Remedy for Human Rights Abuses under Tort and International Law

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By

Emmanuel K. Nartey

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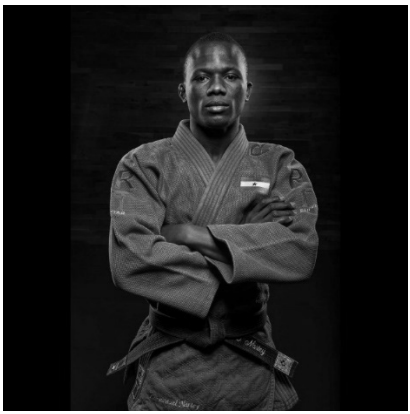
It is imperative for humans to aim for success, not perfection, and not to ever give up our right to be wrong, because then we lose the ability to learn new things and move forward to solve despicable problems that threaten our existence. The truth of the matter is that a life lesson is any lesson that a person can use, and likely will use, in various aspects of one's life for the rest of one`s life. Lessons from corporate human rights violations can come in all shapes and forms and may come unexpectedly or knowingly by human rights victims or legal practitioners.



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PREFACE

The 'lawsuit *Kiobel v Royal Dutch Petroleum* (Shell) was brought in 2002 by 12 Nigerians who alleged that the company'[1] 'aided and abetted' the human rights violations committed against them by the Nigerian government in the Ogoni region of the Niger Delta. Shell, through a Nigerian subsidiary, was involved in oil exploration and production in the region between 1992 and 1995, at the time the abuses allegedly occurred'.[2] This 'case is one of several brought against Shell in relation to the violent suppression of the Movement for the Survival of the Ogoni People, a group that campaigned for the rights of local people and protested against the pollution caused by oil companies'.[3] Nine of the group's members, including its leader, the well-known writer Ken Saro-Wiwa, were hanged in 1995 after being convicted of murder by a military tribunal. The executions of the 'Ogoni Nine', as they were known globally, were condemned by governments and human rights activists around the world.

The primary aim of Part II of this corporate accountability book is to identify a coherent legal principle to establish a novel duty of care for corporate human rights violations and environmental damages. Part II of this book builds on the argument as to whether tort and civil law offer better accountability and remedies for victims of corporate human rights abuses. It carries out an in-depth and critical analysis of the concept of corporate accountability. It also examines the extent to which international criminal law influences international human rights law in its use of tort law and civil law remedies. Finally, it attempts to set out a theoretical mechanism for duty of care as well as a proposal for the establishment of a Hybrid International Transnational Corporation Claims Court that would have the potential to effectively interpret the concept of corporate duty of care under tort law.

The central objective of Part II is to strengthen the argument on MNC accountability and remedy, as well as to develop and present a new practical

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[1]Fegalo Nsuke, 'The Ogoni People and the Struggle for Freedom and Justice in Nigeria' (2019). <https://www.ogoninews.com/ogoni/223-ogoni-un-human-rights-commissioner-says-corporations-must-be-accountable-for-abuses>
Accessed December 2018.
[2]*Ibid.*
[3]*Ibid.*

paradigm for international legal action against human rights violations by MNCs in host or home states, in the context of the tort of negligence (the neighbourhood principles of duty of care). Part II rests on the assumption that the corporation under a duty of care or equivalent has the ability to control the activities of the business directly causing the harm. The ability to control, and not actual control, should be enough of a basis for legal liability. Control should be defined broadly to cover not only majority shareholding, but other situations that give entities either legal or factual control. In certain cases, including but not limited to when there is majority ownership (over 50%), the ability to control should be assumed and the claimant should not have to prove it. Creating and structuring a relationship with a subsidiary, for example, through holding corporations or share companies so that there is no apparent control over its activities, should not be a defence.

The suggestions in Part II can operate alongside direct regulatory actions by states, and would help reinforce compliance. Lastly, the recommendation concerning applicable law is relevant and should be implemented in relation to all cases dealing with private claims under tort/non-contractual liability law.

Grateful acknowledgement is here made to those who helped this research and this book. This work would not have reached its present form without their invaluable help, especially to the Global Legal Review Editorial Team.

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ABBREVIATIONS

ATCA – Alien Tort Claims Act
ATS – Alien Tort Statute
CCL – Control Council Law
ECHR – European Convention on Human Rights
HITNCCC – Hybrid International Transnational Corporation Claims Court
ICC – International Criminal Court
ICESCR – International Covenant on Economic, Social and Cultural Rights
ICJ – International Court of Justice
ICT – International Criminal Tribunal
ICTR – International Criminal Tribunal for Rwanda
ICTY – International Criminal Tribunal for the former Yugoslavia
IFOR – Implementation Force
ILC – International Law Commission
ILO – International Labour Organisation
IMT– International Military Tribunal
JCE – Joint Criminal Enterprise
MNCs – Multi-National Corporations
NATO – North Atlantic Treaty Organisation
NGO – Non-Governmental Organisation
OECD – Organisation for Economic Co-operation and Development
PICC – Permanent International Criminal Court
RICO – Racketeer Influenced and Corrupt Organisations Act
SA – Standard on Auditing
SFOR – Stabilisation Force
TVPA – Torture Victims Prevention Act
UJ – Universal Jurisdiction
UK – United Kingdom
UN – United Nations
UNDHR 1948 – Universal Declaration of Human Rights
UNGA – UN General Assembly
UNGPs – United Nations Guiding Principles
UNSC – UN Security Council
UNSG – Secretary-General of the United Nations
US – United States
WCHR – World Court of Human Rights
WWII – World War II

INTRODUCTION

For over 60 years, issues around globalisation and MNCs have been at the forefront of the international economy, international law and international politics. Indisputably, they are the main catchphrases in terms of economics, environmental protection and human rights law.[4] The concept of globalisation has promoted economic liberalisation and Adam Smith's theory of 'the invisible hand',[5] which perceives that the market economy should regulate itself to promote wealth, jobs, capital, the right to work, health and economic equality in society.[6] It has promoted economic development, the transfer of technology, knowledge and finance, and trade liberalisation across the globe.[7]

However, globalisation has also caused economic inequality, social injustice, environmental damage, the destruction of ecosystems and indigenous people's livelihoods, the promotion of corruption and bad governance in developing countries, and an imbalance of economic power between developed and developing countries.[8] There is also a glaring lack of appropriate mechanisms to govern the global economy. In the context of the international legal system and legal scholars' views, the self-regulatory

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[4] Janet Dine and Andrew Fagan (eds), *Human Rights and Capitalism: A Multidisciplinary Perspective on Globalization* (Edward Elgar 2006).

[5]Adam Smith, *The Wealth of Nations* (C. J. Bullock (ed.), Vol. X. The Harvard Classics, P.F. Collier & Son, 1909–14 (2001)). <www.bartleby.com/10/> Accessed 8 June 2015.

[6]Rawi Abdelal and Richard S Tedlow, 'Theodore Levitt's "The Globalization of Markets": An Evaluation after Two Decades' (2003) Harvard NOM Working Paper No. 03-20, Harvard Business School Working Paper No. 03-082. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=383242> Accessed 8 June 2015. See also Menno T. Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC' in Philip Alston (ed.), *The EU and Human Rights* (OUP 1999).

[7]Arnoldo C Hax, 'Building the Firm of the Future' (1989) 30 (2) Sloan Management Review 75. <http://search.proquest.com/openview/63c2ebf36830d8c46ee32fc7482c4ecc/1?pq-origsite=gscholar> Accessed 8 June 2015.

[8]Jonathan Perraton, 'Joseph Stiglitz's, Globalization and its Discontents' (2004) 16 (6) Journal of International Development 897, 905.

perception of globalisation has led to violations of international law and human rights law by MNCs, either directly or indirectly through their subsidiaries or host state governments. This concern indicates a need to develop an appropriate mechanism to regulate the conduct of MNCs at the international level. It should be noted that the idea of imposing private rights and duties under national and international laws through collective jurisdiction and multinational trading systems, at both global and regional levels, signals the end of the Westphalian State System.[9] Past evidence suggests that some authors advocate a 'hard law' approach to regulating MNCs,[10] while others affirm their position on a 'soft law' approach.[11]

In addition to the well-documented positive impact MNCs have had on the global economy, they have played a role in overcoming many social difficulties in the last 60 years.[12] Nonetheless, corporate activities have also spread economic inequality and injustice around the world,[13] both of which have increased substantially in the last century.[14] Partly to blame is the failure to develop an appropriate legal enforcement mechanism to regulate the conduct of MNCs.[15] The urgent need for such a mechanism can be observed in the continuous violations of human rights by corporations.[16] Several studies have also reported on the negative impact MNCs have had

[9]Duncan B. Hollis, 'Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty' (2002) 25 BC International Comparative Law Review 235.

[10] Alicia Grant, 'Global Laws for a Global Economy: a Case for Bringing Multinational Corporations under International Human Rights Law' (2013) 6 (2) Studies by Undergraduate Researchers at Guelph 14, 23.

[11]John J Kirton and Michael J Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004) 3, 29.

[12] obert Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton University Press 2011).

[13]Clair Apodaca, 'Global Economic Patterns and Personal Integrity Rights after the Cold War' (2001) International Studies Quarterly 587, 602.
<http://www.jstor.org/stable/3096061?seq=1#page_scan_tab_contents> Accessed 9 June 2015.

[14] Mitchell A Seligson and John T Passé-Smith (eds), *Development and Underdevelopment: The Political Economy of Global Inequality* (Lynne Rienner 1998).

[15]<http://openpolitics.ca/tiki-index.php?page=economic+injustice> Accessed 8 June 2015.

[16] Cristina Baez, Michele Dearing, Margaret Delatour and Christine Dixon, 'Multinational Enterprises and Human Rights' (2000) 8 University of Miami International and Comparative Law Review 183.

on society,[17] indicating that a lack of international enforcement of human rights and bad governance at the national level have led to a 'venomous circle of poverty', which can be defined as 'a self-enforcing process of social destitution, that a state can hardly overcome by itself'.[18]

These predicaments occur partially because MNCs as economic entities have the capability to operate on a global scale and surpass the regulatory abilities of individual states.[19] It is also attributed to the ability of MNCs to influence or force national governments to relax their national laws. Other researchers, such as Breed[20] and Meyer,[21] have previously shown an interest in regulating the behaviour of MNCs. However, such attempts to address the problematic aspects of MNCs were not successful, perhaps because the international legal system and legal scholars have ignored the broader concept of the impact of globalisation and could not understand the gravity of social dynamics brought by contemporary globalisation. They have also failed to integrate the orthodox approach of international law with the rapid expansion of MNCs to develop a mechanism that would regulate and minimise human rights violations by enterprises in pursuit of economic benefits.

As mentioned above, the orthodox view has undermined any moves towards enforcement mechanisms to regulate MNCs[22] by creating a legal minefield without any effective and productive solutions. Instead of developing worthless guiding principles and ideologies that do not reflect the current social dynamics in the world, the question to be asked is how to address human rights violations and protect the rights of indigenous people, the rights of other citizens, the rights of property, ecosystems and the

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[17]Emilie M Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 American Journal of Sociology 1373. See also Francis O Adeola, 'Cross-National Environmental Injustice and Human Rights Issues. A Review of Evidence in the Developing World' (2000) 43 (4) American Behavioral Scientist 686, 706.

[18]Partha Dasgupta, *An Inquiry into Well-being and Destitution* (Clarendon Press 1993).

[19]Peter T Muchlinski, *Multinational Enterprise and the Law* (2nd edn, OUP 2007).

[20] Michael Breed Logan, 'Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad' (2002) 42 Virginia Journal of International Law 1005.

[21] William H Meyer, 'Human Rights and MNCs: Theory Versus Quantitative Analysis' (1996) 18 Human Rights Quarterly 368, 397.

[22] Claire A Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: a Crisis of Legitimacy' (2001) 27 Review of International Studies 133, 150.

environment for future generations, while rewarding MNCs for their investments?

Therefore, the aim is to examine whether litigating MNCs and human rights violations in the intersection of national and international law could provide a more effective mechanism for imposing legal obligations on MNCs. This will help in establishing a trail on which to bring litigation against corporations for human rights violations, economic crimes, corruption and environmental damages. Furthermore, Part II will seek to strengthen the argument on litigation against MNCs, as well as to develop and present a new practical paradigm for international legal action against MNC human rights violations in a host state in the form of an international forum – the proposed Hybrid International Transnational Corporation Claims Court (HITNCCC) – with a universal jurisdiction philosophy.

Even though there is substantial evidence to support the argument surrounding the notion of a race to the bottom for foreign direct investment (FDI), this issue is beyond the scope of this book. This book focuses on the economic impact of MNCs on the livelihood of people and on the environment, and therefore cannot provide a comprehensive review of the current developments in environmental law. Nor will it conduct any detailed analysis of corruption in host countries in relation to FDI or of the case studies on human rights violations by MNCs. The book will also disregard the impact of international relations on tort litigation relating to MNCs, which is seen as one of the reasons why 20 out of the 30 Alien Tort Claims Act (ATCA) cases were thrown out of court.

The book contributes to current debates surrounding the regulation of MNCs and the litigation of human rights violations by MNCs, by positing the creation of an international forum to regulate the conduct of MNCs. It also examines the economic literature for a better understanding of the relationship between the economic activities of MNCs and human rights and the environment. This will assist the concept of regulating MNCs, based on global economic output and power, economic benefits, environmental suitability, and the protection the rights of society and of corporations.

Therefore, the key questions to address are the following:

- What is the legal identity of MNCs and what is the definition of MNCs?
- What is the current approach to the regulation of MNCs?

In the orthodox approach to international law, what is a sovereignty right of a state under international law and human rights law? The purpose of this specific question is to clarify the arguments and contradictions surrounding

state sovereignty in relation to the legal obligations of MNCs under international law and to enhance the development of a new paradigm that could act as a mechanism for bringing successful litigation against MNCs.

It is a crucial stage in the quest to establish the legal obligations of MNCs under international law in order to develop the HITNCCC concept.

- Do MNCs have legal obligations under international and human rights law?
- What are the current mechanisms to bring litigation against MNCs for human rights violations?
- What happens if a state does not sign or ratify the treaty? Are there other instruments better than a treaty?

As emerging powers, it is now difficult for international legal orthodox scholars to discount corporations as subjects of international law.[23] This methodology discards the nineteenth-century positivist approach, which created uncertainty among legal scholars with regard to the legal identity of non-state actors. At the same time, it does not aim to displace the relevant natural law principles of early origin,[24] as the legal philosophy behind these principles is crucial to international law in terms of states and MNCs.

In addition, critics have also dismissed the orthodox approach as an old-fashioned[25] artefact of a previous age that is irrelevant today, because it is incompatible with the current social dynamics of globalisation.[26] This view is further supported by the right-wing paradigm that puts MNCs outside the centre of international law. They have also attacked the orthodox approach by arguing for its abandonment and the abandonment of the subject-object separation.[27] In their opinion, the orthodox approach is rigid and outdated.

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[23] Emeka Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6 Northwestern University Journal of International Human Rights 222. <http://heinonline.org/HOL/LandingPage?handle=hein.journals/jihr6&div=14&id=&page=> Accessed 10 June 2015.

[24] Beth Stephens, 'Individuals Enforcing International Law: The Comparative and Historical Concept' (2002) 52 DePaul Law Review 433.

[25] Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014).

[26] Myres S McDougal and Gertrude CK Leighton, 'The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action' (1949) Yale Law Journal 60, 115.

[27] Dame Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995).

As a result, it has claimed the lives of indigenous people and harmed the environment in the context of self-determination.[28] It has also served as a limitation for litigation against MNCs.[29] Thus this book further argues against the orthodox approach and supports the call for an alternative approach to international law doctrine that is broad enough to incorporate states, international organisations, individuals, private and non-governmental organisations and MNCs.[30]

To support the view adopted by the book, there is another argument against this orthodox legal doctrine, concerning the controversy around international legal personality not being a requirement for imposing a right or a duty on MNCs.[31] The interpretation indicates that regardless of what the orthodox approach is, international legal personality follows and flows from the acknowledgement of rights and duties.[32] Hence, it could not be disputed that under moral and legal rules, it is possible to say that the rationale behind the enactment of the Universal Declaration of Human Rights 1948 (UDHR 1948) is clear, and that acknowledgement of the legal identity and obligations of MNCs under international law should follow the principle of acknowledgement of rights and duties under international law in terms of the power and influence of MNCs.

A further argument to support the recognition of the legal personality of MNCs is that they, arguably, are international legal persons, because they already have rights in international settings, such as the right to establish business, the right for protection under human rights law, property rights and other corporate rights under international law.[33] These recognised privileges and obligations under international law allow them to enforce

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[28]Angela Hegarty, *Human Rights: 21st Century* (Cavendish 1999) 290, 310.

[29] Carlos M Vázquez, 'Direct vs. Indirect Obligations of Corporations under International Law' (2004-05) 43 Columbia Journal of Transnational Law 927. <http://heinonline.org/HOL/LandingPage?handle=hein.journals/cjtl43&div=35&id=&page=> Accessed 6 August 2015. See also Jennifer A Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (CUP 2006) 48.

[30]Philip Allott, *Eunomia: New Order for a New World* (OUP 1990).

[31] Olivier De Schutter (ed), *Transnational Corporations and Human Rights* (Bloomsbury 2006).

[32]"Bin Cheng, 'Introduction to Subjects of International Law' in M. Bedjaoui (ed), *International Law: in Achievements and Prospects* (Martinus Nijhoff 1991).
Bin Cheng, 'Introduction to Subjects of International Law' in M. Bedjaoui (ed), *International Law: in Achievements and Prospects* (Martinus Nijhoff 1991).

[33]Markos Karavias, *Corporate Obligations under International Law* (OUP 2013).

their rights[34] in an international court or arbitration. This aspect led to Okeke's contribution to the ongoing debate about the international legal identity of MNCs, which is referred to as the 'Okeke criteria'.[35] The author stresses that MNCs to some extent are subjects of international law, and that they have rights, possess obligations and are authorised to vindicate their rights.[36] Additionally, the attribution of an international legal personality to MNCs has been attached to the capacity, transboundary nature and international impact of the business operations of MNCs that are combined with access to international legal proceedings.[37]

This trend follows Charney's confident suggestion that MNCs possess international legal personality and continually have participated in the international legal system.[38] The author supplements this argument by illustrating that public international law has been applied to contracts between MNCs and state bodies. Corporations also have access to fora created under international conventions or by inter-governmental institutions for the settlement of disputes.[39] Ijalaye also comes to a similar conclusion to indicate that MNCs could be regarded as selective subjects of international contract law for agreements, signed with states.[40]

This view is reaffirmed and supported by international arbitration practice. For instance, in the *Libya Oil Companies Arbitration*[41] Umpire Dupuy applied international law in the settlement of the dispute between a state and a private oil company. In this case, international law was observed as the governing law of the contract. On the other hand, Lauterpacht sees international dispute settlement mechanisms as enclosed in treaties,

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[34] Michael K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, Kluwer 1999).

[35]Christian N Okeke, *Controversial Subjects of Contemporary International Law* (Rotterdam University Press 1974). <http://digitalcommons.law.ggu.edu/pubs/603/> accessed 11 June 2015.

[36]Malcolm N Shaw, *International Law* (6th edn, CUP 2008).

[37]Cynthia Day Wallace, *Legal Control of the Multinational Enterprise: National Regulatory Techniques and the Prospects for International Controls* (Martinus Nijhoff 1982).

[38] Jonathan I Charney, 'Transnational Corporations and Developing Public International Law' (1983) Duke Law Journal 748, 788.
<http://www.jstor.org/stable/1372465> Accessed 11 June 2015.

[39]*Ibid*.

[40] D Kokkini-latridou, 'Review of David Adedayo Ijalaye 'The Extension of Corporate Personality in International Law'' (1981) 28 (3) Netherlands International Law Review 365, 368.

[41]Rudolf Dolzer, 'Libya Oil Companies Arbitration' in Rudolph Berhardt et al., *Encyclopedia of Public International Law III* (1997) 215, 216.

concluding that 'states are the sole subjects of international law'[42] and individuals do not possess rights under international law.[43] The present author submits that by virtue of these contracts and other expansions in the international law system, MNCs do possess international legal personality.[44]

Reiterer challenges the proposition that states alone are 'subjects of international law'[45] and expresses the view that NGOs, transnational corporations and individuals can be subjects of international law. This finding correlates with the views of other authors that the 'modern trend is to recognise that there are other subjects of international law,' including corporations.[46] Overall, the evidence presented in this discussion has proven contradictions and delusions in the orthodox legal system's view on MNCs. Such delusion is, by no means, conclusive, but one does not need conventional wisdom to contend that the orthodox legal view is outdated and was only cogent when MNCs were less significant in international settings.

Several jurists, legal scholars and commenters have concluded that the international legal personality of corporations is an established fact. But an American casebook on international law has expressed the view that the issue of the legal personality of MNCs is controversial in terms of the economic and political power they have, while their legal power, however, supports the traditional view;[47] thus it asserts that corporations are private organisations and subject to national law, not international law.

Correspondingly, Malanczuk in the current study of MNCs, supports this view and rejects the concept that an 'internalised contract' with a sovereign state amounts to a recognition of a corporation as subject to

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[42]Solomon E Salako, 'The Individual in International Law: 'Object'versus 'Subject'' 8.1 (2019) 8 (1) *International Law Research* 132, 143.

[43]Elihu Lauterpacht, 'International Law and Private Foreign Investment' (1997) 4 (2) Indiana Journal of Global Legal Studies 259. <http://heinonline.org/HOL/LandingPage?handle=hein.journals/ijgls4&div=22&id=&page=> Accessed 10 June 2015.

[44]*Ibid.,* 272-76.

[45]Michael Reiterer, 'Book Review: Reviewing Ruth Donner "The Regulation of Nationality in International Law" (1983)' (1987) 81 American Journal of International Law 970.

[46]Jonathan Fried, 'Globalization and International Law-Some Thoughts for Citizens and States' (1997) 23 Queen's Law Journal 259.

[47]Lori Fisler Damrosch et al (eds), *International Law: Cases and Materials* (West Group 2001).

international law,[48] 'even in partial or limited sense'.[49] This view is noted by Muchmore and supported in the jurisprudence of the PCIJ and its successor the ICJ. It can be noted from the *Serbian Loan Case*, [50] where the PCIJ advocated that the law governing an agreement not concluded between subjects of international law must be the municipal law of the concerned state.[51] Likewise, in the *Anglo-Iranian Oil Company Case*[52] between the Iranian government and a British oil company, the ICJ concluded a line of reasoning that an oil company was not a subject of international law.[53] Consequently, it declined to apply the jurisdiction when Iran refused to consent to the Court's jurisdiction.[54] The ICJ pronounced that the agreement was not an international treaty; therefore, it did not seek the involvement of the Court. Additionally, other authors debate that due to the decentralised nature of the international legal system, whereby no centralised law-making and law-enforcing establishments occur, rights and obligations alone cannot constitute MNCs as subjects of international law.[55]

I will argue that the approach adopted by the PCIJ and the ICJ, which is very restrictive in defining MNCs as not being subjects of international law, is questionable. It can be concluded that the court verdict lacks substantial grounds, and its refusal to exercise its power or clarify the subject of corporate international legal personality can be seen as a failure and a biased approach to international law. Furthermore, this book shall conclude on the basis that the court could have adopted a more helpful approach by, firstly, acknowledging the state as the main and leading subject of international

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[48]Peter Malanczuk, 'Multinational Enterprises and Treaty-Making: A Contribution to the Discussion on Non-State Actors and the "Subjects" of International Law' in V Gowlland-Debbas (ed), *Multilateral Treaty-Making* (Springer-Science Business Media 2000) 45-72. See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 2002).

[49]Adam I Muchmore, 'Review of V.Gowlland-Debbas 'Multilateral Treaty-Making (2000)' (2001) 26 Yale Journal of International Law 547, 548.

[50]*Payment of Various Serbian Loans Issued in France (Fr v Yugo)* (1929) PCIJ (ser A) No 20.
<http://www.icjcij.org/pcij/serie_A/A_20/62_Emprunts_Serbes_Arret.pdf> Accessed 1 August 2015.

[51]*Ibid.*

[52]Rudolf Dolzer, *Anglo-Iranian Oil Company Case* (1981) in Rudolph Berhardt et al (eds), *Encyclopedia of Public International Law I* (1992) 167, 168.

[53]*Ibid.*

[54]*Ibid.*

[55]Alexander Orakhelashvili, 'The Position of the Individual in International Law' (2001) 31 (2) California Western International Law Journal 241.

law[56] and, secondly, recognising that MNCs are capable of bearing or do bear international legal personality under international law. Nonetheless, this acknowledgement by the court could be seen as not exclusionary.[57]

Similarly, it could be contended that other legal personalities are not inevitably non-subjects, nor are they excluded from having international legal personality in the future. A subject of international law does not need to have the same features or share the same qualities as a state to fit the definition of a subject of international law.[58] Lastly, there are stages of legal personality, so subjects do not all possess the same level of legal personality on the international stage.[59] Thus, this section shall render the court's view as unsophisticated on the subject of corporate legal identity in relation to MNCs.

I will further argue that the court verdict's reasoning is inconclusive regarding MNCs' legal obligations under international and human rights law and its position on legal personality could not serve as a valid view on globalisation. Also the book supports the definition of international legal personality by the ICJ in the *Reparation for injuries suffered in service of the United Nations*, where it was highlighted that an entity could be a subject of international law only if two accumulating conditions were fulfilled, which were the 'capability of possessing international rights and duties and capacity to maintain its rights by bringing international claims'.[60] It was also acknowledged that a legal subject should possess a capacity to establish diplomatic relations, capacity to conduct international agreements and capacity to bring international claims.[61] Even though one could argue that these criteria impose qualities for a legal entity that MNCs do not possess, in a critical observation it is perfectly adequate to say that MNCs do fall indirectly into the first two categories and directly into the third category. Therefore, this book shall reaffirm that, whether MNCs are viewed directly or indirectly under international law, they have legal identity under international law. This section proposes a new definition of international

[56]Antonio Cassese, *International Law* (OUP 2007).
[57]Jennings R and Watts A (eds), *Oppenheim's International Law: Peace* (Longman 1992).
[58] Olivier De Schutter, *The Challenge of Imposing Human Rights Norms on Corporate Actors* (Hart 2006).
[59]Hugo J Hahn, `Euratom: The Conception of an International Personality' (1958) 71 Harvard Law Review 1001, 1056.
[60] Eric Heinze and Fitzmaurice Malgosia (eds), *Landmark Cases in Public International Law* (Martinus Nijhoff 1998).
[61]Robert Beckman and Dagmar Butte, *Introduction to International Law* (2013) 1 <https://www.ilsa.org/jessup/intlawintro.pdf> Accessed 13 June 2015.

legal personality that is broad enough to incorporate states, international organisations, individuals, non-governmental organisations and MNCs.

The book shall propose the following definition for international legal personality:

> *An entity can be defined as a subject of international law only if it accrues a condition of state, international organisation, individual, non-governmental organisation or corporation, and which has rights under international law, sufficient economic and political power to influence or partake in either direct or indirect domestic and global decision making, and the potential to impact significantly on international law, human rights and the global community in respect to its activities*.

The moral and legal philosophy behind this definition is the broadening of the scope of the concept of international legal entity so that it includes every actor of society who has or may have the capability to bear international legal identity, the capability to exert influence directly or indirectly, and the capability to impact or violate human rights. Having decided the legal personality under international law, it is imperative now to look at the definition of MNCs to support the approach this book is trying to adopt.

Definition of MNCs

Central to the entire debate about MNCs is the concept of what they are, which has given rise to uncertainty as to where the international legal obligations of MNCs are attached. To date, there have been various definitions, but none has come close to defining the true characteristics of MNCs due to the complexities surrounding their economic activities. These failures and the lack of agreement on what constitutes MNCs have contributed to the dilemma regarding the status of corporations under international law.

Senkuttuvan defines an MNC as 'a company that owns an enterprise or has large enterprises in more than one country, rather than a company that owns more than one national interest.'[62] It could be contended that this is a basic definition of a corporation and for that reason does not take into consideration other characteristics, such as recognition of legal rights under international law, rights and duties, and economic and political power. This book shall render this definition inconclusive.

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[62] Arun Senkuttuvan (ed.), *Proceedings of a Conference on MNCs and ASEAN Development in the 1980s* (Institute of Southeast Asian Studies 1981).

Furthermore, Root describes 'an MNC as a parent company that (i) engages in foreign production through its affiliates located in several countries, (ii) exercises direct control over the policies of its affiliates, and (iii) implements transnational business strategies in production, marketing, finance and staffing that transcend national boundaries'.[63] Even though it could be perceived that this definition does highlight some fundamental facts about the current status of MNCs in the global economy, it is still questionable.

Other authors also submit that MNCs have different branches and can be seen only from different 'perspectives (ownership, management, strategy'[64] and structure, etc.).[65] Taken together, these definitions outline the basic failures in establishing what MNCs are, making it very difficult for one to pinpoint where the legal obligations of MNCs are attached.

The UN Draft Code of Conduct of Transnational Corporation sees a transnational corporation as 'an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activities of these entities, which operates under a system of decision, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, 'that one or more of them may be able to exercise a significant influence over the activities of others',[66] and, in particular, to share a particular knowledge, resources, and responsibilities with the others.'[67]

Cherunilam also contributes to the definition of MNCs and highlights that because the activities of MNCs are very broad, it is difficult to have an agreeable definition for them. The author further indicates that according to an OIL report, the term 'MNCs lies in the fact that managerial headquarters

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[63] Franklin R Root, *International Trade and Investment* (South Western 1994). <http://www2.econ.iastate.edu/classes/econ355/choi/mul.htm> Accessed 15 June 2015. Also see: <http://www2.econ.iastate.edu/classes/econ355/choi/mul.htm>. Accessed 5 March 2016.

[64] *Ibid.*

[65] Howard V Perlmutter, 'The Tortuous Evolution of the Multinational Corporation' (1969) Columbia Journal of World Business 9.

[66] < http://dl4a.org/uploads/pdf/9780199558018.pdf> Accessed on 24 April 2017.

[67] Edwin Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower 2012). See also David Weissbrodt and Muria Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) 97 American Journal of International Law 901, 922.

are located in one or more countries, whilst the corporation carries out its operation in another country.'[68]

Several other authors have also attempted to define MNCs but this section will not review their definitions, as they are similar to the above-mentioned ones. Moreover, when comparing various definitions of MNCs at this stage, it is significant to specify that some of them do not reflect the true characteristics and nature of MNCs, creating delusions on the subject of the legal obligations of MNCs under international law. Thus, this section shall contend that the UN Draft Code and Conduct has given the appropriate definition of MNCs and that its view reflects the current dynamics of MNCs. However, it does not impose any legal obligation on MNCs. Nor does it recognise the rights MNCs enjoy under international law – the imperfection that makes it inconclusive.

It could be appropriate to include some rights that corporations enjoy and human rights violations by them as part of the definition, as these two features are inseparable. As pointed out above with regard to the obligations, legal identity and rights of MNCs under international law, their potential to violate human rights is not only a part of their operation but also a link to the legal identity and definition. Hence, it is perfectly sensible to include human rights violations in the definition in the broader sense, as well as to form the legal base for proceedings against human rights violations. For that reason, the book shall seek to broaden the definition of the UN Draft of Code and Conduct as follows:

> *An enterprise constitutes an entity in two or more states, if it is recognised and enjoys rights under international law, if it has sufficient economic and political power to conduct its operations in another state in respect of the jurisdiction and business environment of the entities, with a potential to establish and operate under a system of decisions, allowing a comprehensible policy and common approach through one or more of its decision making centres, in which its business operations are closely linked in terms of economic benefits and influences, by ownership or subsidies, that one or more of them may be able to exercise a substantial influence over activities of the other, which have a direct or indirect impact on host state governments for economic benefits, profit maximisation, and sharing of knowledge, resources, and responsibilities with the others, and which has a potential to either promote global goods or violate human dignity.*

Widening the definition of MNCs in this context helps to establish the legal foundation for assigning legal personality to MNCs, which is the base

[68]Francis Cherunilam, *International Business: Text and Cases* (PHI Learning Pvt Ltd 2010).

upon which to impose obligations and bring litigation against MNCs – but this is still by no means conclusive. Nevertheless, it is perfectly sufficient to conclude here that what has been discussed above offers a strong indication that MNCs are subjects of international law, and the view that MNCs cannot bear international legal status or have legal obligations imposed on them is an illusion.

CHAPTER I

INTERNATIONAL CRIMINAL LAW AND THE CONCEPT OF ACCOUNTABILITY

The objective of this chapter is to examine the extent to which international criminal law can influence international human rights law for use in tort law and civil law remedies. This chapter examines the current international criminal law principles and covenants to measure their efficacy at protecting human rights in relation to corporate human rights abuses in tort and civil law settings. It also examines the effectiveness of the international criminal law system in prosecuting individual crimes under the doctrine of state responsibility and international crime in the international community. This study then moves on to argue that, even though the international criminal system has been effective at prosecuting individuals for international crimes prohibited under international law, it cannot similarly help to achieve tort and civil law remedies for the human rights violations of corporations when these mainly occur in a host country. It achieves this by explaining the differences between international human rights law[69], international humanitarian law,[70] and international criminal law,[71] as well as explaining the model of the International Criminal Court (ICC)[72] that is used as a model of international criminal law accountability.

The Nuremberg trials established accountability as an important concept, stating that humanity would be guarded by an international legal shield and that even Heads of State would be held criminally responsible

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[69] Javaid Rehman, *International Human Rights Law* (Pearson Education 2010)

[70] Hans-Ulrich Baer and Peter Hostettler, 'International Humanitarian Law: An Introduction' (2002) 167 (8) Military Medicine 7. Also see: <https://www.icrc.org/en> Accessed 02 June 2015.

[71] Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Press 2013).

[72] William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011).

and punished for aggression and crimes against humanity.[73] This established critical concepts of accountability that proclaimed: regardless of the status of an entity, there is a possibility that all the players in the international community could be held liable for human rights abuses under the principles of the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia (ICTY).[74] This supports the concept of accountability explained in ***Chapter I-Part I***, which observed that: accountability should define, interpret, and enforce the formal legal norms and regulatory rules of international human rights. In this rationale, accountability should consist of a system of governance, i.e. standards and legal rules that should be respected by all actors and all individual and state officials operating in the international arena and at the domestic level.[75]

The relationship between the development of the critical concept of corporate accountability in ***Chapter I-Part I*** and the Nuremberg principles[76] may partly be explained by the fact that the liability and the enforcement of international human rights law remain an exclusively national responsibility. This also means that the failure of exclusive dependence on the national court and legal processes to control corporate human rights abuses and award effective remedies for victims is the single most compelling argument in this study for an effective international corporate accountability system, one that would be applied using a tort and civil law concept. However, this research is not suggesting that the international community needs an effective international legal system to replace or supplement domestic court duties and processes. Rather, what it is suggesting is an effective international corporate accountability mechanism that supplements the domestic court system and process; in other words, a multilateral institutional framework to hold corporations accountable while simultaneously providing a catalyst for more effective national enforcement of international human rights law.

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[73] Robert H Jackson, 'Nuremberg in Retrospect: Legal Answer to International Lawlessness' (1949) American Bar Association Journal 813.

[74] Rachel Kerr, *The International Criminal Tribunal for The Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford University Press on Demand 2004).

[75] Emmanuel K Nartey, *Accountability Criteria and Remedies under Tort Law for Victims of Human Rights Abuses* (Diss. University of East London 2018).

[76] George A Finch, 'Nuremberg Trial and International Law' (1947) 41 American Journal of International Law 20.
<http://heinonline.org/HOL/LandingPage?handle=hein.journals/ajil41&div=6&id=&page=> Accessed 21 September 2016.

The Concept of the International Criminal Law Trial

The horrifying legacy of World War II forced the creation of a mechanism that would ensure individual accountability for crimes under international law.[77] However, the establishment of a permanent international criminal court did not get far due to tensions arising out of the Cold War.[78] International human rights law expanded quickly during the Cold War and its observed mechanism on the international stage remains principally a political or quasi-judicial debate. For many decades, there was hardly any progress, until 1993 and 1994 when the two *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were created to bring to trial individuals for crimes against humanity,[79] such as genocide and war crimes.[80] Irrespective of their jurisdiction and procedure, the work of both courts will be assessed from a historical perspective. Thus, the precedential value of the *ad hoc* tribunals will clearly not be disputed.

Both tribunals were created by the United Nations Security Council (UNSC), which follows the Charter of United Nations 1945, specifically Charter VII. This gives the UNSC the power to create a judicial body with which all UN Member States are legally bound to cooperate. What is evident in the development of the tribunals is the international adjudicatory mechanisms to resolve future disputes, such as the Permanent International

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[77]Report of the Committee on International Criminal Jurisdiction, 1-31 August 1951, UN Doc. A/2645 (1954).

[78] Joanna Kyriakakis, 'Corporate Criminal Liability and the ICC Statute: The Comparative Law Challenge' (2009) 56 (3) Netherlands International Law Review 333.

Edward B Diskant, 'Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure' (2008) Yale Law Journal 126. Caroline Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law' (2016) 49 The George Washington International Law Review 351 and Ley Organica 5/2010 art. VII (B.O.E. 2010, 152) (Spain). Anita Ramasastry and Robert C Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries: Executive Summary* (Fafo 2009). Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law* (2005) and Caroline Kaeb, 'The Shifting Sands of Corporate Liability under International Criminal Law' (2016) 49 The George Washington International Law Review 351.

[79] Article 7. Crimes Against Humanity and Matthew Lippman, 'Crimes Against Humanity' (1997) 17 BC Third World Law Journal 171.

[80]Madeline H Morris, 'Trials of Concurrent Jurisdiction: The Case of Rwanda' (1996) 7 Duke Journal of Comparative & International Law 349.

Criminal Court.[81] Ever since the creation of the ICTY and the ICTR, the court has clarified and expanded on the key notion of international law and made an invaluable contribution to the legal differences between regimes applicable to international law and non-international armed conflicts. This was distinguished in the *Tadic* decision,[82] which was vital in establishing that there was a common core of international law rules applicable to armed conflicts, irrespective of their character. Following this development, it has been argued that the concept of accountability was crucial in the creation of and during the proceedings of the ICTY and the ICTR. Therefore, the principle of the international court does establish an effective accountability system for crimes against humanity. However, the question is whether this could be applicable to corporations. The answer is that this is yet to be tested due to the flaws in the concept of international criminal law accountability, such as a lack of cooperation between states, politics, a lack of resources, the threat to peace and security, and improper legal procedures.[83]

Accountability within international criminal law is limited to two dimensions. The first is restricted to a narrow class of specific serious crimes such as crimes against humanity, genocide, and ethnic cleansing,[84] and may not include the fundamental human rights that are to be given to all of humanity or environmental rights which are linked to health problems. The second dimension is restricted by the Prosecutor's monopoly on the prosecution procedures, which effectively dispenses private access to remedy. Nonetheless, this is not to say that the approach is ineffective; the prosecution of a corporation or corporate official itself should be highly visible to deter future human rights violations by corporations. It could be possible to hold corporations accountable under international criminal law because tribunals rely on the principles of international law and respect for human dignity.

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[81] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. <http://www.refworld.org/docid/3ae6b3a84.html > Accessed 3 November 2016.

[82] Colin Warbrick and Peter Rowe, 'The International Criminal Tribunal for Yugoslavia: The decision of The Appeals Chamber on The Interlocutory Appeal on Jurisdiction in The Tadic Case' (1996) 45 (03) International and Comparative Law Quarterly 691, 701.

[83] Jelena Pejic, 'Accountability for International Crimes: From Conjecture to Reality' (2002) 84 (845) Revue Internationale de la Croix-Rouge/International Review of the Red Cross 13, 33.

[84] In *The Oxford Handbook of Genocide Studies* (Oxford University Press 2010).