably, those who are with the 'development oriented' mindset over rights talk will not be better-off with this assertion as Foreign Direct Investment (FDI) through TNCSs is the main vehicle of economic development. However, if the COC is to really reduce or reverse the human rights accountability vacuum that the 'New Leviathans' are now enjoying under international human rights law, submitting to the hierarchical dominance of the COC is a matter of practical necessity. One can imagine what would happen to the COC if it does not enjoy supremacy in the context I suggested before. The states might disregard the COC by appealing to their investment and commercial commitments that fall in conflict with it. For stronger reason, TNCs also do the same as they are naturally inclined towards profit maximizing than the cause of human rights, if they are not always human rights unfriendly. In the existence of the above risks, the COC will not accomplish its purpose and it will be only as good as if it was not adopted unless it is given supremacy. Thus, I submit that

[176] .Pierre-Marie Dupuy, 'A Doctrinal Debate in the Globalization Era: On the Fragmentation of International Law' (2007) 1 (1) European Journal of Legal Studies 26

[177] .See, for example, report on the first session of the open ended IGWG on business and human rights on transnational corporations other business enterprises with respect to human rights, A/HRC/31/50 (5 February 206). As indicated in the report, some of the panelists advocate the supremacy of human rights treaties over other treaties, mainly commercial and investment treaties. See especially, paragraphs.52 and 53 of the report.

individuals and peoples should not be slaves of multinationals for the sake of economic development, but both human rights protection and development should go in harmony. Indeed, the 1993 Vienna Declaration and Program of Action articulately provides the path that the international community desires to follow as universally accepted principle while it states that the "human person" is the central subject of development'.[178] This indicates that any development endeavor that avoids human rights and freedoms is unacceptable.

One might ask, as to the hierarchical position of the COC in relation to other human rights treaties in case of conflict. I suggest that, if the other treaties offer more protection than those offered in the COC, the COC has to remain inferior to them. If not, the COC has to be the controlling law. Indeed, unlike the context in which I just discussed in relation to the hierarchical position of the COC and investment and commercial treaties and agreements, the relation of the COC with other human rights instruments might not be as such controversial. Even though they do not directly talk about 'hierarchy', international human rights treaties are already accustomed to stipulate the supremacy of the other instruments guaranteeing more human rights protection than the ones recognized in them. For instance, article 5(2) of the ICCPR prescribes that:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any state party to the present covenant pursuant to law, conventions, regulations or custom *on the pretext that the present covenant does not recognize such rights or that it recognizes them to* a *lesser extent*.[179]

The close reading of the above quoted sub-article reveals that, it is allowing the supremacy of other instruments providing more human rights protection than the convention itself. This could be taken as a better lesson to suggest the hierarchical dominance of other instruments offering better protection than the COC and vice versa.

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[178]. Vienna declaration and program of action, adopted at a world conference on human rights, Vienna, 25June 1993, para. 5

[179]. Adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entered into force on 23 May 1976

[179] . Adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entry into force 23 May 1976 (emphasis added)

4.6 The question of substance: Hinting the nature of rights and the nature and context of obligations to be included under the COC

Earlier, I have attempted justifying the need to adopt the COC. The other questions that naturally flow from it are as to its substance. That is the content of rights and the nature and extent of obligation the COC should come up with. I will be discussing these two issues under separate sub-topics.

4.6.1 Hinting the content of rights

In fact, the objective of this sub-section is not to offer the list of human rights that could be included under the COC. The question that has to be answered here is whether all categories of human rights – civil, political, economic, social, cultural, as well as the right to development, the right to clean and healthy environment and the right peace could be the potential candidates for inclusion under the COC. Since the 1990's, the prominent point of reference to answer such kind of question is the 1993 Vienna Declaration and Program of Action (VDPA). Paragraph five of the declaration declares that:

> "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally, in a fair and equal manner, on the same footing and with the same emphasis".[180]

The general idea of the above paragraph is that as all human rights are interrelated, the respect or protection for one of them entails the respect or protection for some others and vice-versa. For instance, the right to life, which is regarded as the mother of all rights, is connected with all other rights as the loss of one's life entails the loss of all of one's rights since the dead can no longer enjoy his rights on his behalf. The right to clean and healthy environment is highly related with other rights like the right to health as contamination of the environment can cause health problems; it is also related with the right to life as contaminated environment usually creates health problems that eventually lead to loss of life. This is true irrespective of the author of the violation, that is, whether it is a state, TNC or other entity. Thus, every human right has to be observed by any organ without prioritizing between and among rights. Based on the above assertion, I suggest that all

[180] . ibid

categories of rights have to be included under the COC. However, this assertion must not be confused. I am not suggesting that a given TNC has to observe all categories of human rights everywhere; I am suggesting that it has to observe all categories of human rights in areas that come under its 'sphere of influence' (the 'sphere of influence' criterion will be elaborated under the section that immediately follow). The actual question of which particular right or set of rights are violated by a given TNC through its particular activity or series of its activities at a given time is something to be determined on a case by case basis.

4.6.2 Hinting the nature, context and threshold of obligation

Under international human rights law, the nature of obligation (the obligation is usually incumbent on states) is often explained with the following sets of obligations: the obligation to respect, obligation to protect and obligation to fulfill.[181] Indeed, there is also another vocabulary relating to the nature of state obligation, that is, the obligation to promote.

The duty to respect, simply defined, refers to the obligation of the duty bearer to refrain from acting or from facilitating others to act in ways that jeopardize the enjoyment of human rights and freedoms.[182] Whereas, the obligation to protect signifies the obligation of the duty bearer to make sure that human rights and freedoms are not jeopardized by third parties and ensure that the victims are remedied in case their rights are infringed. The duty to fulfill represents the obligation of the duty bearer to take positive measures to make sure that the right holders really enjoy their rights as they are guaranteed in laws. The obligation to promote, as it can easily be inferred from its very terminology, symbolizes the obligation of the duty bearer to create awareness with respect to human rights and freedoms. Incorporating human rights issues in educational curricula and disseminating human rights instruments for the people are among the mechanism often used to promote human rights.

The question now is whether it is plausible to include under the COC all the aforementioned types of obligations. This question essentially takes us back to our earlier discussions on the infirmities of relevant soft laws. One of their infirmities was their silence on the other types

[181] . Mizane Abate, 'Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework' (2016) 4, Mekelle University Law Journal, 37. See also Oliver De Shutter and et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights'(2012) 34, Human Rights Quarterly, John Hopkins University Press 1084

[182]. Ibid..

of obligations of TNCs except the obligation to respect. For instance, the GPs, which are viewed as the most comprehensive international reference point currently in place on the issue of TNCs and human rights, directly addresses only the corporate obligation to *respect* human rights.[183] This not only has the repercussion that TNCs are not bound to take positive measures to be able to comply with human rights standards but also greatly restricts the amelioration of the enormous devastations that TNCs actually bring to individuals and communities where they invest. One area in which the COC has to show progress is, therefore, on the nature of obligations that TNCs have to assume. Bearing all the above points in mind, I suggest that to make it a truly human rights instrument capable of ameliorating the tragic records of TNCs upon human rights, the COC has to embrace all the aforementioned types of obligations. I reasonably expect that my present affirmation to impose obligations other than the obligation to *respect,* that is, the obligations to protect, fulfill and promote human rights on TNCs generates more skepticism and controversies as these were unprecedented let alone in binding human rights instruments but also under the soft laws discussed earlier. The best way to pacify this kind of skepticism is that regard has to be made to the very nature of TNCs while incorporating the obligations to protect and fulfill under the COC. What this affirmation is meant will be made clear under the coming paragraphs as I discuss the context and threshold of human rights obligations of TNCs that the COC has to embrace.

Once we capture the general understanding of the content of rights and nature of obligations that the COC has to encompass, there is another critical question awaiting answers. That is, in what context (situation) will the TNCs bear obligations under the COC? Will it be in certain context only or in all situations? I suggest that as far as this question is concerned, it is tenable to draw lessons from the approach taken in the relevant soft laws as explicated in the earlier discussions. As it has been discussed previously, the relevant soft laws like the 1999 UN global compact and the 2003 UN norms limit the context of obligations of TNCs to the context of their 'sphere of influence' though they have not clearly indicated the meaning of this concept. Principle number 1 of the global compact provides that:

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[183]. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework", Report of the Special Representative of the Secretary General on the issue of Trans-national Corporations and Other Business Enterprises, John Ruggie, A/HRC/17/31 (21 March 20011). See especially from principles 11 through 21.

> ‘Businesses should support and respect the protection of human rights within their ‘*sphere of influence’*

Whereas, the second paragraph of article 1 of the UN draft norms stipulate that:

> Within their sphere of activity and influence, TNCs and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights recognized in international as well as national law including, the rights and interests of indigenous peoples and other vulnerable groups.[184]

As it has been said earlier, the basic aim in dealing with those soft laws was not for historical curiosity, but to derive some lessons from them for the rationalization of the COC. One lesson I could drive from them is the notion of ‘sphere of influence’. Like the GPs, the COC should also adopt the ‘sphere of influence’ test’ to limit the context in which TNCs will be liable, but unlike the former ones, the COC has to offer clear guidance on the meaning of this concept. Thus, even though TNCs are bound to observe all categories of human rights and bear obligations of all types, their application has to be confined to the situations which fall in the ‘sphere of influence’ of a particular TNC in relation to a particular type of obligation or any combination thereof. Likewise, depending on the circumstances prevailing at hand, the ‘sphere of influence’ might be construed to embrace specified geographical area or specified area of activity or both. The reason why this kind of restriction is needed is bearing in mind the fact that TNCs are neither state/public agents nor charitable organizations destined to spend all of their resources in the interest of the people but are private entities operating for gains. So, unlike states that has to observe all types of human rights obligations in all situations without exception the obligations of TNCs has to be defined with the visible link they have with the right or set of rights at issue. That is what it meant sphere of influence. The best way to clarify this point is by a way of example. For instance, let us assume that a given TNC (call it, Electronics Company) invests in certain host states in the production of electronic devices like computers. In this instance, it is truly

[184]. Norms on the responsibility of TNCs and other business enterprises with regard to human rights, U.N.Doc E/CN.4/sub.2/2003/12/Rev.2 (2003), article 20

under its sphere of influence to educate the community about the adverse impacts of its activities on the environment, to educate the local community to claim their right if they feel that it is in jeopardy (these are aspects of the obligation to *promote* human rights). The obligation of the Electronics Company to *protect* human rights in the above context requires it to make sure that third parties like states and other entities not use this particular company as an instrument to jeopardize human rights and freedoms of the individuals and the community in which it invests. This could also mean that if the rights of the individuals and peoples are violated in the above context, the company has to make the harm good or if it fails to do so, victims could bring their claim for redress before the competent international adjudicatory organ to be set up as per the provisions of the COC (that organ will be indicated in our upcoming discussions). The obligation to *fulfill* in the above context requires that the Electronics Company has to allocate resources and take some positive measures for the fulfillment of the rights of individuals and community that come under its sphere of influence. For instance, this could mean that the Electronics Company has to invest resources to make sure that the individuals and communities that are displaced from their land for the establishment of this company will get a rewarding job either within the company or outside, as the case may be.

I think the above explanations reduce the confusion and skepticisms regarding the context in which TNCs could be bound to observe human rights obligation to respect, protect, fulfill and promote. However, is it reasonable to say that the Electronics Company bears the positive duty to educate individuals about their political right to vote? Or why it bears the obligation to fund the construction of domestic justice offices and court rooms so that people can have better access to justice? In such fact situation, it is not reasonable to impose such exaggerated obligation on such private entities in areas which does not have any direct or indirect link to its activities. It is outside its sphere of influence. After all, such excessive obligation restricts free market economy. Thus, the sphere of influence test represents what is often referred to as the Aristotelian golden mean – the moderation between two extreme conditions. It both protects human rights and freedoms against the encroachment emanating from TNCs and also prevents the imposition of exaggerated obligation on these private entities. I also argue that the fact that a given TNCs bears the obligation to respect, protect, fulfill and promote human rights institutions falling under its sphere of influence is not

with the intention of relieving the relevant state from its human rights obligations in this particular circumstances. The COC will not dismantle the already existing mechanisms of human rights protection, but supports them.

The last, but not the least point worth addressing in relation to the obligations to be included under the COC is the question of threshold of liability. That is, what degree of action is required of TNCs to say that it has failed to act pursuant to its obligation under the COC? In this case too, I will drive a lesson from those soft laws discussed earlier. Those soft laws provide 'due diligence standard' as threshold of liability. That is, the moment at which a given TNC fails to act with 'due diligence' towards a right that falls within its sphere of influence, it meant that it has violated its obligations under the COC. Indeed, among all the soft laws that have been discussed earlier, it is the GPs that introduced the notion of 'due diligence' standard.[185] The GPs refers to it as' human rights due diligence.[186] I also emphasize that the question of due diligence (threshold of liability) comes to the picture if and only if the right under question falls under the sphere of influence of a given TNCs. If not, that TNC has no obligation at all under the COC so that no talk about threshold of liability – due diligence standard. What constitute due diligence action is something to be determined on a case by case basis by taking into account the rights violated, the nature and capability of the particular TNC to be able to act in a particular way in particular situation. The basic thing to hold in mind is that the failure to act with due diligence with respect to its obligations in the situations falling under its sphere of influence marks the point at which a given TNCs is said to have violated its obligation under the COC. I argue that the due diligence standard should also be incorporated under the COC in a way that embrace all types of obligations: obligation to respect, obligation to protect, obligation to fulfill and even obligation to promote. Indeed, these all types of human rights obligations are not fully separate from one another and they are in fact, mutually reinforcing. I will go back to the examples of the Electronics Company to elucidate how the above four types of human rights obligations work in light of the human rights due diligence standard. Assume that the

[185]. See Guiding principles on business and human rights: Implementing the United Nations "Protect, respect and remedy framework", report of the special representative of the secretary general on the issue of trans-national corporations and other business enterprises, John Ruggie, A/HRC/17/31 (21 March 20011). See particularly commentary to principle 18.
[186].ibid

individual members of the local community that are dislocated as a result of the establishment of the Electronics Company suffers from lack of rewarding jobs and unable to sustain their lives. Further assume that the victims lodge their claim for redress before the international adjudicatory organ (see section 4.7.2 below) alleging that their human rights to work and related rights are violated. In this case, the issue that the adjudicatory organ has to address is whether, in that particular scenario, the Electronics Company acted or not acted with due diligence, that is, with persistent effort to make sure that those individuals get a rewarding job. If not, the company is said to have failed to act with due diligence and as such it violates its duty to *fulfill* the right under consideration and its obligation engages. This entitles the victims to redress. Let us think a little bit otherwise. Suppose that on certain working day, mafia groups from outside entered the fence of the company and stabbed some of the workers to death and severely injured the others. In this particular scenario, the company is said to have violated its due diligence standard if it has not provided adequate security guards and if it does not made a call for help from the local police, local community and from other imaginable sources to rescue the victims. In this scenario, the company violates its obligation to protect human rights with due diligence standard of care.

4.7 Hinting institutional means of enforcement

Let us begin this sub-section with two common affirmations in the legal world. The first is the idea that legal rules and principles are only as strong as the enforcement mechanisms behind them. The second is the idea that if there is a right, there has to be a remedy or right without remedy is an equivalent of no right at all. Both of these assertions are rooted in pragmatism, not in rhetoric. From these sayings, I can drive the affirmation that the COC will be only as strong as the enforcement mechanisms to be devised for it and the rights to be guaranteed under it will remain rhetorical unless accompanied by remedial measures in case they are put in peril. To speak contrary to G. W. Bush's expression, the fact that the COC incorporates list of human rights and obligations will not signify "mission accomplished". The rights and obligations to be guaranteed under the COC will not be a self-executing. Thus, for the assurance of the implementation of the rights to be recognized under the COC, I suggest the following institutional back up.

4.7.1 Hinting a monitoring organ – a committee of experts

Like other international human rights treaties such as the ICCPR establishing treaty bodies (monitoring organs), the COC has to include provisions establishing a monitoring organ. This monitoring organ shall be composed of committee of experts (here after called the corporate obligation committee – COC committee, for short). The committee members work in their professional (personal) capacity to supervise the realization of the COC, not as representatives of states or business entities. Some might ask that why is it not preferable to give the task to the already existing committees under the human rights treaties than duplicating committees? However, given the fact that the COC is international human rights instrument of its kind in the sense that it imposes *binding* and *direct* obligations on TNCs than on states, it requires special expertise and that is why I suggest this new committee. Second, as the number of TNCs operating in the practical world for which the COC committee has to give technical assistance are as many times more than the number of states of the world, this task cannot be properly accomplished by the committees that are already instituted under international human rights instruments like the ICCPR since their number is limited – eighteen only.[187] Given the cumbersome process of international law making, it also not warranted to suggest the amendment of the ICCPR to increase the number of the members of the committee to be sizeable enough to do the job under the COC.

The committee should not be given the power to receive complaints from victims. This has to be reserved for the court (see the next section below). The function of the committee has to be the following. It has to keep the list of TNCs operating throughout the world – this includes TNCs currently in place and those that come into existence in future pursuant to the laws of each nation and make them public. The committee should also offer technical assistance for any TNC and state with respect to the understanding and implementation of the COC. In addition, it shall be given the power to receive periodic reports from the TNCs in its list in relation to their compliance with the COC. The committee should also receive reports from member states to the COC with respect to the status of those members in relation to the implementation of few obligations that the COC imposes on them **(**see section

[187] . International covenant on civil and political rights, adopted and opened for signature, ratification and accession on 19 December 1966 by General Assembly resolution 2200 A (XXI) and entered into force on 23 May 1976 article 28 (1)

4.9 below as to the limited obligations of states under the COC). The details about the nomination, election, numbers, functions, sessions and, working procedure and term of office of the committee have to be indicated in the COC and shall be fully elaborated in the rules of procedure of the committee that will be drawn by the committee itself. The committee shall also be given the power and duty to give general guidance to victims who need to lodge their claims before the court (see the court below).

4.7.2 Hinting international court of corporate justice (ICCJ)

Before proceeding to my proposal under this sub-section, it is wise to give few background explanations. The first is that, as things now stand, there is no world court of human rights that could adjudicate claims of victims of human rights violations against any violators despite some initiatives to establish such kind of court.[188] Second, as it is unambiguously stipulated under article 34(2) of its statute, only states can be parties before the international court of justice (ICJ) with regard to cases that it adjudicates in accordance with its contentious jurisdiction. Accordingly, there is no global supranational judicial organ that entertains claims of victims of human rights violations committed by any organ – states or non-state actors. In the context of the particular issue under the present study, this means that there is no international judicial organ that adjudicates the claims of victims whose human rights and freedoms are jeopardized by TNCs. In such state of affairs, judicial enforceability of COC at the international level is inexistent. To fill this kind of institutional gap, I propose that there has to be established international court of corporate justice (ICCJ) that adjudicate claims of human rights violations brought by victims/their representatives against the violator TNC. However, if the international community successfully set up world court of human rights (WCHR) that entertains claims of human rights violations with respect to rights guaranteed in any international instruments, I suggest that the powers, personnel and resources of the ICCJ has to be superseded by the new WCHR. In that case, the WCHR has to set up a division/bench on corporate justice that specially adjudicates claims of human rights violations brought by victims/their representatives against TNCs

[188] . On the initiative regarding the establishment of World Court of Human Rights, see Manfred Nowak and Julia Kozma, 'A world Court of Human Rights' (2009), available at www.udhr60.ch , last accessed on 1 May 20017.

pursuant to the COC. The reason why I propose the ICCJ to be overtaken by the WCHR is to avoid duplication of institutions.

The decision of the ICCJ has to be binding on the parties but only in relation to the particular issue under which it is rendered. Based on the nature of the particular claims before it, the ICCJ can decide against the violator TNC a monetary award and rehabilitative measures. However, the ICCJ will not be given the power to order the dissolution of the TNC that is found violating human rights. The reason is that as TNCs are creations of domestic law, it is difficult to dissolve them through international judicial process.

The states parties to the COC have to cooperate with the ICCJ with respect to the enforcement of its decisions. In fact, as in any other area of international law, it might be difficult to ensure the 'cooperation' obligation of states with the court under the COC. Perhaps, the concluding observations (recommendations) that the COC committee makes regarding the compliance/non-compliance of a given state party with its cooperation obligations under the COC will contribute to the observance of this instrument by it.

The jurisdiction of the ICCJ will not include the power to entertain claims against the administrative members or individual shareholders of a given TNC but only the claims that are lodged against the TNC as corporate entity – in its own capacity as a legal person.

4.8 Hinting procedural scheme of enforcement

4.8.1 The issue of standing: *Actio popularis* in focus

Who is eligible to loge claims against TNCs before the ICCJ? Victims and their legal representatives are the first eligible bodies. Besides, the COC has to encompass the idea of liberal standing to enable different nongovernmental organizations and civil societies to lodge claims representing the victims. The COC should also recognize class/group action so that many affected individuals/communities or their representatives can lodge their claims in a single suit in as far as they arise from similar cause of action.

4.8.2 The issue of exhaustion of local remedies: Indicating a new paradigm

Under international and regional human rights instruments, claims before international institutions could only be brought after local remedies are exhausted or if they are believed

to be ineffective. One might ask whether this kind of approach is to be adopted under the COC regarding the claims to be brought before ICCJ. As it has been consistently argued throughout this study, one of the main things that necessitate the adoption of the COC is the ineffectiveness of home and host states based regulation. This connotes the ineffectiveness of local remedies. In this backdrop, it is not reasonable, as a matter of principle, to suggest that the victims have to exhaust local remedies before lodging their claims before the ICCJ. It will be a contradiction to argue that victims have to exhaust local remedy and at the same time asserting the fragility of the local avenues. Thus, as a matter of principle, the COC has to employ the presumption that there is no local remedy available for the victims and it has to directly receive victims' claims. This presumption could be rebutted if and only if the defendant (usually TNCs) could prove to the highest satisfaction of the ICCJ that there is a convenient local remedy to the victims in which case the victims might be required to exhaust the local remedies. This is reliance on the evidentiary rule of a 'reverse burden of prove' rule. Still, the mere existence of the domestic ordinary tort law remedy will not suffice unless it is proven that the domestic forum recognizes horizontal application of human rights, in the present case, the possibility for the victims of corporate human rights abuse to directly lodge their claims for redress against TNCs in human rights law terms. As I have indicated under chapter three in relation to the examples of home state based regulation through the use of domestic tort law remedy in the countries of the European Union, it (domestic tort law) is inadequate to redress claims of human rights violations. Claims of human rights violations have to be lodged self-sufficiently in human rights terms, without the need to accommodate them to elements of mere domestic tort laws.

To some, my suggestion that the exhaustion of local remedy should not be a rule under the COC might appear to be at odd with the *modus operandi* of international law, that is, the principle of complementarity. The best way to reconcile these issues is to understand my new paradigm as a *modus vivendi* – a practical arrangement that enables the coexistence of conflicting ideas for the purpose of achieving a desired result.

4.9 Avoiding confusion: The place of states obligations in relation to the COC

Before making my case under this sub-topic, it is better to have a short account of the commonly known trajectory of international human rights laws. That trajectory is the

historical fact that the need to protect human freedom against arbitrary measures of civil society (or to use the current term, 'state') has caused the struggle for freedom and necessitated to impose upon it (the state) the duty to recognize basic rights and freedoms of humankind. This historical process has culminated in the understanding that the state is the historical violator of human rights and freedoms. As a consequence, international human rights instruments impose obligations almost exclusively on states. This trajectory reveals the historical foundational precept upon which international human rights law has been built.

That being said, it is commendable to answer the question of as to what is going to happen to the relevant state obligation under international human rights law if the international community successfully adopts the COC and imposes direct human rights obligations on TNCs. I argue that the COC is not aimed to disrupt the foundational precept upon which the existing international human rights law is constructed over the decades and centuries of struggles and painstaking works of people from every walk of life. The focus of the COC will be to broaden ways for the victims of TNCs to preserve their rights and freedoms and to narrow the gap left by all other avenues of human rights protection models that were discussed earlier; it is not to devise for states an escape mechanism to get out of their human rights obligations under other international human rights laws. I am not arguing to deconstruct what is already constructed, but to hint a way to build upon it. After all, the stand that the parties to the COC will only be states, not TNCs is a manifestation of the position to maintain the usual place of states in relation to the human rights protection. Accordingly, to prevent a kind of vicious circle and to maintain the unity of the COC with other body of international human rights laws, the COC has to be carefully crafted in cognizance of the following core points.

First, the COC will not impose direct obligations on states except the following two ones. These include the obligation to meaningfully cooperate with the COC committee and the ICCJ in the course of the implementation of the COC. The other is the obligation to present periodic report to the COC committee on the status of the observance of the COC by the TNCs domiciled in its territory (in case of the home states) and the TNCs operating in its territory (in case of the host states).

Second, Victims can lodge their claim on similar issue (that they lodged against a given TNC before the ICCJ) against state before any other forum. However, ICCJ or its equivalent division under the WCHR will not entertain victims' claims against any states or other agents, but against TNCs only.

4.10 Doing for the best and withstanding the worst: Overcoming the resistances laying ahead of the COC

> *"I am mentally prepared for the worst, but hopeful for the best, I think I have the moral victory"(Ken Saro-Wiwa, Nigerian writer, environmental and human rights activist, a detention diary)*

The above opening quote could be taken as an abridged version of the explanations that could be offered on the promises and challenges that the struggle for the rights and freedoms of human kind generally entails. The rightfulness of the cause of our struggle might not save us from formidable challenges, but we must always act with hope to achieve what we think is the best; we must persevere no matter how near and frightening the challenges are.

The history of the struggle for the development of international human rights law has not always been straightforward, especially as far as the developments of the hard laws are concerned. It is filled with many ups and downs. For instance, the history of the drafting process and ratification of the twin international human rights covenants – the ICCPR and the ICESCR is full of polarized views especially because of the ideological antagonism between the Western and Eastern world as part of the Cold War rivalry. Likewise, it is not difficult to forecast that the initiative for the adoption of the COC might face heavy resistances emanating from different perspectives. One might ask: how do we know beforehand the resistances that appear in future against the move toward the adoption of the COC? Well, two explanations could be given on this question. Firstly, if the move to adopt hard international laws that impose human rights obligations incumbent upon states met resistance, the move to impose binding human rights obligation on private entities (TNCs) will, for stronger reason, meet huge opposition both from the business community and from states as unorthodox idea. That will be the case because as it has been discussed earlier as part of the doctrinal questions relating to the COC, it is theoretically more natural to impose human rights obligations on states than on private entities like TNCs. Secondly, there are

historical and scholarly indicators as to the resistance towards the development of laws imposing direct obligation on TNCs. The best example is the resistances of states and the business community that led the United Nations Human Rights Commission to reject the draft norms in 2003. These two points are good indicators to forewarn us about the possible oppositions that might encounter us in the course of our struggle for the adoption of the COC. As the saying goes, forewarned is forearmed. Thus, as we struggle for the just cause of reversing the act of human rights abuse by multinational enterprises, we must also carefully prepare and act with great resolve to overcome the challenges ahead. Some of the foreseeable resistances to the adoption of the COC will be highlighted below along with the possible ways of overcoming them.

4.10.1 Neglect of human rights' history-based challenge

The opposition to the extension of human rights obligations to non-state actors based on the fear that it shifts the historical pedigree of human rights is not a mere speculation, but has its roots in legal literature. As I have indicated under chapter two, one of the old oppositions to the extension of human rights obligations to non-state actors (of which TNCs are a part) is the argument that it contradicts with the historical evolution of the idea of human rights as obligations incumbent on the so-called historical violators of human rights – states.[189] Given the current status of international human rights law that is known with its hesitance to impose direct obligation on non-state actors, it is understandable that the above opposition is yet not dead. Of course, to those who confine themselves to the long cherished idea of state hegemony in the international legal structures, the COC might be equated with what the theologians call 'heresy' or 'heterodoxy'. In the struggle towards the adoption of the COC, the way to overcome this challenge is by developing the approach that the COC will not mark the total shift of human rights obligations from states to TNCs in this particular scenario, but to fill the gap left by the state-centered international human rights law in responding to the challenges posed by globalization to human rights. As the socio-legal world, as opposed to the sacred religious principles, is not an equivalent of an inflexible set of rules and events, the international human rights law should be able to adapt itself to the dynamics of power that positively or negatively affect human rights and freedoms. Thus, the

[189] . Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006)

COC will symbolize a response by the international community to changing circumstances brought about by globalization, not a move to dismantle the role of states in the international human rights law structure.

4.10.2 The 'blame-game'-based challenge

The other possible opposition awaiting the march for the adoption of the COC is the fear that if human rights obligation are directly imposed on TNCs, the states get the avenue to blame TNCs for the violations that occur with their own officials and agents and the TNCs might reply back to states with similar escape mechanism and while victims continue to suffer in the middle. I do not and cannot ignore this kind of fear. However, we can overcome it. The fact that states and TNCs blame one another does not signify that the real violator is lost in the middle. When the COC comes to life, the victims will have wider opportunity to lodge their claims against TNCs before the ICCJ or against states before any available forum. Thus, the fear that something might be lost in the middle of the 'blame game' will not be a convincing reason to oppose to the rationales of the COC.

4.10.3 Limited standard of protection-based challenge

One of the arguments that developed in the course of the development of soft laws regulating business-human rights nexus, particularly with regard to the UN norms was the fear that laws that impose human rights obligations on TNCs provide only minimum standard of protection while leaving the matter to voluntary corporate self-regulation might enhance greater standard of protection.[190] I argue that this kind of argument against the direct extension of human rights obligations to TNCs is indefensible because of the following reason. Indeed, uttering about greater protection without having a guarantee for the observance of the minimum protection is no less than putting the cart before the horse. What is generally true is that all international human rights instruments provide only minimum standard of protection. However, this does not mean that the organ upon which the obligation is incumbent is forbidden from offering greater protection than the basic guarantees recognized in the laws. Therefore, the COC not lowers the standard of protection that TNCs has to offer for human rights nor is intended to do so, but to have an assurance of

[190]. Olive De Schutter, 'Accountability of Multinationals for Human Rights Violations in European Law'(2004), Center for Human Rights and Global Justice Working Paper Number1,2004.

the minimum protection and making the field open for the TNCs to make the greater protection available. It is a way of putting the horse before the cart, not the opposite. We have also seen in our earlier discussions that CSR is not able to offer even the minimum protection, let alone the more ambitious greater protection.

4.10.4 Fear of 'antagonizing'-based challenge

Another vital point in the course of the debate over the issue of adopting international binding law regarding human rights obligations of TNCs is the idea that this kind of effort might create a kind of antagonism/animosity between TNCs and human rights in the sense that it might create the attitude that the former are identified as the violators of the latter. This kind of fear is forwarded by a panelist during the first session of the IGWG on the elaboration of international legally binding instrument on TNCs and other business enterprises with respect to human rights.[191] I do not undermine this argument. However, it can be pacified. The best way to pacify it is to create the view that TNCs are not always gluttonous entities acting in disregard of everything but their gains. The truth is that TNCs also play an invaluable role in lifting the human family from a very abominable to dignified life conditions even though they also poses a threat to it.[192] The record on business-human rights relation is not always negative. TNCs create job opportunities for thousands of millions of people around the world. They build infrastructures like roads and light powers. They also build social service institutions such as schools and hospitals. Thus, business interests and human rights are not necessarily antagonistic to each other, but also mutually reinforcing. By inculcating the above points, we will be able to pacify the perceived animosity between the world of human rights and the world of business. In effect, we reduce the resistance to the COC.

4.10.5 Anti-business sentiment-based challenge

Some, especially the business entities might consider that binding human rights obligation based regulation on them restricts the smooth operation of their business for fear of violating human rights standards. The SRSG wrote that:

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[191] . See report on the first session of the open ended IGWG on business and human rights on transnational corporations other business enterprises with respect to human rights, A/HRC/31/50 (5February 206), para. 45

[192] . Philip Alston and Ryan Goodman, *The successor to international human rights in context: Law, politics, and morals* (Oxford University Press 2013). See also Peter T. Muchlinski, 'Human rights and multinationals: Is there a problem? (2001) 77 (1), Royal Institute of International affairs 31

> ‘Business generally dislikes binding regulation until they see their necessity and inevitability’.[193]

In similar vein, Deva also observes that:

> With respect to regulation, there is significant divergence in the expectations of multinational enterprises and human rights activists, particularly pertaining to regulation by states acting individually or collectively at international level. Multinational enterprises expect (favor) all-pervasive de-regulation and plead for regulation only in those areas where de-regulation hampers their capacity to maximize profit.[194]

Needless to repeat, the above excerpts indicate how the business entities are resistant to any form of external regulation on their activities. The reason for this could not be anything else than the fear that strict regulations might harm their business. Indeed, it is not only business entities, but also some states that view regulations as anti-business sentiment.[195] This kind of resistance will be more so with respect to the COC as it imposes both direct and binding obligation and as it involves international adjudicatory organ for its enforcement. The better way to overcome this kind of challenge in the process of the adoption of the COC is to enhance the participation of business entities, particularly the top leaders of TNCs rather than pushing them aside. This also includes the task of inculcating in the business world that observance of human rights and freedoms by business entities, particularly TNCs, do not necessarily hampers their profit maximizing intent, but also boosts their economic advantage by sending message to consumers that those TNCs that comply with the COC are the reputable business entities to consume their goods and services. Indeed, the view that the respect for human rights by business entities benefits these business entities apart its significance in upholding human rights and freedoms has its support in human rights law scholarship. For instance, Weissbrodt and Kruger affirm that:

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[193] . John Gerard Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) [101] (4), The American Journal of International Law 819

[194] .Surya Deva, ‘Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat?’ (2004) 5, Melbourne Journal of International Law 37

[195] . Regarding the United Nations draft Norms, for instance, the United States once said that it is anti-business agenda (see Philip Alston and Ryan Goodman, *The Successor to International Human Rights in Context: Law, Politics and Morals (*Oxford University Press 20013)

> There is also increasing reason to believe that greater respect for human rights by companies leads to greater sustainability in emerging markets and better business performance. For example, observance of human rights aids businesses by protecting and maintaining their corporate reputation, and creating a stable and peaceful society in which they can prosper and attract the best and brightest employees. Moreover, consumers have demonstrated that they are willing to pay attention to standards and practices used by a business that observes human rights and may even boycott products that are produced in violation of human rights standards. Similarly, there is evidence that a growing proportion of investors is seeking to purchase shares in socially responsible companies.[196]

The above extract clearly and succinctly explains the advantages that business entities, in our case TNCs, could reap if they comply with human rights standards. With simple analysis, I can derive from the above excerpt that if TNCs fail to observe human rights standards, they forfeit all the above mentioned benefits. From this, I can safely assert that compliance of the TNCs with the COC is good not only for the prevalence of human rights and freedoms but also boosts their business interest, not necessarily obstruct it.

4.10.6 Impermanence of TNCs-based challenge

Unlike states,[197] TNCs are not permanent entities; they are entities subject to dissolution and wind up for different reasons in accordance with the domestic legal process of each nation where they are incorporated. They might be involved in gross human rights abuse today and might be dissolved soon before victims are remedied. I do not hide the existence of this kind of challenge. However, as we are living in a world of 82,000 TNCs (as per the 2009 estimate) [198] and as the COC will not be adopted with particular reference to specific TNC

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[196]. David Weissbrodt and Muria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) (97) (90)

[197] .One might raise the issue that even states are not permanent as they might be disintegrated or merged. My answer to such potential assertion is that, even if states are amenable to disintegration and merger, there the concept of state succession in which the commitments entered by a former state is incumbent upon the new state(s) formed upon the disintegration or merger of the former state(s). However, it is less likely to have such kind of succession of obligations in case a given TNC dissolves. Second, we observe from the practical world that the dissolution of states is less common than the dissolution of business entities.

[198] .United Nations conference on Trade and Development (UNCTAD), world investment report 2009, vol. 1, transnational corporations, agricultural production and development , overview, xxi, available at www.unctad.org/en/doc/wir_2009_en.pdf, last visited on 10 May 2017

or some of TNCs, the fact that TNCs might cease to exist at certain point in time does not undermine the necessity and purpose of the COC.

4.11 Conclusion

Those soft laws that were developed to ameliorate the gap in the 'catch through the others' hand' approach are not adequate to minimize the lacunae because of many limitations they have. Besides, the inadequacy of CSR (corporate voluntary self-regulation) to limit the adverse impacts of their operations on human beings and the environment is crystal clear. As a consequence, TNCs are operating in the atmosphere of an accountability vacuum in the kingdom of international human rights law.

If the international community is to fill the real gap in the international human rights protection system with respect to TNCs and human rights, adopting the COC is an indispensable tool to do so. Once adopted, COC enables the international human rights law to directly catch TNCs through international adjudicatory institution – the ICCJ without absolute need for the intermediacy of states. The COC not only fills the accountability vacuum defined in other means of regulations and reverses/minimizes multinationals' impunity, but also advances the idea of universality of human rights that is rooted in the inherent dignity of all members of the human family.

There lie strong challenges ahead of the COC, but they could be overwhelmed by employing different subtle techniques identified in our discussions.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

International human rights law, as it now stands, is insufficient to ensure the compliance of TNCs with international human rights standards. The 'catch through the others' hand' approach is with no enough strength to restrain the 'New Leviathans'. There is unhidden accountability vacuum in this regard. The genesis of this problem is rooted in public international law in general that is state-centered and almost shrugs off non-state actors from its domain. All the attempts made heretofore and the outcomes (soft laws) are not strong enough to reverse the plight that the dominant players of globalization, TNCs, are bringing to the human environment, human health, human liberty and their mother – human life.

Given the enormous threat that economic globalization is posing to human rights through TNCs and given the atmosphere of the accountability vacuum they are in, adopting a binding international human rights instrument imposing direct obligations on multinationals (the COC) seems to be not a choice, but a practical necessity.

There will be challenges ahead of our struggle for the COC. Indeed, the history of human rights and human rights instruments has not always been straight; it has been full of zigzags and bitter struggles, but their results, in many instances, are something to be proud of. The adoption of the ICCPR and the ICESCR epitomize the instances in which bitter struggles and polarization of ideas were observed though they could not prevent the twin covenants from coming to life. Thus, no matter the challenges laying ahead of the COC, we must not be despaired of them, but overcome with subtlety and honest discussions with every stakeholder from every walk of life: from governments, from the business community, from international and regional governmental organizations, from different non-governmental Organizations (NGOs), from human rights defenders, from religious groups and from any other conceivable human associations.

At the end, I do not forget to put one critical remark. That is, as I strongly affirm the profound importance of the COC in protecting the human family against the abuse of TNCs,

I do not present it as a panacea for every imaginable business-human rights debate. After all, the COC will be a body of international law and as such, it cannot absolutely escape the infirmities that affect international law in general. Thus, it should not be considered as a standing alone instrument – it will not symbolize a biblical version of the rules of international human rights law that do not command the allegiance to and the aid from any other authority than the one dictated in itself. Other mechanisms should also be strengthened side by side and complement each other for the common goal of protecting humanity against the adverse impacts of TNCs. That is the nice path to follow as it offers the victims with dynamic forums in this dynamic world to assert their rights and freedoms.

5.2 Recommendations

Based on the analysis made and the conclusion arrived at in this study, I recommend the following:

1. Given the broader options it has at its disposal pursuant to resolution 26/9 of June 26/2014 of the UN Human Rights Council that established its mandate in shaping the path of the future treaty on TNCs and human rights, I recommend the IGWG to use this golden chance to mobilize support from every corner of the world and from every walk of life: from the business community, from individuals, from indigenous peoples, from governments, from international governmental organizations (mainly the United Nations – its principal organs, its agencies, its offices, its programs, its funds), from regional governmental, organizations like African Union, European Union, Council of Europe, Organization of American States and any other regional organizations), from religious groups, from Non-Governmental Organizations and to be able to reach at consensus on the kind of binding and comprehensive instrument that impose direct obligation on TNCs and submit for the council for approval.

2. I recommend the UN Human Rights Council not to lead the IGWG from the back and merely see what the it is doing, but closely and actually support the group to enable it to come up with the instrument that represents the viable option among the alternatives – the instrument that impose direct obligation on TNCs with adequate institutional and procedural support structure.

3. To that effect, I recommend the council not to handle the TNCs-human rights issue on an on-again, off-again basis (unlike it has been doing before), but to continually work on the issue until the more viable option is followed that and viable option – the COC is adopted.
4. I recommend the Office of the High Commissioner for Human Rights, as an Organ operating under the UN Human Rights Council and as per the request made to it by the council pursuant to resolution 26/9 of June 26/2014, to extend its unreserved assistance to the IGWG to make sure that the instrument that touches the heart of the issue will be produced, that is the instrument that impose direct human rights obligations on TNCs – COC
5. I recommend the International Labor Organization (ILO) to use its special expertise and experience in setting international labor standards and to tremendously contribute to the provisions of the COC, mainly the parts that deal with international labor standards that TNCs have to be bound by.
6. I recommend the International Law Commission, to use the expertise and experience it used in drafting international instruments like the Law of the Sea Convention, again for the purpose of assisting the IGWG to come up with the instrument of the kind suggested in this study – the COC. If it faces difficulty in directly working with the IGWG, I recommend the commission to prepare a draft COC and make it public so that the IGWG can take an input from it, though informally. Still, if the work of the IGWG is likely to follow or actually follows the option other than that embrace direct obligation on TNCs, I again recommend the ILC to submit the draft just mentioned to the UN General Assembly for discussion, adoption and to be opened for signature, ratification and accession.

7. I recommend the industrial nations that send TNCs to different parts of the globe to hold the view that they should no more have to live under the irony of being the champions of human rights on the one hand and allow their corporations unrestrained to the extent they transgress the rights and freedoms of the peoples of the host states in which they invest on the other. To that end, I recommend them to support the initiative that is geared towards the adoption of international treaty that impose direct obligation on TNCs.

8. I recommend developing host nations to see economic development as human development and as there is no true human development unless human rights and freedoms are upheld and should support the move towards the adoption of an instrument imposing direct obligation on TNCs to close the accountability vacuum.

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