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PROFITS VERSUS HUMAN RIGHTS: ACCOUNTABILITY FOR CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS

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A minor dissertation submitted in *partial fulfillment* of the requirements for the award of the
degree of Master of Philosophy

Faculty of the Humanities

University of Cape Town

2011

COMPULSORY DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work. Each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

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Abstract

This thesis seeks to examine the interplay between business and human rights within the context of political transitions from authoritarian to democratic rule. In the wake of the globalisation process and the subsequent breakdown of the Westphalian state system, transnational corporations (TNCs) have acquired augmented powers at a global level where previously states had been the only players; and yet TNCs have none of the human rights obligations of states, particularly under international law. This dissertation aims to examine why this accountability lacuna exists in relation to corporations, specifically in relation to state-sponsored human rights violations in which TNCs are complicit. The thesis addresses issues relating to (i) to what extent corporate actors *are* and *should* be held accountable under international human rights law; and (ii) *how* they could be held accountable. The thesis accordingly makes an examination of the current accountability trends and mechanisms available, as well as the history informing corporate accountability for complicity in human rights violations. It is argued that issues of corporate accountability for complicity in human rights violations are made more complex in the context of political transitions from authoritarian to democratic rule. In this vein, the dissertation examines the South African example of such a political transition; namely: (i) what accountability mechanisms were employed in order to address issues of corporate complicity in state-sponsored human rights violations in the South African milieu; (ii) the success thereof; and (iii) the lessons that may be learnt from the South African experience.

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Chapter One: Corporate Accountability as a Problem of Transitional Justice

1.1 Introduction

The late twentieth century has heralded the advancement of human rights and the growing reach of international human rights law; in the midst of this development, however, new interrelated issues have gradually emerged. The fundamental changes of a globalized world have presented new challenges to human rights and their enforcement; new players, aside from states and individuals, are directly and indirectly involved in human rights violations. Accordingly, new accountability mechanisms able to address these new actors and novel concerns need to be developed. In this regard, a key question is whether, or in what sense, corporations can be held accountable for human rights violations with which they are directly or indirectly involved.

Corporations, in particular transnational corporations (TNCs), now represent a formidable force in the international arena, not only in terms of their economic activities but also in terms of their influence and involvement in the internal political affairs of many different societies, including authoritarian regimes and military dictatorships. There are numerous ways in which corporations, and in particular transnational corporations, may commit or be involved in human rights violations. Corporations may violate human rights either by being directly involved in their perpetration, or they may be indirectly involved or “complicit” in such violations. However, few accountability mechanisms are available in relation to TNC complicity in human rights violations. As corporations expand their operations from local to global contexts the degree of accountability for their behaviour, particularly in relation to human rights violations, increasingly begs examination. In the course of this thesis the various accountability mechanisms for corporate complicity in human rights violations, particularly those available in terms of public international law, will be examined in order to determine whether the current mechanisms are stringent enough, and whether international human rights law offers adequate methods for curtailing the augmented power of corporations. Beginning with an examination of the history of corporate accountability, particularly within public international law, the thesis aims to establish (i) why there is in fact this lacuna in international law in terms of corporate accountability for human rights violations; (ii) what mechanisms may be used to hold corporations accountable; and (iii) the prospects of success of such accountability mechanisms.

As international human rights law is a relatively new and still evolving field this thesis may perhaps offer more questions than answers. Nevertheless the topic warrants exploration: as territorial borders become less defined and corporations entrench themselves as powerful global players, questions regarding their accountability for human rights violations multiply. There is a growing need to assess TNC accountability for human rights violations in comparison to that of traditional international human rights actors, namely individuals and states.

It is clear, even upon a superficial viewing of the landscape, that human rights discourse has achieved increasing prominence globally and has coalesced in broad political and legal changes.¹ Within this *milieu*, international human rights law has come to prominence as a mechanism for enforcing human rights. Human rights discourse has achieved a global reach far beyond the initial theories that shaped general rights discourse, such as those of Hobbes, Locke, Kant and Hohfeld² and international human rights law has spearheaded the legal codification of human rights norms. Accordingly, the focus of this work will be primarily on the significance of international human rights law in relation to the accountability of corporations for their complicity in state-sponsored human rights violations. In particular, this thesis will place a specific focus on the business-human rights interplay within the context of political transitions from authoritarian rule, and will examine the accountability of TNCs for complicity in human rights violations committed by the states in which they are operating.

The aim of this work is thus, by way of descriptive and illustrative analysis, to examine and analyse the manner in which corporations, particularly TNCs, have been held legally accountable for human rights violations in which they were directly or indirectly involved. The examination will be limited to contexts of political transition from authoritarian to democratic regimes; in this sense it involves an investigation of transitional justice. South Africa, and its recent political transition and transitional justice processes, will serve as an illustrative example of the manner in which corporations have been dealt with where they have been complicit or indirectly involved with state-sponsored human rights abuses.

1.2 Corporate Complicity in Human Rights Violations

As a point of departure, it is important to establish what may be understood by the term “complicity”. This is not an easy terms to define, as it encompasses a number of separate notions. In a pure legal sense, however, the “offences of complicity” may encompass a myriad of offences; *inter alia* aiding, abetting, acting as an accessory or accessory after the fact, conspiring, or assisting.³ Ultimately, in a legal sense, there is no uniform standard with regard to what complicity is, but the key elements are the same; namely that there is intentional encouragement or assistance, on the part of B (the complicit actor), in assisting A (the perpetrator) in the commission of an offence by A.⁴ A number of international law instruments, such as the

¹ Todd Landman, *Protecting Human Rights: A Comparative Study*. Washington, DC: Georgetown University Press, 2005; Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, New York: Cambridge University Press, 1999; Daniel C. Thomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism*, Princeton, N.J.: Princeton University Press, 2001; Kiyoteru Tsutsui, “Global Civil Society and Ethnic Social Movements in the Contemporary World,” *Sociological Forum* 19, 2004, p.63-88.

² See Immanuel Kant, *Perpetual Peace and Other Essays*. (translated by Ted Humphrey). Hackett Publishing Company (1983); John Locke, *Two Treatises of Government* (Peter Laslett ed., 1988); Thomas Hobbes, *Of Man, Being the First Part of Leviathan*. Vol. XXXIV, Part 5. The Harvard Classics. New York: P.F. Collier & Son, 1909–14; Bartleby (2001); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press (1946). The article appeared earlier at 26 *Yale Law Journal* 710 (1917).

³ Paul Watchman, “Complicity: Charting a Path through the Conceptual Minefield”, in the 2005 *Business & Human Rights Seminar Report: Exploring Responsibilities and Complicity* (London: December 2005).

⁴ Sanford H. Kadish, “Reckless Complicity”, in *The Journal of Criminal Law and Criminology* (1973-), Vol. 87, No. 2 (Winter, 1997), p.369.

United Nations Global Compact;⁵ (Global Compact), also attempt to give a definition or guideline in terms of when companies would be considered to be guilty of complicity in terms of Principle 2 of the Global Compact, complicity is comprised of two elements: (i) “[a]n act or omission (failure to act) by a company, or individual representing a company, that ‘helps’ (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse”; and (ii) [t]he knowledge by the company that its act or omission could provide such help”.⁶ The UN High Commission for Human Rights states that where a company “authorises, tolerates or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuses”⁷ then it would be deemed to have been complicit.

The International Commission of Jurists (ICJ) has suggested an approach to corporate accountability for complicity in human rights violations against which corporations can monitor their behaviour, detailed in a three volume series.⁸ In volume 1 of the series, the ICJ addresses notions of corporate complicity and accountability.

The ICJ report aims to provide solutions beyond the ambit of international human rights law as a mechanism for accountability for corporate complicity in human rights violations, and focuses primarily on criminal law (international criminal law, “supplemented by criminal law concepts common to national systems”; and “the law of civil remedies found in both common law countries and civil law jurisdictions”).⁹ The ICJ Report accordingly only considers the circumstances under which a corporation could be held *legally* accountable for complicit conduct under criminal law.¹⁰

The ICJ adopts a three-prong approach to the circumstances under which a company could be held criminally accountable for complicity in gross human rights abuses,¹¹ by using the principles of (i) causation; (ii) knowledge; and (iii) proximity:

- (i) causation: whether the company’s conduct (a) enabled, (b) exacerbated, or (c) facilitated the commission of gross human rights abuses;

⁵ Retrieved at www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/index.html on 12 December 2010.

⁶ Principle 2 of the Global Compact retrieved from <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>, on 12 January 2011.

⁷ See OHCHR Briefing Paper, “The Global Compact and Human Rights: Understanding Sphere of Influence and Complicity, in UN Global Compact / Office of the United Nations High Commissioner for Human Rights (UNHCHR), *Embedding Human Rights in Business Practice* (New York: November 2004).

⁸ International Commission of Jurists, *Corporate Complicity & Legal Accountability: Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*, International Commission of Jurists 2008.

⁹ *Ibid*, p.5.

¹⁰ *Ibid*, p.7.

¹¹ “[G]ross human rights abuses” in the ICJ Report, is “generally understood as describing an infringement of a flagrant nature that amounts to a direct and outright assault on internationally recognised human rights...for example, crimes against humanity, enforced disappearances, extrajudicial executions, prolonged arbitrary detention, slavery and torture”, *Ibid*, p.5.

- (ii) knowledge: whether the company (a) knows, or (b) should have foreseeably known, “that its conduct would be likely to contribute to the gross human rights abuses”;
- (iii) proximity: whether the company was close or proximate “(geographically, or in terms of the duration, frequency and/or intensity of interactions or relationship)” to (a) the primary agent of the human rights abuses, or (b) to the victims.¹²

Significantly, the test requires no intention or even awareness related to the human rights abuse on the part of the company, in order for it to be held accountable; a reasonableness standard is employed – if a ‘reasonable’ person would have foreseen the consequences of their conduct, then the company will be legally accountable. Moreover, the company’s proximal relation to the perpetrator or victim of the abuse determines the extent of its liability; the closer proximity the more likely that the company will be held accountable.¹³ The ICJ report represents a pragmatic approach towards notions of accountability and complicity in relation to corporations. But it has no legal standing: as the ICJ itself observes, the test outlined in its report is merely a guide for both businesses and prosecutors, lawyers and victims as to when businesses are most likely to be (and should be) held legally accountable for complicity in gross human rights abuses.¹⁴

Therefore at this juncture, although the parameters of the term complicity are not clearly defined in general, and in relation to corporations in particular, however there a number of key elements of complicity; namely (i) knowledge or foreseeability of the human rights violation occurring); (ii) intention (to assist the perpetrator) in the commission of the human rights violation; and (iii) the corporation does not directly commit the human rights violation. However, in practice it appears difficult to determine (i) the degree of complicity, and (ii) what measure of accountability or culpability should be attributed to the complicit party.

1.3 Accountability and the Business/Human Rights Paradigm

The late twentieth century heralded a global human rights awakening in public international law with the emergence of more human rights tribunals and permanent and special courts than ever before. These include: the International Criminal Court (ICC) which was established on 1 July 2002 under the auspices of the Rome Statute of the International Criminal Court (Rome Statute) adopted on 17 July 1998;¹⁵ the Special Court for Sierra Leone (established in 2002, under the auspices of UN Security Council Resolution 1315¹⁶ adopted unanimously on 14 August 2000),¹⁷ the International Tribunal for the Former Yugoslavia (ICTY)

¹² *Ibid*, p.8.

¹³ *Ibid*, p.8.

¹⁴ *Ibid*, p.7.

¹⁵ See the “United Nations Treaty Collection” at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (retrieved 02 January 2011).

¹⁶ S/RES/1315.

¹⁷ See <http://daccess-dds ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement> (retrieved 02 January 2011).

(established on 25 May 1993 in terms of UN Security Council Resolution 827¹⁸ adopted unanimously on 25 May 1993);¹⁹ and the International Tribunal for Rwanda (ICTR) (established in November 1994 under the auspices of UN Security Council Resolution 955²⁰ adopted on 8 November 1994);²¹ all established for the prosecution of individuals alleged to have perpetrated human rights violations, primarily war crimes; crimes against humanity; and/or genocide. Furthermore, beyond the development of such institutions, there has been a considerable international groundswell and enthusiasm to assert the need for holding perpetrators of human rights violations, individuals as well as state agents, accountable.

Individuals and states, as perpetrators of human rights violations, have been the main concern of this quest for accountability; corporations, however, have not received similar attention. Human rights discourse appears to be characterised by an implicit differentiation between natural persons and states, on the one hand, and juristic entities such as corporations, on the other hand. The quest for holding perpetrators of human rights violations accountable has primarily concerned the former while ignoring the latter. However, in practice it is far from clear *how* corporations in general, and TNCs in particular, may actually be held accountable for their complicity in human rights violations. TNCs cannot readily be held accountable by host states within their domestic criminal and civil law jurisdictions in part due to the distinctive structure of TNCs. A TNC is typically not one company, but rather a central company with separate nodes (subsidiary companies) in different jurisdictions. These subsidiaries are in turn incorporated in different countries, but usually receive their main directives from the parent company. Vernon describes a TNC as: “a *parent company that controls a large cluster of corporations of various nationalities... [with] access to a common pool of human and financial resources and responsive to the elements of a common strategy.*”²²

Of course, *de jure* differentiation of this kind may well be compatible with a considerable degree of coordination in practice; however, it is hard to determine how much *de facto* authority a parent company actually exercises over its subsidiaries. Where it appears that the parent company exercises extensive control of its subsidiaries, the justification of said parent being held accountable for activities by its subsidiaries may increase: “[o]bligations that extend to the world wide activities of the firm can be placed on the parent company and its directors to the extent that these activities are under the parent’s *de facto* control.”²³

¹⁸ S/RES/827.

¹⁹ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/306/28/IMG/N9330628.pdf?OpenElement> (retrieved 02 January 2011).

²⁰ S/RES/955.

²¹ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf?OpenElement> (retrieved 2 January 2011).

²² Raymond Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises*, New York: Basic Books, 1971, p.4

²³ Sol Picciotto, “Rights, Responsibilities and Regulation of International Business”, *Columbia Journal of Transnational Law* 42(131), 2003, p.148.

Therefore, as we enter the early twenty-first century a significant lacuna can be identified in the development of international law: how to deal with corporate actors in holding them accountable for their complicity in past human rights violations. Some attempts have been made to develop at least a general framework for this purpose,²⁴ but so far the adoption of these measures has been on a voluntary basis only. In so far as these measures are voluntary they involve self-regulation by corporations; thus in practice corporations themselves determine their degree of accountability for their complicity in human rights violations, without any objective standard or monitoring body to guide them or reprimand them for non-compliance. Moreover, these measures are yet to capture and focus the attention of the majority of corporations on their accountability for human rights violations.

This thesis will explore and examine the extent to which corporations can currently be held accountable with regard to human rights violations in which they were complicit. However, due to length constraints, it will not seek to address in detail the further question of *how* to hold the corporation accountable. This thesis seeks primarily to offer a descriptive analysis of the history of corporate accountability and the current standards and trends in terms of accountability.

At a general level these issues concern the underlying relation between morality, law and business. Historically, the purpose and sole responsibility of business has been perceived, certainly in capitalist societies, as being the maximization of profit in the free market. A corporation is primarily mandated to make profit and does not have any obligations apart from pursuing the interests of its shareholders, or to engage in enterprises which are not lucrative. Corporations (unlike non-governmental organizations and other civil society collectives) are not expected to be altruistic in their pursuits. As Milton Friedman notably observed: *"[t]here is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."*²⁵

On this free market perspective, companies are there to make a profit and human rights are a subsidiary issue. Until recently scant attention appears to have been paid to the interplay between corporate enterprise and human rights. The issue of accountability for corporations, in particular TNCs, is neither a solely political or legal question, and in fact it is also an economic question; as TNCs, in their mandates and operations, straddle geopolitical, economic and legal lines. These lines are further blurred by the transformative nature of geopolitical systems in general. In terms of international law we are moving, it has been argued, from the

²⁴ For example, the OECD *Guidelines for Multinational Enterprises*, Revision 200, Vol. 2006. Paris (2000) retrieved at <http://www.oecd.org>; the United Nations "Global Compact" retrieved from <http://www.unglobalcompact.org>; "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises" (U.N. Doc. A/HRC/11/13/, 22 April 2009) retrieved at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>; United Nations Social and Economic Council, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2. New York: United Nations.

²⁵ Milton Friedman "The Social Responsibility of a Business is to increase Profits" *New York Times (Magazine)* 13 September 1970 at 32; see also Milton Friedman (ed.), *Capitalism and Freedom*, Chicago: University of Chicago Press (1962).

“Westphalian order” of territorially defined sovereign nation states²⁶ to a globalized “[p]ost-individuals” world where geographical borders or territorial jurisdictions are becoming more fluid.²⁷ Corporations have increasing global reach and power, to some degree surpassing that of states which have a weakened ability to determine and regulate the movement of goods and services transnationally.²⁸ As a result transnational corporations are taking on powers and roles previously assigned to the state and becoming at once more politicised and less accountable. In light of such changes, public international law as well as domestic law may have to be amended to reflect that individuals and states are no longer the only or primary actors in both domestic and international arenas. This has significant implications for the accountability of TNCs for their involvement in human rights violations. As Peter Muchlinski concludes:

“[the] traditional notion that only states and state agents can be held responsible for human rights violations is being challenged as the economic and social power of [TNCs] appears to rise in the wake of the increasing integration of the global economy.”²⁹

It is nevertheless common cause that corporations cannot be castigated for their mere presence in an authoritarian society or in conflict situations; mere presence does not necessarily amount to active collusion or complicity with human rights violations. That being said, and while accepting that the presence of TNCs in authoritarian regimes and conflict zones is driven by self-interest and profiteering, they can and should be held to account for involvement in any human rights wrongs committed in pursuit of that interest (even if not committed by them directly). Although the links are tenuous, they may nonetheless be tangible. Even if corporations might not have political profiles, this does not preclude their possible complicity in human rights violations. However, due in part to the cardinal position enjoyed by TNCs there has been a reluctance to deal with them as perpetrators of human rights violations, the more so in the murky contexts of political transitions.

1.3 Accountability in the Context of Transitions (from Authoritarian Rule)

Issues of corporate accountability for complicity in state-sponsored human rights violations are further complicated in contexts of political transitions from authoritarian rule; and such issues of accountability for past human rights abuses, in the context of authoritarian regimes, typically arise in the context of incipient change to democratic rule. A democratic transition involves a dynamic process with competing interests and conflicting moral and political considerations. Emergent democratic conventions and structures, including the

²⁶ See R.R. Palmer, J. Colton, and L. Kramer, *A History of the Modern World*, 9th ed, New York: Knopf (2002), p.139.

²⁷ S.J. Kobrin, “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights,” *Business Ethics Quarterly* 19, 2009, p.349-374; A.G. Scherer, G. Palazzo, and D. Matten, “Introduction to the Special Issue: Globalization as a Challenge for Business Responsibilities,” *Business Ethics Quarterly* 19, 2009, p.327-348.

²⁸ A. Giddens, *Consequences of Modernity*, Cambridge: Polity Press 1990; D.A. Irwin, *Free Trade under Fire*, Princeton, N.J.: Princeton University Press, (2002).

²⁹ P.T. Muchlinski. 2001. “Human Rights and Multinationals: Is There a Problem?” *International Affairs* 77(1), p. 31 as cited in S.J. Kobrin, “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights,” *Business Ethics Quarterly* 19, 2009, p.349-374.

executive, legislature and judiciary, and society in general, are in a state of flux. Dealing with issues of accountability in a transitional context where basic perspectives on perpetrators and the rights of victims are not yet settled either in law or politics is both necessary and a special challenge. As José Zalaquett observed, “dealing with transitional political situations is a new area of human rights practice that poses some complex ethical, legal and practical questions”.³⁰ This is the domain of transitional justice.

There is no concise definition of transitional justice, and multiple definitions abound. The term seems to have first appeared in the lexicon in the early nineties (although not necessarily with the same meaning it has today).³¹ At a foundational or basic level, transitional justice is, as stated by Ruti Teitel, one of the seminal authors in this emerging field, “the conception of justice in periods of political transition”.³² In the influential formulation of Neil Kritz transitional justice is concerned with how emerging democracies ‘reckon’ or deal with the wrongs of the past, perpetrated by a prior regime.³³ This implies that transitional justice does not merely focus on the punishment of perpetrators, but also on the healing of victims, as well as aiming at the reintegration of a somewhat fractured society as a whole.

Even so, ‘transitional justice’ tends to have a narrower focus and more specific sense than the broader set of issues at stake in, for example, the German debates on “reckoning with the past”. Thus Timothy Garton Ash has contended that the English terminology fails to capture all the elements of the German “*Geschichtsaufarbeitung*”, and “*Vergangenheitsbewältigung*”, which “may be translated as ‘treating’ the past”...“working over’ the past, ‘confronting’ it, ‘coping, dealing or coming to terms with’ it; even ‘overcoming’ the past. The variety of possible translations indicates the complexity of the matter at hand.”³⁴ Compared to this, as Paige Arthur’s account of its genealogy demonstrates the new sub-field of transitional justice has been concerned with such issues as that of accountability for human rights violations in a narrower legal-institutional perspective in the transitional context :

“Instead of “coming to terms” with historical complexities (as one might expect in an effort to deal with “the past”), transitional justice was presented as deeply enmeshed with political problems that were legal-institutional and, relatively, short-term in nature. So short-term, in fact, that they could be dealt with specifically during a “transitional” period.”³⁵

³⁰ José Zalaquett, “Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints”, in *State Crimes: Punishment or Pardon* (Justice and Society Program of The Aspen Institute ed., 1989), at p.26.

³¹ See Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” in *Human Rights Quarterly*, Vol. 31, No.2 2, May 2009, p.332. Ruti Teitel, however, lays claim to having coined the term; Ruti Teitel, “Editorial Note – Transitional Justice Globalized”, 2 *International Journal of Transitional Justice* 1 (2008).

³² Ruti G. Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* 69 (2003).

³³ Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995) as cited in Paige Arthur’s “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” in *Human Rights Quarterly*, Vol. 31, No. 2, May 2009, p.331.

³⁴ Timothy Garton Ash, *The Truth About Dictatorship*, N.Y. Rev. Books, 19 Feb. 1998, at p. 35, as cited in Paige Arthur’s “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” in *Human Rights Quarterly*, Vol. 31, No. 2, May 2009, p.332.

³⁵ Paige Arthur “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice” in *Human Rights Quarterly*, Vol. 31, No.2, May 2009, p.333.

It is not the aim of this thesis to provide an in-depth analysis of transitional justice in general; rather it aims to examine some basic issues relevant to the availability and use of legal-institutional mechanisms of holding corporations accountable for human rights violations within the transitional context.

In this regard a basic challenge is posed by the fact that under former authoritarian regimes pervasive forms of human rights abuse (and abuses of power) typically permeated the legal and political spheres as well as the executive, legislative and judicial dimensions of government. Accordingly, transitional justice processes must attempt to steer a path towards democracy where key institutions, including the judiciary, required to serve as vehicles for democratic change, have themselves been tainted with an abusive character. Such institutions must themselves be transformed as vehicles for justice and accountability, and yet must also remain functional throughout the transformative process.³⁶ In such circumstances there is a pressing need for the new democratic regime to make the perpetrators of past human rights violations accountable, while also attempting to distance the even-handedness and rule of law required of the new democratic dispensation from the arbitrary brutality of the former authoritarian regime. As Elster astutely observed, in a transforming society there is tension between “the desire to demarcate oneself from the earlier regime and the desire to punish that regime as severely as it deserves.”³⁷

Transitional justice is not a contemporary phenomenon only (although the focus of this piece will be on contemporary transitions); in fact elements of transitional justice are already evident in the democratic transitions of ancient Athens.³⁸ War crimes tribunals also have an extensive history going back 200 years and more.³⁹ However, contemporary transitional justice had its genesis with the Nuremberg Tribunal following World War II, even if the term itself was not yet used in association with the Nuremberg Tribunal.⁴⁰ However, the Nuremberg Tribunal established a historical landmark in the development of international law and the creation of international law structures to hold perpetrators of international human rights violations accountable.⁴¹ There have, however, been further, more recent developments in the field of transitional justice.

A significant subsequent development in the broad field of transitional justice involved the use of non-judicial accountability processes in Latin America and post-communist Eastern Europe. In the wake of Argentina’s transition to democratic rule from 1984, and Chile’s later democratic transition from 1990, truth commissions were developed as an accountability mechanism in lieu of criminal prosecution of perpetrators of human

³⁶ As Teitel observes in relation to the legal system: “In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation”, Ruti G. Teitel, *Transitional Justice*, Oxford: Oxford University press (2000), p.152.

³⁷ Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*. Cambridge University Press (2004). p.237.

³⁸ *Ibid*, at p.3-23.

³⁹ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals*. Princeton University Press, (2001).

⁴⁰ Ruti G. Teitel, ‘Transitional Justice Genealogy’, 16 *Harvard Human Rights Journal* 69, 70 (2003).

⁴¹ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crime Tribunals*. Princeton University Press, (2001).

rights violations.⁴² In post-communist Eastern Europe, lustration and the opening of state security archives were developed as mechanisms of accountability for past human rights violations, while the South African Truth and Reconciliation Commission (TRC) came to be regarded as a model of extra-judicial transitional justice.⁴³

1.4 Problem Statement and Research Question

The aim of this mini-dissertation is to give a primarily descriptive account of the manner in which corporations, particularly TNCs, are dealt with in the context of political transitions, where former authoritarian regimes have committed clear human rights violations with the arguable complicity of said corporate actors. The point of departure of the study will be to describe and elucidate the shifting landscape (both legal and political) in which corporations operate as well as their changing roles in this landscape. More specifically, the aim of this thesis is to analyze what mechanisms are currently in place to hold corporations accountable for human rights violations committed by state agents with whom they were complicit. The focal point will be on the accountability of TNCs for their indirect involvement and/or complicity in human rights violations by past authoritarian regimes. This will be contextualized with regard to democratic transitions from authoritarian rule. The aim is to explore the issue of corporate accountability for indirect involvement in human rights violations through a historical account of relevant past developments and an examination of current trends and options.

The evolving role of TNCs in the international milieu requires appropriate means of dealing with any malfeasant behaviour by corporations in relation to human rights. Accordingly, this study and investigation is motivated by a desire to examine the past structures and current trends in terms of standards of accountability for corporations, and the possible shortcomings of existing mechanisms, within the context of political transitions. The thesis will be primarily descriptive in nature, including a more detailed examination of the South African political transition of the mid-nineties.

The proposed investigation therefore seeks to understand why there has been such limited accountability of TNCs for their complicity in human rights abuses. This will require both some historical background and an account of the legal-institutional context. The preliminary chapters will thus serve primarily as background, laying the foundation for further investigation into the present position.

An ancillary issue is the normative question whether corporations *should* be held accountable for involvement in, or complicity with, human rights violations by authoritarian regimes, particularly in terms of public international law. Ultimately, the answers I will aim to tease out in the course of this literature-based

⁴² See Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 *Human Rights Quarterly* 1 (1990); José Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations", 43 *Hastings Law Journal* 1425 (1992).

⁴³ José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations', 43 *Hastings Law Journal* 1425 (1992).

investigation; are (i) whether corporations should be held accountable for their complicity in human rights violations; if so (ii) how such accountability may be enforced against them, particularly in the context of political transition.

The scope of this work will be limited to the transitional context; particularly the lessons that can be learnt from the South African experience, in relation to the degree of accountability of TNCs for state-sponsored human rights violations. Hence the focus of this work is on the South African case. South Africa is an example of a country which, during its transition from authoritarian to democratic rule, notably attempted to grapple with issues of individual accountability for human rights violations committed by individuals as well as by state agents. But conversely the South African TRC process appears to have neglected the issue of corporate accountability in that the post-transition regime only dealt with corporate involvement in the perpetration of human rights abuses in passing; and rather focused primarily on individual perpetrators, as opposed to organizations or juristic persons. South Africa therefore represents a telling example of the inadequacies that abound in relation to dealing with corporations regarding state-sponsored violations of human rights.

Issues of accountability do, however, canvas issues of corporate social responsibility. Accordingly, a subsidiary topic will also be the related issue of corporate social responsibility in view of current debates not only about corporate accountability for human rights violations, but also corporate responsibility for taking proactive, positive human rights action: “[t]he dispute is not then about how companies should behave, but about the best means of securing socially desired behaviour.”⁴⁴ Therefore the aim is not and should not be to police all the activities of corporations, but rather to ground their conduct in a philosophy of social responsibility, framed within a global human rights culture. Accordingly, we need to move beyond Friedman’s conception of the “social responsibility of business”⁴⁵ being profit-making, as this responsibility also encompasses human rights obligations.

1.5 International human rights law and its Instruments

Human rights law in the context of domestic criminal law has its theoretical foundations in liberal theory in terms of which individual rights serve to protect individuals and prevent the tyranny of the state.⁴⁶ International law, for its part, traditionally dealt primarily with relations between states. Therefore while the state is the main *subject* of international law in ensuring the enforcement and protection of human rights, it is also, conversely, the primary *object* of human rights law.⁴⁷

⁴⁴ See John Parkinson, ‘The Socially Responsible Company’ in Michael K. Addo, *Human Rights Standards and the Responsibility of Transnational Corporations*, Springer (1999), p.56.

⁴⁵ Milton Friedman *Capitalism & Freedom* (1962) 133; see also Milton Friedman “The Social Responsibility of a Business is to increase Profits” *New York Times (Magazine)* 13 September 1970 at 32; see also Milton Friedman (ed.), *Capitalism and Freedom*, Chicago: University of Chicago Press (1962).

⁴⁶ See John Locke, *Two Treatises of Government* (Peter Laslett ed.), Cambridge University Press (1988).

⁴⁷ Henry J. Steiner, “The Youth of Rights”, 104 *Harvard Law Review* 917 (1991) (reviewing Louis Henkin, *The Age of Rights* (1990)).

Although it has these early foundational roots, current international human rights law first developed in the aftermath of World War II (WWII). The United Nations (UN) was founded in 1945, with fifty-one member states (consisting primarily of Western states), in the wake of WWII.⁴⁸ The Charter of the United Nations (UN Charter), which included a strong commitment to human rights, came into force on 24 October 1945.⁴⁹ The Universal Declaration of Human Rights⁵⁰ (UDHR), one of the founding human rights instruments, was adopted on 10 December 1948, and is considered one of the most important and fundamental human rights instruments.⁵¹ The International Covenant on Social, Economic and Cultural Rights,⁵² the International Covenant on Civil and Political Rights⁵³ and its two Optional Protocols⁵⁴ were later enacted as binding treaties giving legal effect to the rights enshrined in the UDHR as well as promoting the principles enshrined in the UN Charter. The rights delineated in the UN Charter were later codified, along with the subsequent main international human rights conventions, in the International Bill of Rights.⁵⁵ Nevertheless, as Henry Steiner and Philip Alston observed, the UDHR is:

*“the parent document, the initial burst of idealism and enthusiasm, terser, more general and grander than the treaties, in some sense the constitution of the entire movement...the single most invoked human rights instrument.”*⁵⁶

Consequently, although the UDHR is declaratory in nature, and therefore does not constitute binding international law, it is nevertheless considered to have become part of customary international law.⁵⁷ And the UDHR expressly stipulates that “every individual and every organ of society” has a duty to promote human

⁴⁸ One of the purposes of the UN includes, “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”, Article 1(3) of the UN Charter.

⁴⁹ Chapter XIV of the UN Charter also confirms the jurisdiction of the International Court of Justice (established in terms of the *Statute of the Permanent Court of International Justice* 16 December 1920) over all UN member states. Therefore any judicial action instituted between member states and adjudicated before the International Court of Justice, the decision of the International Court of Justice is binding on such states.

⁵⁰ Resolution 217 (III) of the UN General Assembly on 10 December 1948.

⁵¹ Henry J. Steiner & Philip Alston, *International human rights in context: Law, politics, and morals. Text and materials* (2nd ed.). Oxford: Oxford University Press (2000).

⁵² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (entered into force, 3 January 1976). United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>; (retrieved on 13 January 2011).

⁵³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>; (retrieved on 13 January 2011).

⁵⁴ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3bf0.html> (retrieved on 13 January 2011); UN General Assembly, *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, 15 December 1989, A/RES/44/128, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a70.html> (retrieved on 13 January 2011).

⁵⁵ The International Bill of Human Rights consists of the Universal Declaration of Human Rights (adopted in 1948); the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966); the Optional Protocol to the International Covenant on Civil and Political Rights; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

⁵⁶ Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, and Morals. Text and Materials* (2nd ed.). Oxford: Oxford University Press (2000), p.120.

⁵⁷ Paul Sieghart, *The International Law of Human Rights*. Oxford: Clarendon Press (1983).

rights.⁵⁸ Therefore it would appear that every person (be they natural or juristic) has an obligation to ensure the “promotion” of human rights, and correspondingly, it may be inferred that they also have a duty not to infringe upon those rights.

1.6 Transnational Corporations and Globalisation

A key factor impacting on the treatment of TNCs, also from a human rights perspective, is that of the globalisation process. It is no easier to define “globalisation” than it is to define a transnational corporation, and the definitions are many and varied. At a basic level “globalisation” relates to the increasing global interconnectedness of people beyond territorial borders or; as Stiglitz observed, globalisation is the ongoing process of “closer integration of persons and countries”.⁵⁹ Significantly globalisation has led to the diminution of the power of the state particularly in trans-border transactions and in relation to TNCs. It has not however heralded the complete demise of the state.⁶⁰ Rather, the globalisation process has aided in the creation of a complex global network of separate, yet interconnected nodes, thereby augmenting trans-border trade and enterprise. Michael Santoro argued that the power of the modern TNC is the cause and effect of globalisation and a result of the “weakened condition of the nation-state system”.⁶¹

This increasing power of TNCs requires us to address what duties, liabilities and responsibilities they may have corresponding with their newfound status and power. In recent years there have been some experiments in developing a legal basis for transnational corporate accountability.⁶² Previously, there had been a limited range of available judicial measures in the context of domestic criminal justice systems, mostly geared towards exacting punishment on individuals, to deal with the misconduct of corporations. A chief factor in the growth of new forms of litigation was the introduction of other punitive measures, for example fines or punitive taxation, making it possible for corporations to be held accountable or punished for their misdeeds. International exchanges between people and bodies need to be more closely monitored and require appropriate accountability mechanisms to be put in place.

⁵⁸ United Nations General Assembly. 1998 (1948). *Universal Declaration of Human Rights*, vol. 2005. New York: United Nations, (Preamble).

⁵⁹ J. Stiglitz (ed), *Globalization and its Discontents*, Harmondsworth: Penguin (2002). See also M. Kalder (ed), *New & Old Wars: Organized Violence in a Global Era*, Stanford: Stanford University Press (1999), p.3–4; T.L. Friedman (ed.), *The Lexus and the Olive Tree*, New York: Anchor Books (2000), p.8.

⁶⁰ J. Stiglitz, (ed.), *Making Globalization Work*, Harmondsworth: Penguin (2006), p.22; J.A. Scholte (ed.) *Globalization: a Critical Introduction*, Basingstoke: Palgrave Macmillan (2005), p.75-78.

⁶¹ M.A. Santoro, “Post-Westphalia and Its Discontents: Business, Globalization, and Human Rights in Political and Moral Perspective”, *Business Ethics Quarterly* Vol. 20, No. 2 (April 2010), p. 286.

⁶² Claudia T. Salazar, ‘Applying International Rights Norms in the United States: Holding Multinational Corporations accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act’ in the *St. John’s Journal of Legal Commentary*, Vol.19(1), (2004), p.112-113.

1.7 International Monitoring of Corporate Governance: the South African Case

Significantly, South Africa is one jurisdiction where the use of corporate governance monitoring is not unprecedented. In fact the first model for international monitoring of corporate governance, the Sullivan Principles, was implemented in South Africa during Apartheid from 1977 to 1994. The Sullivan Principles are considered to represent “the first and most elaborate example we have of transnational, nongovernmental corporate monitoring”.⁶³ In the event the Sullivan Principles proved less than effective at monitoring corporate behaviour and fostering corporate practice in tune with global human rights norms.⁶⁴ Nevertheless they pioneered a novel, recognised system of trans-border independent monitoring of parent companies and their subsidiary operations, and ultimately of multinationals in general.

In addition, in South Africa, the Bill of Rights of the new 1996 Constitution⁶⁵ (Bill of Rights) entrenched a number of basic human rights applicable to both natural and juristic persons alike.⁶⁶ Moreover, the Bill of Rights is applicable to all South African law, and is binding upon all organs of state.⁶⁷ Accordingly, under South African law, both natural and juristic persons are now accountable for violations of human rights, as enshrined in the Bill of Rights – “the horizontal application of human rights”.⁶⁸ Therefore South Africa is a constitutional democracy where all laws must adhere to and be in line with the tenets enshrined in the Constitution.

1.8 Democratic Transition and Corporate Accountability: The South African Truth and Reconciliation Commission

In the wake of South Africa’s political transition, which began in earnest in 1990 and culminated in the first democratic elections held in 1994, the negotiated settlement included a provision for amnesty though not a blanket amnesty excluding all accountability for perpetrators of gross human rights violations. This resulted in the establishment of the Truth and Reconciliation Commission (TRC). In November 1995 Archbishop Desmond Tutu was appointed to chair the Commission, with Alex Boraine serving as deputy. The first official TRC hearing was held in East London, on 15 April 1996 and the final public hearing was concluded in August of 1997 while the Commission submitted its Interim Report in October 1998.

⁶³ Gay W. Seidman, “Monitoring Multinationals: Lessons from the Anti-Apartheid Era”, *Politics & Society* 31 (2003), p. 394.

⁶⁴ The Sullivan Principles and its monitoring system were considered by many anti-apartheid activists to be tantamount to “corporate camouflage”, Elizabeth Schmidt, *Decoding Corporate Camouflage: U.S. Business Support for Apartheid*. Washington: Institute for Policy Studies, (1980); and Kevin Danaher, *In Whose Interest? A Guide to U.S.-South Africa Relations*. Washington: Institute for Policy Studies, (1984).

⁶⁵ Chapter 2 of the Constitution of the Republic of South Africa, 1996 (Constitution).

⁶⁶ Section 8(2) of the Constitution: “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.

⁶⁷ Section 8(1) of the Constitution: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”.

⁶⁸ Danwood Mzikenge Chirwa “The long march to binding obligations of transnational corporations in international human rights law” (2006) 22 SAJHR 76, p.98.

The TRC, as part of a negotiated amnesty agreement between the National Party government and the liberation movements, was mandated to deal with the perpetrators of politically motivated human rights abuses under the prior apartheid regime and during the political conflicts of the anti-apartheid struggle. The TRC was established as a vehicle for national unity; with an emphasis on truth telling, restorative justice and conditional amnesty *in lieu* of criminal sanctions or punitive justice.⁶⁹ The TRC was presented and perceived as a model of restorative justice (a term coined during its proceedings), rather than retributive justice, and the TRC aimed for societal healing and reconciliation through truth-telling for victims and perpetrators alike. The TRC Amnesty Committee granted amnesty to former perpetrators of politically motivated human rights violations conditional on full disclosure, without any further punitive sanctions.⁷⁰

The TRC has been heavily criticised, however, for not effectively addressing the structural violence and systemically abusive character of the apartheid regime. One argument is that too much attention was focused upon individual victims of gross human rights violations and perpetrators, rather than the systemic nature of the apartheid machine itself, which encroached on the daily lives of all citizens.⁷¹ However, the involvement of the (international and domestic) business sector in the human rights violations perpetrated by the apartheid regime was not entirely overlooked by the TRC. The TRC had a special sectoral hearing dealing with the role of the business sector under Apartheid.⁷² In this forum companies could admit to active participation, or indirect contribution, to any human rights atrocities committed by the Apartheid regime, from which they had benefited. But few companies were willing to acknowledge any misdemeanour on their part. This is an issue which will be examined further in chapter four of this paper.

1.9 Research design and thesis structure

The thesis has been designed as a literature-based review of the various accounts and critiques regarding the manner in which transnational corporations have been dealt with in terms of their accountability for complicity in the commission of human rights violations by authoritarian regimes. I have focused most keenly on a number of topical journal articles, which detail the current trends, as well as other texts detailing background historical developments.

In light of the fact that this research question entails both political and legal dimensions, my approach will be multidisciplinary and make use of a broad range of literature including economic, political, and legal studies

⁶⁹ See Desmond Tutu, *No Future without Forgiveness*. London: Rider Books (1999).

⁷⁰ '[T]he tendency to equate justice with retribution must be challenged and the concept of restorative justice considered as an alternative. This means that amnesty in return for public and full disclosure (as understood within the broader context of the Commission) suggests a restorative understanding of justice, focusing on the healing of victims and perpetrators and on communal restoration.' TRC, *Final Report*, p. 117.

⁷¹ See Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa," 32 *Diacritics* (2002), p.33-59; Deborah Posel, "The TRC Report: What Kind of History? What Kind of Truth?" Paper presented at conference "The TRC: Commissioning the Past," University of the Witwatersrand, Johannesburg, 11-14 July (1999); Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge, UK: Cambridge University Press (2001).

⁷² The issues related to the TRC Business Sector Hearing are further elaborated upon in chapter four, below.

which address the interplay between business and human rights. In order to get a holistic view of the arena, I will canvas works from both sides of the spectrum – i.e. those authors who are in favour of creating more accountability for corporations as well as those who are not.

The first step will be to address the underpinnings of political and legal ideology in relation to corporations and the extent to which they may be held accountable as human rights actors. As these issues relate directly to public international law, it will be important to investigate the manner in which international law at present deals with corporate actors and their human rights accountability.

Whilst the business-human rights interplay encompasses a broad range of issues, this thesis will only focus on a specific aspect of that relationship. The scope of this study will be limited primarily to TNCs and their relationship with human rights abusive states, and what the standards of accountability, historically and currently, are for TNC complicity in such abuses.

This work will serve as a descriptive analysis of the history of, and the mechanisms currently in place for, holding TNCs accountable for state-sponsored human rights violations in which they were complicit. The context of this analysis will be within the ambit of political transitions from authoritarian to democratic regimes, with a particular focus on the South African case. This work does not attempt to develop a novel approach to holding TNCs accountable for complicity in relation to human rights violations committed by states, but rather seeks to examine the framework within which TNCs operate and the current, available accountability mechanisms. Therefore, although it makes use of a number of perspectives in the literature, it does not seek to develop a new accountability mechanism or theory.

The study consists of five chapters, focused on a distinct but linked set of issues:

Chapter one: Analytical Framework – The first Chapter sets out the analytical framework of the research question and presents the problem as well as the purpose of the study, methodology, as well as a literature review. Chapter one serves as an exposition of the background and history pertaining to the aforementioned question. This chapter also introduces the concepts and terms which are to be developed in the following chapters, as well as introducing, at a general level, the issues to be discussed, in more detail, in each chapter.

Chapter two: Conceptualizing the Business-Human Rights Paradigm – The second chapter will entail a conceptual outline of the framework within which corporations operate, and the ideological underpinnings thereof (for example the effect of globalisation and the gradual decline of the Westphalian model). It will provide a brief survey of the factors underlying the gradual shift in socio-political and economic power from states to TNCs. This chapter will also include an analysis of key concepts, such as the notion of a corporate entity and its degree of liability, in the context of the discourse of human rights. The main objective of this chapter will be to examine whether corporations can be held accountable for their complicity in state-sponsored human rights violations.

Chapter three: Experiments in Corporate Accountability – The focus of this chapter will be primarily on how TNC accountability for human rights violations has previously been dealt with in public international law, and what the current trends are in terms of mechanisms that may be used to hold corporations accountable. This chapter will also outline the historical context of the international movement to hold corporations accountable for human rights violations.

Chapter four: The Transitional Context – Chapter four will contextualize the issues discussed in chapters two and three within the context of democratic transitions from authoritarian rule. The focus in this chapter will be specifically on South Africa and how it has attempted to deal with issues of corporate complicity post-transition. This chapter will focus on mechanisms such as the TRC as well as other more current mechanisms which attempt to deal with issues such as corporate social responsibility.

Chapter five: Conclusion – This chapter will serve as a review of the findings made in the course of the thesis with possible recommendations, relevant to corporate accountability for human rights violations. Chapter five will reflect on the outcomes of the issues discussed in the paper, and give a brief summary of the arguments and pertinent points presented in the paper.

1.10 Conclusion

“The rights secured by justice are not subject to political bargaining or the calculus of social interests.”⁷³

Our questions in regard to the accountability of TNCs are intertwined with notions of justice. At an abstract and conceptual level the present thesis raises the question whether justice requires that TNCs should be held accountable for complicity in human rights violations. More specifically, can it be just to have different degrees of accountability for natural and juristic persons?

The position of TNCs within the international human rights landscape is at odds with the tremendous weight and value attached to human rights in the globalized world. In the face of this global human rights hegemony, TNCs and their behaviour relating to human rights violations have been relatively un-policed. Although there have been a number of public and civil society awareness campaigns about TNC behaviour in relation to labour standards, scant attention has been paid to corporate behaviour in politically precarious circumstances. Given the fact that authoritarian states and their agents have frequently been perpetrators of human rights abuses, corporations operating within their ambit can all too readily become complicit in human rights abuses through their association with, or assistance to, such states, in order to benefit financially.

Ultimately, it is not a matter of prohibiting or limiting lucrative corporate behaviour and investment, but rather of increasing their degree of accountability; for TNCs are important actors on the world stage who should accordingly have a corresponding and proportional degree of accountability for their part, be it direct or

⁷³ John Rawls, *A Theory of Justice*. Universal law Publishing Co Ltd (1971), p.28.

indirect, in human rights abuses. It appears that international law may serve as the best means of implementing accountability measures, given the trans-jurisdictional operations of TNCs. And yet as it stands, and what this work aims to elucidate, the current standards of accountability in international public law for TNCs are far from stringent.

Although, as noted above, the history of human rights discourse is ancient, the question of human rights and business is a novel one, which has only really taken root in the late-twentieth and early twenty-first centuries, in the later phase of globalisation. That being said, it appears to be one of the more pressing issues of the twenty-first century, in an age where human rights discourse has entered the mainstream and where corporations appear to be the new world superpowers. It is accordingly imperative that there be mechanisms in place to curtail any abuse of power (and accordingly any complicity in human rights abuses) by corporations.

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Chapter Two: Conceptualizing the Business-Human Rights Paradigm

“What is the purpose of an economy? If it is not solely for the well-being of the people who live within it, what is an economy for?”⁷⁴

This chapter serves as an exposition of the background and theoretical underpinnings of the business-human rights debate. It begins with a discussion of what may be understood by a corporation, and how its juristic ‘personhood’ has shaped its relation with human rights (given that a corporation is a juristic person comprised of natural persons). It then moves on to what can be understood by the term ‘transnational corporation’ (TNC) with a view to its jurisdictional consequences at national and international levels.

The second chapter also investigates the notion of corporate accountability both from a historical perspective and in its contemporary relevance, particularly in the realm of public international law. The trends and processes that have informed the business-human rights paradigm will also be explored including that of globalisation as well as the growing power exerted by market forces, and so of TNCs, in a globalized world. This chapter then closes with a look at the emergent international human rights framework and the available legal instruments to human rights law in general. This chapter aims to build upon chapter one and explore how conceptions of the corporation and of human rights have informed the quest for accountability of corporations for their complicity in violations of human rights.

Ultimately this chapter aims to examine (i) the extent to which there is a lacuna in international law with regard to corporate accountability for complicity in human rights violations; and (ii) whether corporations can in fact be held accountable for complicity in human rights violations, particularly in terms of international law.

2.1 Human Rights

In order to better understand and grapple with the discourse of human rights and its relationship with corporations, one needs to consider what is understood by the somewhat amorphous notion of “human rights”. The Office of the High Commissioner for Human Rights for the United Nations (OHCHR) concisely defines the parameters and nature of human rights (in terms of international law) and subdivides them into three main categories of rights:

- 2.1.1. first generation rights are the civil and political rights (for example the right to freedom of expression, and the rights to freedom from torture and slavery);
- 2.1.2. second generation are the economic, social and cultural rights (for example the rights to health, education and social security); and

⁷⁴ Richard C. Longworth, *Global Squeeze: The Coming Crisis for First-World Nations*. Chicago: Contemporary Publishing, (1998), p.3.

2.1.3. third generation rights are collective rights (for example the rights to development, to self-determination, to peace and to a clean environment).

All these categories of human rights are nevertheless deemed to be indivisible and worthy of equal respect and enforcement. Animating the discourse of human rights is the principle of non-discrimination, which is at the heart of, and central to, all human rights and is an important principle in international human rights law, and a guiding force in a number of international human rights treaties and conventions. The principle of non-discrimination prohibits discrimination on a number of grounds, including race, sex and religion and applies to all people and in relation to all human rights. The principle of non-discrimination works in tandem with the principle of equality. The discourse of human rights contains the modality of rights and duties, with states assuming the primary obligations under international law regarding the enforcement and protection of human rights. Accordingly, states are entrusted, in terms of international law, with protecting both individuals and groups against human rights violations, as well as being tasked with taking positive measures to ensure the “enjoyment” of human rights. Individuals, by the same token, are entitled to enjoyment of their human rights, while respecting those of others.⁷⁵

The traditional view of human rights is primarily state-centric, with states considered to be the key subjects of international law, with corresponding human rights duties and obligations. Accordingly, in the traditional view of human rights, only states are considered to be being human rights violators. Therefore on a superficial view, it appears difficult, if not impossible or legally incorrect, to include non-state actors, such as corporations within this domain; as Anthony Clark Arend observes:

“...states are still the main actors in the international system and the primary creators of international law. Even though non-state actors exist, and, in some cases, these non-state actors have entered into international agreements, these actors do not enter the process of creating general international law in an unmediated fashion. In other words, the interactions of non-state actors with each other and with states do not produce customary international law. Only state interactions can produce custom.”⁷⁶

2.2 Corporate Identity and Accountability – The Transnational Corporation (TNC) in International Criminal and Civil Law Jurisdictions

The reach and power of corporations has expanded exponentially along with the intensification of the globalisation process from the mid-twentieth century. In terms of their resources and global reach some major corporations are indeed larger than most states today.⁷⁷ TNCs are also increasingly trespassing on to

⁷⁵ All information at this paragraph 2.1, regarding human rights, retrieved from the Office of the United Nations High Commissioner for Human Rights, “What are Human Rights?": <http://www.ohchr.org/en/issues/Pages/WhatareHumanRights.aspx>.

⁷⁶ Anthony Clark Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999), p.176.

⁷⁷ See United Nations Development Programme, *Human Development Report 2010: The Real Wealth of Nations: Pathways to Human Development* (2010).

terrain that was once the sole preserve of states thereby disturbing the delicate balance that existed in international law. Under international law states have long been the most powerful global presence as well as the primary actors, compared to other non-state actors who do not have extensive obligations under international law. Accordingly, new mechanisms are required to deal with this change in circumstance, as transnational corporations increasingly emerge as a strong counter to state-based power. Certainly TNCs have pervasive power well beyond the parameters of the market place, and broad social and political influence. The transnational corporation must be understood and examined as a pivotal player in the globalized world. As Micklethwait and Wooldridge tellingly observed:

Nowadays, the influence of this unsettling organization is even more pervasive. Hegel predicted that the basic unit of modern society would be the state, Marx that it would be the commune, Lenin and Hitler that it would be the political party. Before that, a succession of saints and sages claimed the same for the parish church, the feudal manor, and the monarchy ... They have all been proved wrong. The most important organization in the world is the company: the basis of the prosperity of the West and the best hope for the future of the world.⁷⁸

However, this rise in significance and power of corporations has not been accompanied by a corresponding increase in legal or other ways of holding them accountable. It may be argued that, in part, the general lack of accountability of corporations stems from the nature of the corporate structure itself. Traditionally, corporations have been afforded the benefits of the doctrine of separate legal personality. In terms of this notion the company is considered to be a separate juristic person from the natural persons who control the administration of company assets.⁷⁹ This doctrine, in essence, shields the assets of the human executives of the corporation from potential creditors. It is only in rare situations (for example where the separation was in fact a sham created with fraudulent intent) that a court will pierce this 'corporate veil'⁸⁰ and treat the corporation and its executives as one and the same. This conception of separate legal personality, moreover, only relates to the situation where *natural* persons are in charge of the assets of a company, and does not relate to the parent-subsidary relationship where "one company owns and controls another".⁸¹ This is, of course, a crucial feature of the organisational structure of transnational corporations (TNCs). The parent-subsidary structure is one usually employed by TNCs, with the parent company being incorporated in one state (the 'home state'), with various subsidiaries incorporated within their particular 'host states'. The different jurisdictional bases of the parent and subsidiary companies may then be used as a "jurisdictional veil" to extend the doctrine of separate legal personality to the relation between the parent company and its subsidiaries.⁸² The subsidiary is considered a juristic person of another jurisdiction, and is accordingly

⁷⁸ John Micklethwait and Adrian Wooldridge, *A Future Perfect: The Challenge and Promise of Globalization*. Random House (2003), p.xv.

⁷⁹ *Salomon v A Salomon & Co Ltd* [1897] AC 22 (House of Lords).

⁸⁰ This fiction of the separate legal personality of the company is often referred to as 'the corporate veil'.

⁸¹ P. Muchlinski, "Limited Liability and multinational enterprises: a case for reform?", *Cambridge Journal of Economics* 2010, 34, 915-928, at 918.

⁸² P. Muchlinski, "Limited Liability and multinational enterprises: a case for reform?" *Cambridge Journal of Economics* 2010, 34, 915-928, at 920.

incorporated under a different legal system to its parent company. Accordingly, the question then arises as to whom in fact to hold accountable when corporations and/or their subsidiaries have been complicit in human rights violations, or in fact how to hold the corporation accountable in light of these distinctions between the TNC and its subsidiaries as well as that of juristic and natural persons.

Muchlinski does, however, suggest an approach for dealing at least with the new parent-subsidiary dynamic. Drawing on the work of Blumberg⁸³ and Strasser⁸⁴, he suggests the use of enterprise analysis. Enterprise analysis adopts a “substance over form” approach, and seeks to tease out and examine the actual nature of control between the parent and subsidiary companies, in order to look at the group structure holistically and to determine whether in fact the parent is in *de facto* control of the subsidiary. Therefore, where it can be shown that the parent company exerted control over the subsidiary, the malfeasant behaviour of the subsidiary may be attributed to the group, and the parent company will not enjoy separate legal personality or limited liability from the consequences of the malefactions of its subsidiary.⁸⁵ This may increase the likelihood of, and create further grounds upon which the ‘corporate veil’ may be lifted.⁸⁶

More generally Muchlinski advances the view that the corporate veil should be pierced where it is in the interests of justice to do so and not only in circumstances where the doctrine of separate legal personality is being abused or misused. For Muchlinski this would encourage a legal order where parent companies would be liable for the malfeasance of their subsidiaries, even if the parent were only indirectly involved in such wrongdoing, and would provide an incentive for parent corporations to implement better policies and be more diligent in their operations. Furthermore, parent corporations would no longer be able to hide behind the “jurisdictional veil”, as the parent’s and subsidiary’s actions would be deemed to be one and the same.⁸⁷ It bears mentioning, although trite, that a parent company may be held jointly liable with its subsidiary, where both were *directly* involved (by act or omission) in the commission of the offending act.⁸⁸

In light of the above and with the gradually evolving nature of corporations, and of TNCs in particular, their degree of accountability for complicity in human rights violations needs to be accordingly amended. Therefore as the powers of TNCs have been augmented, and as they assume more responsibilities which were previously the preserve of the state, so should their obligations and degree of accountability be increased; TNCs should not be permitted to hide behind the corporate veil and the doctrine of limited liability. In the words of Garth Meintjes, “the idea of a corporation as a legal fiction without responsibilities is no more

⁸³ P.I. Blumberg, K.A. Strasser, N.L. Georgakopoulos, & E.J. Gouvin, *Blumberg on Corporate Groups*, (2nd ed.) Vol. 1. ch.3, New York:, Aspen Publishers (2005), para 6.02-6.03.

⁸⁴ K.A. Strasser, “Piercing the corporate veil in corporate groups”, *Connecticut Law Review*, vol. 37, 637-65 (2005), p.661.

⁸⁵ See P. Muchlinski, “Limited Liability and multinational enterprises: a case for reform?” *Cambridge Journal of Economics* 2010, 34, 915-928, at 919.

⁸⁶ *Ibid*, at 919.

⁸⁷ *Ibid*, at 923.

⁸⁸ *Ibid*, at 921-22, and 926.

sacred or accurate than the idea of unfettered state sovereignty.”⁸⁹ Therefore as there are checks-and-balances for every player on the global stage, TNCs should be no exception.

In actual practice, though, the position of TNCs in international criminal law is a complex and elusive matter if also one that is currently undergoing some potentially significant changes. The UN Norms⁹⁰ define a TNC as any juristic body involved in a profit-making venture in a number of countries (more than two countries), whatever the composition of the corporation, or the countries in which it has operations, and regardless of how many persons undertake such profitable endeavours.⁹¹ Given the typically complex internal structure of TNCs, the parent company may have little formal authority over its subsidiary, although the subsidiary may effectively be required to follow policy devised by the parent company. It nevertheless remains a separate juristic person incorporated in another jurisdiction. States, the main actors under international law, generally respect the principle of territoriality and will typically not interfere in other territories by implementing human rights policy or obligations in relation to foreign nationals in a foreign territory or state.⁹² Accordingly, “home states” have been disinclined to chastise parent companies in regard to human rights violations committed by their subsidiaries in foreign territories (host states).⁹³ Moreover, no covenants of customary international law oblige home states to control the activities of TNCs in other territories.⁹⁴

Historically, TNCs have been dealt with (on the rare occasions they have been held accountable) in terms of human rights violations, primarily through the criminal law. There has, however, gradually been a shift towards using the civil law as an avenue for redress – particularly the remedy of reparations, with the majority of these matters settled out of court for vast, undisclosed amounts.⁹⁵ In particular, a U.S. statute, the Alien Tort Claims Act⁹⁶ (ATCA), has come to prominence as a mechanism for seeking civil redress, in particular reparations; a topical example being the *Khulumani*⁹⁷ case, which will be examined in further detail in chapter three. The history of civil cases against corporations for human rights violations is a fairly recent development, mainly played out in U.S. federal courts, thanks in most part to the ATCA. The first case to

⁸⁹ Garth Meintjes, “An International Human Rights Respective on Corporate Codes”, in *Global Codes of Conduct: An Idea Whose Time Has Come* p.83-99, at p.87 (Oliver F. Williams ed., 2000).

⁹⁰ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, 55th Sess., 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) .

⁹¹ “[A]n economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively”, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, 55th Sess., 22d mtg., Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003) .

⁹² J. Donnelly, “State Sovereignty and Human Rights”, *Human Rights and Human Welfare*, Denver: University of Denver Graduate School of International Studies, 2004.

⁹³ UNCTAD, *World Investment Report: 2007*. New York: United Nations, (2007).

⁹⁴ United Nations Human Rights Council. *Report of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; Addendum. Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation*. New York: United Nations, 2007.

⁹⁵ For Example the Swiss Banks Litigation, *Doe I, et al. v. Unocal Corporation*, 963 F. Supp. 880 (C.D. Cal. 1997); *Doe, et al. v. Unocal Corporation*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).; *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2nd Circ. 1980); *Sosa v Alvarez-Machain*.

⁹⁶ 28 U.S.C S1350.

⁹⁷ *In re South Africa Apartheid Litigation*, 346 F.Supp.2d 538, 549-51 (S.D.N.Y. 2004).

successfully use the ATCA in relation to human rights violations was the case of *Filartiga v. Pena-Irala*⁹⁸ and later confirmed and varied in *Sosa v. Alvarez-Machain*⁹⁹, and of course, most topically, the current case of *Khulumani v Barclays Nat'l Bank Ltd.*¹⁰⁰

2.3 Globalisation and the State-Corporate Power Paradigm

As already indicated in 1.3 and 1.7 above the evolving process of globalisation has profoundly impacted on the traditional business-human rights paradigm, not least with regard to the increasing prominence of TNCs. At its core, and as previously stated, globalisation involves a process whereby the state-centric approach of the 'Westphalian system', with its reliance on exclusive territorial jurisdictions, has an increasingly reduced significance. Territorial borders have become more deregulated and increasingly permeable to trade not only in goods, but also for the exchange of political and social ideologies.

The traditional Westphalian system was premised on the model of sovereign nation states and the principle of territoriality (i.e. exclusive territorial jurisdiction). The Westphalian system came about as a result of the Peace of Westphalia of 1648 which heralded a new political order in which sovereign nation-states had exclusive jurisdictions with regard to domestic law but were precluded from interfering in the domestic affairs, even if these involved gross human rights violations, of other jurisdictions.¹⁰¹ In contrast, the emerging "Post-Westphalian" world is characterized primarily by (i) a greater fluidity and permeability of sovereign borders and jurisdictions; (ii) the conflation of the distinction between the public and private spheres; and (iii) "the fragmentation of authority".¹⁰² In the wake of the globalisation process, the balance of power between states and corporations (in particular TNCs) has steadily shifted in favour of corporations with a gradual reduction of the concentration of power in the hands of the state.¹⁰³ This power shift affords TNCs increasing opportunities to take advantage of the various jurisdictions of weakened nation-states – the 'home states' and 'host states' in which they operate.¹⁰⁴

Globalisation has been claimed by some analysts to represent the "end of geography",¹⁰⁵ while others have stressed the significance of the ways in which "[c]ultures, economies and politics appear to merge across the globe through the rapid exchange of information, ideas and knowledge, and the investment strategies of

⁹⁸ 630 F.2d 876 (2d Cir. 1980).

⁹⁹ 542 U.S. 692 (2004).

¹⁰⁰ 504 F.3d 254, 258 (2d Cir. 2007).

¹⁰¹ See R.R. Palmer, J. Colton, and L. Kramer, *A History of the Modern World*, 9th ed, New York: Knopf, 2002: [p.139].

¹⁰² Stephen J. Kobrin, "Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights" *Business Ethics Quarterly* 19:3 (July 2009) p. 350; A.G. Scherer, G. Palazzo, and D. Matten, "Introduction to the Special Issue: Globalization as a Challenge for Business Responsibilities," *Business Ethics Quarterly* 19, 2009, p.327-348.

¹⁰³ U. Beck, *What is Globalization?* Cambridge: Polity Press, 2000; D.C. Korten, *When Corporations Rule the World*, 2nd ed. San Francisco: Berret-Koehler 2001.

¹⁰⁴ A. Giddens, *Consequences of Modernity*, Cambridge: Polity Press 1990; D.A. Irwin, *Free Trade under Fire*, Princeton, N.J.: Princeton University Press, 2002.

¹⁰⁵ See Zygmunt Bauman, *Globalization: The Human Consequences*, Columbia University Press (2000).

global corporations.”¹⁰⁶ Globalisation represents a grand shift in the functioning of the world economy and the international political order; it amounts to an increasing move from a territorially based and state-centric framework of international relations and law to a new interconnected order of geographic, social and political relations. As McGrew eloquently states (emphasizing the interconnectedness of the globalized world), globalisation is:

“a process (or set of processes) that embodies a transformation in the spatial organization of social relations and transactions, generating transcontinental or interregional flows and networks of activity, interaction, and power”¹⁰⁷.

As this web of global interconnectedness expands and intensifies the conceptual and literal space between peoples is reduced; there has been a shift from a global world to a “global village”.¹⁰⁸ George Soros accordingly characterizes globalisation in terms of “the free movement of capital and the increasing domination of national economies by global financial markets and multinational corporations.”¹⁰⁹ For our purposes the key feature of these developments is the interrelationship of the process of globalisation and the operations of TNCs – the two are closely interwoven. TNCs are both drivers and beneficiaries of globalisation.

A survey of the relevant literature shows that, for varying reasons, globalisation has both proponents¹¹⁰ and detractors.¹¹¹ For our purposes the crucial issues concern the implications of globalisation for human rights. These have been complex and ambiguous. On the one hand the spread of the discourse of human rights and the development of a global human rights movement is thanks, in part, to economic and political globalisation and the resultant interconnectedness of the world; as more people become aware of their human rights, this leads to a growing quest to hold individuals, states and corporations alike accountable for their involvement in human rights violations.¹¹² On the other hand globalisation, and especially the increasing

¹⁰⁶ Allan Cochrane & Kathy Pain, “A Globalizing Society”, in *A Globalizing World? Culture, Economic, Politics* p.5-21; see esp. p.6 (David Held ed., 2000) as cited in Mahmood Monshipouri, Claude Emerson Welch, and Evan T. Kennedy, “Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities”, *Human Rights Quarterly*, Volume 25, Number 4, November 2003, p.968.

¹⁰⁷ David Held & Anthony McGrew, with David Goldblatt & Jonathan Perraton, “Globalization”, *5 Global Governance* 483, 483 (1999).

¹⁰⁸ Marshall McLuhan, *The Gutenberg Galaxy: The Making of a Typographic Man* 31 (1962) (The first text in which this term “global village” was used.)

¹⁰⁹ George Soros, *George Soros on Globalization* 1 (2002), quoting Jedediah Purdy, “The Values of the Market: Stiglitz and Soros”, *16 Ethics & Int’l Aff.* 143, 143 (2002).

¹¹⁰ Including G.K. Helleiner “Markets, politics and globalization: Can the global economy be civilized?” *Journal of Human Development*, 2(1) (2001), p.27-46; P.P. Balestrini, “Amidst the digital economy, philanthropy in business as a source of competitive advantage”. *Journal of International Marketing and Marketing Research*, 26 (2001), p.13-34.

¹¹¹ Including, J. Brecher & T. Costello, *Global village or global pillage: Economic reconstruction from the bottom up*. Boston, MA: South End Press (1994); J. Mander & E. Goldsmith (Eds.). *The case against the global economy and for a return toward local*. San Francisco, CA: Sierra Club Books, (1996); Anthony Giddens, *Consequences of Modernity*, Cambridge: Polity Press 1990; D.A. Irwin, *Free Trade under Fire*, Princeton, N.J.: Princeton University Press, 2002..

¹¹² P.P. Balestrini, (2001) “Amidst the digital economy, philanthropy in business as a source of competitive advantage”. *Journal of International Marketing and Marketing Research*, 26(1 February): p.13-34.

reach and power of TNCs, has exacerbated the difficulties in holding them accountable for complicity in human rights violations.

It is widely recognised, and no longer a contentious view, that as a result of globalisation power has been ceded by states to market forces¹¹³ (and so also to TNCs, as a driving force of the market). But it is still open for debate as to what extent the increasing economic power of TNCs infringes on the actual sovereignty of states. TNCs increasingly control the means of production across territorial jurisdictions, and so exercise increasing power through their ability to produce and control the flow of goods. Their power thus emanates chiefly from their control of access to the goods societies need to function.¹¹⁴ Peter Drucker has argued that such power effectively amounts to political power: greater control of access to resources inevitably confers a position of power in relation to others.¹¹⁵ However the more power TNCs gain this not only further subordinates the role of the state in the regulation of trade and transfer of capital, but also conversely politicizes the power of the TNCs, as states acquire an interest in regulating the actions of those who can determine the conditions of economic growth and capital flow.¹¹⁶ Accordingly, TNCs need to be held accountable for their newly augmented power, not least in the human rights arena.

It has been contended that in this increasingly globalised world “corporations may have as much or more power over individuals as governments”.¹¹⁷ There are approximately 82, 000 TNCs, employing 80 million workers operating in the world today.¹¹⁸ Transnational corporations produce approximately one-fifth of global wealth; the sales revenue of the nine leading TNCs outstrips the tax revenues of the majority of countries, save for those of the United States, the United Kingdom, France, Germany, Italy and Japan.¹¹⁹ In addition, the annual turnover and economies of a number of TNCs dwarfs that of many countries; and individually the largest TNCs have annual sales superior to the gross domestic product of all but approximately twenty-five of the largest country economies.¹²⁰

¹¹³ Susan Strange, *States and Markets*. Blackwell Publishers (1988).

¹¹⁴ See Peter Drucker, *Concept of the Corporation*. John Day: New York 1946.

¹¹⁵ *Ibid.*

¹¹⁶ Yash Ghai, “Rights, Social Justice, and globalization in East Asia”, in *The East Asian Challenge for Human Rights* (Joanne R. Bauer & Daniel A. Bell eds., Cambridge University Press 1999) at p. 252, as cited in Mahmood Monshipouri, Claude Emerson Welch, and Evan T. Kennedy, “Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities”, *Human Rights Quarterly*, Volume 25, Number 4, November 2003, p.973

¹¹⁷ Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, 111 *Yale L.J.* 461 (2001) at p. 461, as cited in Mahmood Monshipouri, Claude Emerson Welch, and Evan T. Kennedy, “Mulyinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities”, *Human Rights Quarterly*, Volume 25, Number 4, November 2003, p.971.

¹¹⁸ United Nations Conference on Trade and Development, *World Investment Report 2010: Investing in a low-carbon economy* (2010), p. 19.

¹¹⁹ David P. Forsythe, *Human Rights in International Relations* 33 (2000), at p.192 as cited in Mahmood Monshipouri, Claude Emerson Welch, and Evan T. Kennedy, “Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities”, *Human Rights Quarterly*, Volume 25, Number 4, November 2003, p.968..

¹²⁰ See United Nations Development Programme, *Human Development Report 1999*, p.32; Wesley Cragg, “Human Rights and Business Ethics: Fashioning a New Social Contract”, *Journal of Business Ethics*, Vol. 27, No. ½, Business Challenging Business Ethics: New Instruments for Coping with Diversity in International Business: The 12th Annual EBEN Conference (Sep., 2000), p.209.

In light of the growth of the globalisation movement and correspondingly global connectivity, corporations particularly TNCS, today are spoilt for choice in terms of where they choose to set up their business operations.¹²¹ This has consequently led to a “race to the bottom”¹²² with states competing for large corporate investment by having a legal environment amenable and inviting to the demands of big business, (without too many regulatory checks and balances). Globalisation has in turn also weakened the position of states “to regulate business” extraterritorially; as a result of the principle of territoriality which means that a state cannot use its law extraterritorially – beyond the geographical bounds of the state itself.¹²³ Accordingly gives them limited control over the activities of their TNCs operating in other territories

2.4 Corporations and Accountability for Human Rights Violations under International Law

Human rights discourse has a rich history going back to the natural rights theories of Locke and Hobbes but it was only in the course of the twentieth century that notions of human rights were incorporated into international law. The International Nuremberg Tribunal represented the first occasion in history where individuals were held liable for human rights violations in terms of international law.¹²⁴

A key characteristic of rights discourses is that there are specified jural relations between rights-bearers and duty-bearers “against whom those rights can be claimed”.¹²⁵ In terms of the classic Hohfeldian analysis rights and duties are correlative; accordingly rights come with correlative or corresponding duties (of other parties) to respect the rights held by the rights-bearer.¹²⁶ Significantly, though, the development of international human rights law largely remained premised on the notion of *individuals* (natural persons) being rights-bearers and accordingly other natural persons having correlative human rights duties. This has resulted in corporate actors being, to a significant degree, left out of the ambit of human rights discourse, and accordingly corporations have seldom, if ever, been considered as bearers of correlative human rights duties. Arguably this is a questionable absence, as corporations should have human rights duties

¹²¹ Wesley Cragg, “Human Rights and Business Ethics: Fashioning a New Social Contract”, *Journal of Business Ethics*, Vol. 27, No. ½, Business Challenging Business Ethics: New Instruments for Coping with Diversity in International Business: The 12th Annual EBEN Conference (Sep., 2000), p.209..

¹²² Roy Culpeper and Gail Whitmen, ‘The Corporate Stake in Social Responsibility’, *Canadian Corporations and Social Responsibility*, Canadian Development Report 1998 (Reneuf Publishing, Ottawa, Canada), p.13-35, as cited in Wesley Cragg, “Human Rights and Business Ethics: Fashioning a New Social Contract”, *Journal of Business Ethics*, Vol. 27, No. ½, Business Challenging Business Ethics: New Instruments for Coping with Diversity in International Business: The 12th Annual EBEN Conference (Sep., 2000), p.209.

¹²³ Wesley Cragg, “Human Rights and Business Ethics: Fashioning a New Social Contract”, *Journal of Business Ethics*, Vol. 27, No. ½, Business Challenging Business Ethics: New Instruments for Coping with Diversity in International Business: The 12th Annual EBEN Conference (Sep., 2000), p.209-210.

¹²⁴ See J. Donnelly, *International Human Rights*, 3rd ed. Boulder, Colo.: Westview Press, 2007; J.R. Paul, “Holding Multinational Corporations Responsible Under International Law”, *Hastings International and Comparative Law Review* 24 (Spring) 2001, p.285-296; C.M. Vazquez, “Direct vs. Indirect Obligations of Corporations Under International Law”, *Columbia Journal of Transnational Law* 43, 2005, p. 927-959.

¹²⁵ S. Pegg “An Emerging Market for the New Millennium: Transnational Corporations and Human Rights” in *Transnational Corporations and Human Rights*, ed. J.G. Frynas and S. Pegg. Houndmill: Palgrave MacMillan, 2003, p.16.

¹²⁶ See Wesley Newcomb Hohfeld. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press (1946). The article appeared earlier at 26 Yale Law Journal 710 (1917).

corresponding to the human rights claimed by natural persons, regardless of the fact that corporations are juristic persons.

Any work attempting to address the issue of human rights, in part or in whole, cannot ignore the public international law framework from which it stems. At present, international law remains primarily focused on states, state officials and individuals with regard to issues of wrongdoing and accountability for human rights violations. Historically states have been considered to be not only the custodians of public international law, but also subjects thereof; that is, possessing “international legal personality”.¹²⁷ In contrast, corporations are considered to be ‘objects’ of international law, with rights and duties “conferred” upon them by states and which are only exercisable by states.¹²⁸ That being said, the UDHR expressly stipulates that “every individual and every organ of society” has a duty to promote human rights.¹²⁹ Moreover, a number of organizations, for example bodies of the UN, aside from individual natural persons, have been considered subjects under international law.¹³⁰ Therefore, although states are the primary actors under international law this does not, however, mean they are the only actors. Still, this remains a contested issue in international public law; there is a school of thought which posits that corporations are accountable for “violations of customary international law, either directly or through national courts”.¹³¹ There is, however, a dissenting school which advances the contrary view that corporations are not, and cannot in fact be, subjects of international law, and should accordingly not have any human rights obligations in terms thereof.¹³²

Drawing on the work of Andrew Clapham who addresses issues of corporate accountability in his seminal work *Human Rights Obligations of Non-State Actors*¹³³ the present study will examine the possible degree of accountability of corporations for their complicity in human rights violations and the critiques of such accountability mechanisms. Clapham uses the example of international organizations (IOs) such as the United Nations who, like states, as well as “certain parties to internal armed conflicts” have human rights obligations in terms of international law.¹³⁴ He admits that the terrain is not as clear-cut in regard to

¹²⁷ See J.G. Ruggie, “Reconstituting the Global Public Domain: Issues, Actors and Practices.” *European Journal of International Relations* 10(4), 2004, p.499-531; A. Wawryk, “Regulating Transnational Corporations through Corporate Codes of Conduct.” in *Transnational Corporations and Human Rights*, ed. J.G. Frynas and S. Pegg. Houndmill: Palgrave MacMillan, 2003, p.53-78.

¹²⁸ A.C. Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy”, *Review of International Studies* 27, (2001), p.133-150.

¹²⁹ United Nations General Assembly. 1998 (1948). *Universal Declaration of Human Rights*, vol. 2005. New York: United Nations, (Preamble).

¹³⁰ S.R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, *Yale Law Journal* 111 (2001), p.443-545.

¹³¹ J.J. Paust, “Human Rights Responsibilities of Private Corporations”, *Vanderbilt Journal of Transnational Law* 35 (May) 2002, p.801-825; S.R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, *Yale Law Journal* 111 (2001), p.443-545; C. Wells and J. Elias, *Holding Multinational Corporations Responsible for Breaches of Human Rights*, Cardiff: Cardiff University Centre for Business Relationships, Accountability and Sustainability and Society, 2003; International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*. Veersox, Switzerland: International Council on Human Rights Policy (2002).

¹³² C.M. Vazquez, “Direct vs. Indirect Obligations of Corporations under International Law”, *Columbia Journal of Transnational Law* 43, 2005, p.123.

¹³³ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press, 2006).

¹³⁴ *Ibid*, at p.30.

corporations but Clapham is nevertheless of the view that “there is no reason to believe that certain international law obligations cannot attach to non-state actors in the form of legal persons.”¹³⁵ Clapham avers that international law incorporates duties for individuals “both in their public and private capacities” while IOs also have certain duties. There is accordingly no basis upon which to assert that corporations, or other actors, cannot have corresponding duties under international law.¹³⁶

Moreover, Clapham asserts that this inclusion of additional actors will not weaken the human rights regime; the human rights framework is in fact malleable enough to accommodate such adjustments:

*“I would suggest that the strength of the human rights system has always been its ability to adapt to new demands and new needs. There are now demands for protection from the effects of big business and non-state actors. The human rights machinery and norms are pliant enough to be reoriented to cope with these new demands.”*¹³⁷

2.4.1 Critiques of Corporate Accountability

Although a number of authors believe that there should be increased corporate accountability, there is by no means a unified voice in this regard, and in fact a number of critiques thereof have emerged. Clapham acknowledges that there has been far from overwhelmingly support of the view, to which he subscribes, i.e. that “non-state actors and private individuals have duties under international law”. He notes several key critiques, a number of which will be reviewed below:

(a) “*The Trivialization Argument*”

A number of theorists contend that introducing other actors, such as non-state actors, into the fray as having human rights obligations, would trivialize the traditional notion of human rights, as human rights duties would no longer be attached to, or rest solely on, the state.¹³⁸ In terms of this approach states should be the sole bearers of human rights obligations, and to do otherwise (by adding other actors) would dilute the importance of human rights, which bear special gravitas precisely because they relate directly to grave abuses by the state. This approach is in keeping with the traditional view of states as the only duty-bearers in terms of human rights law. Clapham counters that the founding human rights instruments, such as the UDHR, do not speak directly and solely to states alone, but also posit individual rights without mention of the state.¹³⁹ Accordingly, Clapham rejects this critique on two grounds: firstly he argues that there is no

¹³⁵ *Ibid*, at p.30-31.

¹³⁶ *Ibid*, at p.31.

¹³⁷ *Ibid*, at p.22.

¹³⁸ *Ibid*, at p.33.

¹³⁹ *Ibid*, at p.33-34.

veracity to the claim that human rights are only actionable against states, rather human rights appear to be more universal in applying to all people and actors – “human rights are to be respected by all persons, groups, and states, and that exceptional additional duties for the state have been explicitly articulated.” Secondly, he argues that the question of ‘trivialization’ is a supremely subjective judgment or assessment – “[w]hat can be considered trivial depends on who you are and what are your interests”.¹⁴⁰

(b) “*The Legal Impossibility Argument*”

The proponents of this view assert that it is a fiction in law to have non-state actors subject to certain duties or obligations in terms of international law. This is in light of the fact that international law and customary international law was born primarily out of state action; including (i) the signing and ratification of treaties (treaties which are only binding on the signatories thereto); and (ii) customary international law which results not from the signing of treaties, but rather from states acknowledging or accepting certain rules as binding on them. In terms of this approach non-state actors such as IOs may have human rights obligations under international law, but only where they have become a party to treaties initiated by states or through the application of customary international law.¹⁴¹ In addition, in terms of this argument, armed rebel factions may also be subjects of human rights law, but only where they have gained actual government status.¹⁴²

Clapham contends that in relation to armed factions this claim is spurious: in practice a number of armed movements that were *not* equivalent to a government, have in fact been probed in relation to the commission of human rights violations by, for example, the Truth and Reconciliation Commission of Sierra Leone and the Guatemalan Historical Clarification Commission.¹⁴³ Moreover, and more topically, terrorists groups have been considered as subject to human rights obligations, an assertion made by theorists, observers, NGOs, certain governments, and central UN bodies, such as the General Assembly, alike.¹⁴⁴ Clapham argues that this willingness to amend human rights law to include terrorists as having human rights obligations is “ushering in an era where states acting in the United Nations are willing to attach human rights obligations to non-state actors in general and to terrorists in particular.”¹⁴⁵

¹⁴⁰ *Ibid*, at p.35.

¹⁴¹ *Ibid*, at p.35.

¹⁴² *Ibid*, at p.35-36.

¹⁴³ *Ibid*, at p.37-38.

¹⁴⁴ *Ibid*, at p.38-41.

¹⁴⁵ *Ibid*, at p.41.

Moreover, Clapham asserts that the definition of human rights has evolved; “the term ‘human rights’ has generated meanings and significance beyond the realm of international legal obligations owed by states.”¹⁴⁶ Accordingly, to delimit or prohibit the inclusion of non-state actors within the ambit of this definition is illusory; and Clapham finds such claims unpersuasive – “excluding any obligations for non-state actors through appeals to the ‘definition’, ‘essence’, or ‘original sense’ of the term ‘human rights’ are unconvincing.”¹⁴⁷

(c) “*The Policy Tactical Argument*”

According to Clapham, this argument is premised on the contention that governments may, as a tactical move, opt to focus on the obligations of non-state actors in order to deflect attention away from the state’s own human rights violations to those perpetrated by rebel groups or armed militia thereby legitimizing the government’s own reprisal actions in relation to such actions. By casting terrorist groups as bearers of human rights obligations the state can be viewed as simply acting to prevent human rights abuses (committed by the rebel groups); “[i]n this way, human rights law may be cynically captured and abused to justify further oppression.”¹⁴⁸

Clapham asserts that in fact U.S. legal precedent has been relatively swift in acknowledging that corporations do in fact have obligations in terms of international human rights law. Citing the *Talisman*¹⁴⁹ case Clapham notes that Judge Schwartz in that case concluded that:

substantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA [Alien Tort Claims Act] against corporate defendants for such substantial violations of international law, including *jus cogens* violations, are the norm rather than the exception.¹⁵⁰

Accordingly, in light of such domestic precedent for holding corporations liable for human rights violations, Clapham sees no reason why corporate actors should not also have similar accountability in terms of international law.

¹⁴⁶ *Ibid*, at p.41.

¹⁴⁷ *Ibid*, at p.41.

¹⁴⁸ *Ibid*, at p.42.

¹⁴⁹ *The Presbyterian Church of Sudan et al v Talisman Energy Inc, Republic of the Sudan Civil Action 01 CV 9882 (AGS)*, US District Court for the Southern District of New York, Order of 19 March 2003.

¹⁵⁰ *The Presbyterian Church of Sudan et al v Talisman Energy Inc, Republic of the Sudan Civil Action 01 CV 9882 (AGS)*, US District Court for the Southern District of New York, Order of 19 March 2003, at p.47, cited in Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press, 2006), p.45.

2.4.2 Clapham's Approach to Human Rights Violations by Non-state Actors

For Clapham, there is clearly room for non-state actors within the international human rights system, and it is important that they be acknowledged as important human rights concerns. Historically human rights have functioned as a check on state power but that does not restrict their applicability to non-state actors within the private sphere. He observes that “while [human rights] have protected private power, they also contain the seeds for action against private power – in the same jurisdictions that have historically curtailed public power when such power has threatened private autonomy.”¹⁵¹ However, Clapham is aware that the application of such human rights obligations to non-state actors is not common to all jurisdictions: “With a multiplicity of jurisdictions for human rights claims, we have to accept that human rights obligations may attach to non-state actors in some jurisdictions and not in others.”¹⁵²

Moreover, Clapham asserts that there is no reason to view international human rights law as fixed; human rights are relatively malleable and there is nothing prohibiting their evolution to include violations of human rights by non-state actors even if states are the primary agents in this regard. Furthermore, it appears that the enjoyment of human rights is not merely predicated on an individual's relationship to the state; as Clapham observes –

*“we can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.”*¹⁵³

Ultimately for Clapham the human rights obligations of non-state actors cannot be ignored, and it is clear that such obligations exist, even if they are unenforceable in certain jurisdictions. In his view “international human rights obligations can fall on states, individuals, *and non-state actors*. Different jurisdictions may or may not be able to enforce these obligations, but the obligations exist just the same.”¹⁵⁴ (Emphasis added).

Clapham's approach to holding non-state actors (including corporations) accountable for human rights abuses is premised on the traditional notion of states being the primary actors and law-making authority and bearing obligations under international law. His approach, however, goes further and advances the view that some traditional public law obligations should also be applicable to non-state actors. Clapham advocates a shift in international human rights law in order to hold accountable all actors capable of violating international human rights law; therefore he concludes that “the existing

¹⁵¹ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press, 2006). at p.56.

¹⁵² *Ibid*, at p.57.

¹⁵³ *Ibid*, at p.58.

¹⁵⁴ *Ibid*, at p.58.

general rules of international human rights law, created and acknowledged by states, now fix on non-state actors so that they may be held accountable for violations of this law.”¹⁵⁵ This will evidently have major implications for TNCs involved in, or complicit with, human rights violations. In relation to the current debate as to whether corporations are in fact subjects of international law, and accordingly possessed of international legal personality Clapham implies that corporations do in fact have “limited international personality”.¹⁵⁶

Clapham does not, however, completely discount the importance of the state and acknowledges its continued value and worth, along with that of non-state actors:

*“I would also argue that public international law can apply in the networks and sectors that focus on duties for non-state actors. And, I would suggest we can construct such a framework without the existing law of state responsibility crumbling and without inappropriately legitimizing the relevant non-state actors.”*¹⁵⁷

Clapham contends that the reluctance to recognize corporate international legal personality is premised on two grounds: (i) the fear that “foreign corporations would somehow be able more easily to interfere in the political and economic affairs of states if they were acknowledged to possess a degree of international legal personality”; and (ii) “a fear that these foreign corporations would be able to trigger excessive diplomatic protection for national companies of the host state where the foreign nationals are controlling shareholders in those national companies.”¹⁵⁸ But for Clapham there seems no justifiable basis upon which to exclude other non-state actors as long as some credence is given to the notion of individuals having certain rights and obligations under customary international law and international humanitarian law:

*“As long as we admit that individuals have rights and duties under (?) customary international law and international humanitarian law, we have to admit that legal persons may also possess the international legal personality necessary to enjoy some of these rights, and conversely to be prosecuted or held accountable for violations of the relevant international duties.”*¹⁵⁹

Clapham’s key point is that if natural persons enjoy human rights and obligations, it is not peculiar for juristic persons also to enjoy such rights and obligations. For example, in the case of the South African Bill of Rights, “a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty

¹⁵⁵ *Ibid*, at p.28.

¹⁵⁶ *Ibid*, at p.78.

¹⁵⁷ *Ibid*, at p.29.

¹⁵⁸ *Ibid*, at p.78.

¹⁵⁹ *Ibid*, at p.79.

imposed by the right".¹⁶⁰ However there is a caveat to this enjoyment of these rights for juristic persons in terms of the Constitution as "[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person."¹⁶¹ Therefore one must be cautious in attributing all human rights, and the enjoyment thereof, by natural individuals wholesale to juristic persons, as it is clear that certain human rights cannot equally be applied to, or enjoyed by, a juristic person (such as the right to human dignity).¹⁶² Regardless thereof all juristic persons are bound by a duty to observe the human rights of others.

Clapham comments that his approach appeals to the effectiveness principle: "If international law is to be effective in protecting human rights, everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves."¹⁶³ For Clapham the problem is that attempts have been made to treat issues of subjectivity, international legal personality and international capacity as one in the same, accordingly diminishing the possible understanding of non-state actors being considered as bearers of human rights obligations – "[t]rying to squeeze international actors into state-like entities box is, at best, like trying to force a round peg into a square hole, and at worst, means overlooking powerful actors on the international stage."¹⁶⁴ Therefore Clapham is ultimately of the view that "various non-state entities have enough international legal personality to enjoy directly rights and obligations under general international law as well as under treaties."¹⁶⁵ One cannot help observing the implications of Clapham's view for TNCs, particularly in light of the evolving nature of corporations and their augmented powers which should come with corresponding duties, and accordingly accountability. The lack of a more extensive framework for the accountability and obligations of non-state actors in international human rights law will result in an accountability vacuum with regard to non-state actors, and TNCs in particular. Although states may have been historically acknowledged as the most important actors on the international law plane, a reluctance to recognize the changing world order and the rise of the power of the corporation could in fact reduce the legitimacy of human rights. International law should give better effect to the importance of human rights as a yardstick for ethical conduct by all persons, both natural and juristic, as well as the human rights duties and obligations all persons have towards each other. As such obligations attach to all persons it would be unreasonable to include state actors (who are juristic persons for all intents and purposes) and other non-state [juristic] actors such as individuals, rebel and terrorists groups, while excluding some non-state actors, such as corporations or TNCs, who arguably wield even greater power. As Clapham suggests, in order for international

¹⁶⁰ Section 8(2) of the Constitution.

¹⁶¹ Section 8(4) of the Constitution.

¹⁶² Section 10 of the Constitution.

¹⁶³ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press, 2006), p.80.

¹⁶⁴ *Ibid*, at p.80.

¹⁶⁵ *Ibid*, at p.82.

law to be “effective” in safeguarding human rights it needs to ensure that “everyone” has a duty not to violate human rights directly or indirectly or to assist governments in the violation thereof.¹⁶⁶

In the final analysis human rights do not exist solely by virtue of individual relations to the state, but simply by virtue of being human. Therefore if those rights are being impinged upon by any actor, such actor must be held directly accountable without having to go through the relevant state involved. This applies especially in circumstances where the state concerned has a poor human rights record and does not value human rights. Similarly, in circumstances where TNCs are acting in politically unstable territories and may be complicit in state-sponsored human rights violations, the relevant states are unlikely to hold them accountable. In such circumstances the imperative to hold TNCs directly accountable seems far greater; it becomes imperative to have the correct accountability mechanisms, in terms of international law, to deal with such corporate malfeasance and complicity in human rights violations.

2.5 Concluding Remarks

Chapter two aimed to examine the issue of whether corporations can in fact be held accountable for their complicity in human rights violations. Intuitively, the immediate response would be a resounding answer in the affirmative, but upon canvassing the landscape, one realizes that the answer is not that categorical. Particularly in terms of international human rights law, which places profound importance on the role of the state as the bearer of human rights obligations and the state is the conduit through which human rights issues are to be addressed. In practice, though, this comes up against the reality of authoritarian and other states which do not value the preservation of human rights. Moreover, this does not take account of the increasing role and significance of TNCs, the more so in close association with human rights violations by authoritarian states.

That being said, human rights are not a static concept, and are sufficiently flexible to encompass other non-state actors; indeed, if human rights are to have a greater impact globally this is a shift that needs to occur. From our review of the development of human rights and the relevant human rights principles, and in terms of international law as it currently stands, the case for the inclusion of other non-state actors as having human rights obligations appears strong, even compelling. In principle that implies that corporations, TNCs in particular, should and can be held accountable for their complicity in human rights violations. However, in actual practice and law that remains a challenge

As we have seen the lacuna in international law in relation to corporate accountability stems primarily from the primacy placed on the role of the state. Moreover, traditionally states are considered to be the principal

¹⁶⁶ *Ibid*, at p.80.

subjects of international law, and correspondingly the only bearers of human rights violations, with corporations merely being 'objects' of international law whose rights and duties are conferred upon them by and only exercisable by the state.¹⁶⁷ What may, however, be gleaned from the above is that the nature of the corporation is changing, in some ways almost usurping the power of the state as an important international actor; for their part international human rights are malleable and the international law system is flexible enough to be amended to accommodate this change in the global political-legal milieu; and there is no coherent prohibition against corporations being held accountable for human rights violations. Accordingly TNCs can and should be held accountable for complicity in human rights violations.

In light of this proposition that corporations should be held accountable for complicity in human rights violations, an examination of what accountability mechanisms are in fact available needs to be made. Hence in chapter three an exploration of accountability mechanisms will follow. The chapter will open with a brief description of the history of accountability mechanisms and the current trends in relation thereto. The chapter will then aim to contextualize these issues of accountability within the zone of political transition. An examination will also then be made of accountability in the South African context, with a focus on the TRC and its business sector hearings.

The following chapter, building upon the issues of accountability explored in this chapter, aims to examine (i) what mechanisms have been previously used and (ii) what the current mechanisms are in terms of holding corporations accountable for human rights violations; and (iii) indeed the prospects of success of such mechanisms. The subsequent chapter, following on from these theoretical discussions, will also address the practical considerations emanating from the aforementioned theories, and how the interplay between business and human rights has been traditionally addressed and what, if any, are the emerging and current trends.

¹⁶⁷ A.C. Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy", *Review of International Studies* 27, (2001), p.133-150.

Chapter 3: Corporate Accountability Mechanisms

Building upon the issues of accountability addressed in the preceding chapter this chapter will examine, what mechanisms can in fact be used to hold corporations accountable for complicity in human rights violations. First we will look at how issues of corporate accountability have been historically addressed and then consider what the current trends and mechanisms are for holding corporations liable for human rights violations in which they were complicit.

As discussed in chapter 2 the issue of corporate accountability is complicated by the corporation's ambiguous status as a juristic person composed of natural persons. These complications are multiplied in the case of a TNC as a distinct enterprise comprised of a parent company in the jurisdiction of one state and subsidiaries in the jurisdictions of other states, with coordinated operations involving significant transborder trade and production of goods.¹⁶⁸

A gradual trend does, however, seem to be emerging towards increasing corporate accountability for complicity in human rights violations. There are three key corporate accountability mechanisms that warrant attention; namely (i) state responsibility; (ii); soft law norms; and (iii) corporate governance.. These three mechanisms may collectively (or separately) be used to hold corporations accountable in varying ways and with varying degrees of success. The problem is therefore whether corporate accountability for complicity in human rights violations should be sought by legal and judicial means or through internal efforts at improving corporate self-governance.

Historically, corporations, in the limited extent to which they have been held accountable by legal and judicial means, have primarily been held accountable only for *direct* human rights violations committed by them; in few if any cases have corporations been held accountable under the law with regard to corporate complicity or indirect involvement in human rights violations, up until the late twentieth century. This is nevertheless important history to observe, however, as it created the foundation for the increasing numbers of corporate complicity matters to come.

Traditionally, and particularly in light of the doctrine of separate legal personality, the corporation itself, as an entity, has always been considered beyond the purview of judicial accountability; only the individual members (as the human agents of the corporation) were liable, in very limited circumstances, for the acts of the corporation; as Hobbes already observed: "If a Mulct be laid upon the [corporate] body for some unlawful act, they are only liable by whose votes the act was decreed, or by whose assistance it was executed..."¹⁶⁹ In this limited sense emphasis has always been placed on the legal accountability of the human agents of

¹⁶⁸ Luzius Wildhaber. "Some Aspects of Transnational Corporation in International Law", 27 *Netherlands International Law Review* (1980), 79-88, at 80; Peter Muchlinski, *Multinational Enterprises and the Law*, 1995, Blackwell Publishers, at 12-13, and 15.

¹⁶⁹ Thomas Hobbes, *Leviathan* 155 (J.C.A Gaskin ED., Oxford University Press 1996) (1651).

the corporate entity, rather than that of the corporate entity itself.¹⁷⁰ Therefore, historically there has been little acknowledgment of corporations themselves being accountable, and the shift in an alternative direction only began in earnest in the wake of World War II and the Nuremberg Trials.

This chapter will first discuss the history of the development of corporate accountability for human rights abuses. It will be contended that these developments have only recently come of age with the dawn of the twenty-first century.

3.1 History of corporate accountability – the Nuremberg Trials

At the end of World War Two (WWII) in June 1945, the Allied Forces (composed of the United Kingdom; United States of America (USA); France; and the former Soviet Union) aimed to create an international judicial vehicle of accountability for the state-sponsored human rights violations committed by the German Reich. The International Military Tribunal (IMT) was created as a judicial mechanism for trying individuals in terms of the newly introduced concept of international human rights law. Perpetrators were tried in their personal capacity, regardless of their relationship with the state in a series of trials at the Palace of Justice.¹⁷¹

The premier trial before the IMT was the Trial of Major War Criminals, held in terms of the London Charter of 8 August 1945.¹⁷² This trial ran from 20 November 1945 until 1 October 1946 and tried twenty-two individual perpetrators, who were high ranking officials of the German Reich, as well as a number of political and military organizations; including the SS and the Nazi Party.¹⁷³ The Trial of Major War Criminals is of great importance for being the first time in history where individuals were tried in terms of international law for crimes that were considered to be against international peremptory norms (*ius cogens* norms)¹⁷⁴. Telford Taylor, Chief of Counsel for War Crimes elucidated three imperatives behind the establishment of the Trial of Major War Criminals at Nuremberg; namely that (i) “all men are bound as a matter of law to observe the “standards of conduct generally observed in civilized countries”; (ii) those who violate such standards are liable to be prosecuted by tribunals in terms of international law; and (iii) these standards make it a criminal offence, in terms of international law, to (a) plan and execute an “aggressive war”, (b) violate “the laws and customs of war generally observed among belligerents”, and (c) persecute certain

¹⁷⁰ A clear example of this were the three Nuremberg trials of industrialists and the board of directors of defendant companies accused of war crimes, as opposed to the corporations themselves; namely the Flick Trial; I.G. Farben Trial, and Krupp Trial.

¹⁷¹ Jonathan A. Bush, “The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said”, *Columbia Law Review*, Vol. 109:1094, p.1101.

¹⁷² See United Nations, *Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)*, 8 August 1945, 82 U.N.T.C. 280, available at: <http://www.unhcr.org/refworld/docid/47fdb34d.html> (retrieved 17 January 2011); United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)*, 8 August 1945, available at: <http://www.unhcr.org/refworld/docid/3ae6b39614.html> (retrieved 17 January 2011).

¹⁷³ Jonathan A. Bush “The Prehistory of Corporations and Conspiracy” in *International Criminal Law: What Nuremberg Really Said*, *Columbia Law Review*, Vol. 109:1094, p.1105.

¹⁷⁴ *Jus cogens* norms are norms of international which are binding on all states even without a state’s express consent to be bound.

groups on racial, religious or other grounds.¹⁷⁵ Therefore the aim of this Nuremberg Tribunal was to prosecute those allegedly guilty of committing offences that ran contrary to the global human rights order and international law standards and norms.

The Nuremberg Tribunal effectively created a new international ethos with regard to state sanctioned human rights abuses. Perpetrators of human rights abuses could no longer invoke the justification of doing their duty in terms of 'superior orders', while those in positions of authority had to accept the implications of their 'command responsibility'. Therefore individual state agents, senior individuals as well as their foot soldiers, were held accountable under the law. This provided a precedent for the development of international human rights law, which enabled the criminal prosecution, in terms of international law, of individual state agents who did not respect international *ius cogens* norms, and human rights in particular.¹⁷⁶ As Teitel observes, as a result of Nuremberg "the paradigm of accountability shifts from national to international processes and from the collective to the individual."¹⁷⁷

From 1947 until 1949, a second set of trials began, geared towards holding German industrialists liable for their involvement in the commission of international crimes.¹⁷⁸ The focus here will be on this second set of trials held in terms of Control Council Law No. 10179¹⁸⁰ – the Trials of War Criminals before the Nuremberg Military Tribunals (Second Nuremberg Trial). The Second Nuremberg Trial prosecuted individuals who were not highly ranked within the Nazi regime but who had close ties to, and provided extensive support, financially and otherwise, to the Nazi regime. The defendants included doctors (who had performed medical experiments on reluctant subjects from concentration camps); members of the judiciary; members of various SS organizations; and members of the diplomatic and administrative core.¹⁸¹ In particular, within

¹⁷⁵ See Telford Taylor, *Final Report to The Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*; Brig. Gen. Telford Taylor, "Nuremberg Trials: Synthesis and Projection", 31 May 1949, p.3, retrieved 8 March 2010 from <http://images.library.wisc.edu/History/EFacs/GERRecon/omq1949n162/reference/history.omq1949n162.taylornuremberg.pdf>.

¹⁷⁶ Ruti Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', in *The Yale Law Journal*, Vol. 106, No. 7. (May, 1997), p.2038 – 2039.

¹⁷⁷ *Ibid*, p.2039.

¹⁷⁸ Jonathan A. Bush "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", *Columbia Law Review*, Vol. 109:1094 (2009), p.1103.

¹⁸⁰Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, promulgated at Berlin, 20 December 1945 by the Allied Control Council for Germany.

¹⁸¹ See *United States of America v. Karl Brandt et al.* (Doctor's Trial); *The United States of America vs. Erhard Milch* (Milch Trial); *The United States of America vs. Josef Altstötter, et al.* (Justice/Judges' Trial); *The United States of America vs. Oswald Pohl, et al.* (Pohl Trial); *The United States of America vs. Wilhelm List, et al.* (Hostages Trial); *The United States of America vs. Ulrich Greifelt, et al.* (RuSHA Trial); *The United States of America vs. Otto Ohlendorf, et al.* (Einsatzgruppen Trial); *The United States of America vs. Ernst von Weizsäcker, et al.* (Ministries Trial); *The United States of America vs. Wilhelm von Leeb, et al.* (High Command Trial); *United States of America v. Friedrich Flick, et al.* (Case 5), United States National Archives (USNA), RG-238, M891/5/3172; *United States v Krupp* (Krupp Case); *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1948)* (Trials of War Criminals), Vol. IX; *United States v. Carl Krauch* (IG Farben case), *Trials of War Criminals*, Vol. VIII.

these proceedings, three German industrialists trials were held; namely the Krupp Trial,¹⁸² IG Farben Trial¹⁸³ and the Flick Trial¹⁸⁴. These three cases will be the primary focus of our examination.

The defendants (all directors of their respective companies) in the Flick Trial, I.G. Farben Trial, and Krupp Trial were indicted, *inter alia*, for war crimes and crimes against humanity such as enslavement; the plundering and spoliation of occupied territories and the exploitation of their inhabitants; the seizure of plants in occupied territories; the persecution of Jews; membership in a criminal organization (e.g. the SS); and crimes against peace by assisting in the execution of wars of aggression and wars in contravention of international treaties.¹⁸⁵ In the Flick Trial three of the six indicted defendants were acquitted, while three received sentences ranging from two and a half years to seven years (Friedrich Flick received a sentence of seven years).¹⁸⁶ In the Krupp Trial one of the twelve indicted defendants was acquitted, eleven were found guilty and received sentences ranging from two years to twelve years (Alfred Krupp, along with two other directors, received a sentence of twelve years).¹⁸⁷ In the IG Farben Trial of the twenty-four defendants indicted, twenty-three were tried, ten were acquitted, and thirteen were found guilty and received sentences ranging from one and a half years to eight years (Carl Krauch received a sentence of six years).¹⁸⁸

Approximately thirteen trials were held in total at Nuremberg after WWII, with 200 individual prosecutions, 38 acquittals and less than 38 death sentences, and the remainder were sentenced to prison sentences ranging from eighteen months to life.¹⁸⁹ And of the total of 300 individuals tried and thirteen cases heard during the Nuremberg Trials, 177 individuals were prosecuted and twelve cases were heard before the Second Nuremberg Trial.¹⁹⁰

Ultimately, the Nuremberg Trials prosecuted *individuals* for *corporate* involvement in the perpetration of human rights violations by the Nazi regime. Therefore the Nuremberg Trials pioneered judicial accountability of *individuals*, but not of *corporate actors*.

¹⁸² *United States v Krupp* (Krupp Case); Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1948) (Trials of War Criminals), Vol. IX.

¹⁸³ *United States v. Carl Krauch* (IG Farben case), Trials of War Criminals, Vol. VIII.

¹⁸⁴ *United States of America v. Friedrich Flick, et al.* (Case 5), United States National Archives (USNA), RG-238, M891/5/3172.

¹⁸⁵ See Telford Taylor, *Final Report to The Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, p.63-73.

¹⁸⁶ *Ibid*, p.118.

¹⁸⁷ *United States v Krupp* (Krupp Case); Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1948) (Trials of War Criminals), Vol. IX.

¹⁸⁸ *United States v. Carl Krauch* (IG Farben case), Trials of War Criminals, Vol. VIII.

¹⁸⁹ Brig. Gen. Telford Taylor, "Nuremberg Trials: Synthesis and Projection", 31 May 1949, p.4, retrieved 8 March 2010 from <http://images.library.wisc.edu/History/EFacs/GerRecon/omg1949n162/reference/history.omg1949n162.taylornuremberg.pdf>

¹⁹⁰ *Ibid*, p.4.

3.2 Current trends in corporate accountability: State responsibility

Traditionally, states have been considered to be the only actors who are possessed of international legal personality with corresponding rights and obligations; moreover in terms of international human rights law states act as the primary vehicle for the enforcement of human rights values.¹⁹¹ States that have signed and/or ratified human rights treaties are bound to respect and protect human rights, to prevent human rights abuses from occurring, and to remedy the occurrence of such abuses.¹⁹² Accordingly, much of the responsibility for human rights remains at a state level. In terms of international law, each state is duty bound to enforce and protect human rights, and ensure the observance of such rights by all actors or “entities” operating within its territory or control.¹⁹³ There is, however, no obligation on states to ensure the observance of international human rights principles by corporations, incorporated within their territory, also in these corporations’ “extraterritorial” operations.¹⁹⁴ Therefore with respect to TNCs the home state only exerts state responsibility over the TNC incorporated in its territory – i.e. operating within its jurisdiction, while host states have responsibility for subsidiaries operating in their respective territories and jurisdictions.¹⁹⁵ In practice these multiple and split jurisdictions preclude the effective functioning of state accountability mechanisms with regard to TNCs. In light of the augmented global power of TNCs, as noted in chapter one, this state-centric vision is highly problematic for the application of international law in relation to TNCs.

For Florian Wettstein, TNCs have acquired increasing power as a result of two primary factors: (i) they enjoy control of the means of production across territorial jurisdictions, and can therefore “determine outcomes in the global production structure”; and (ii) they have extensive bargaining power and influence because of the “dependencies” created by their control over global production processes.¹⁹⁶ Moreover, TNCs have the technical know-how, knowledge and information; since innovation is a key driver of economic globalisation and of the market in general, those who have access to the most information or

¹⁹¹ See J.G. Ruggie, “Reconstituting the Global Public Domain: Issues, Actors and Practices.” *European Journal of International Relations* 10(4), 2004, p.499-531; A. Wawryk, “Regulating Transnational Corporations through Corporate Codes of Conduct.” in *Transnational Corporations and Human Rights*, (J.G. Frynas and S. Pegg ed.s), Houndmill: Palgrave MacMillan, 2003, p.53-78.

¹⁹² Sarah Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights”, *Netherlands International Law Review*, Vol. 46 (1999) p.175; Robert McCorquodale, “Human Rights and Global Business”, *Commercial Law and Human Rights*, S. Bottomley and D. Kinley, eds. Aldershot; Burlington: Ashgate Dartmouth (2002) p.92-97.

¹⁹³ S. Deva, “Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat.’” *Melbourne Journal of International Law* 5, p.49.

¹⁹⁴ See Sarah Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights”, *Netherlands International Law Review*, Vol. 46 (1999) p.180-181; J. Donnelly, “State Sovereignty and Human Rights”, *Human Rights and Human Welfare*. Denver: University of Denver Graduate School of International Studies (2004); United Nations Human Rights Council. *Report of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; Addendum. Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation*. New York: United Nations (2007).

¹⁹⁵ “In practice only the home and host country have direct jurisdiction over the TNC’s headquarters or a subsidiary.” Stephen J. Kobrin “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights”, *Business Ethics Quarterly* 19:3 (July 2009), p.351.

¹⁹⁶ Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution*, Stanford University Press: Stanford, California, 2009, p.195.

knowledge have crucial advantages in so far as “[k]nowledge and innovation have become the single most important factors of competitiveness in the global economy”.¹⁹⁷ Moreover, the privatization of knowledge by large corporations increasingly forces states to form liaisons with these corporations in order to have access to such knowledge and to stay developmentally relevant, progressive, and ultimately competitive. Wettstein contends that significant state powers have already been ceded to large corporations and TNCs. Nowhere was the predominant position of corporations more pronounced than in the economic crisis of 2008, when states bailed out a number of captains of industry, a move which was considered altruistic by most, but was in fact necessitated by the stranglehold large corporations have on fiscal economies. States cannot afford to see these big corporations fail; TNCs are ultimately now the true bastions of global economical and political power.¹⁹⁸ Therefore there is a palpable reluctance on the side of states, both host states and home states alike, to hold TNCs accountable for their human rights conduct or to monitor and “regulate” their human rights behaviour, particularly extraterritorially.¹⁹⁹

From the above it is manifest that in relation to TNCs it has become quite outdated in international relations and law to still retain the Westphalian system, where states are considered to be the primary mechanisms for accountability under international law. TNCs no longer occupy the same position as (national) corporations did prior to globalisation, and have further entrenched themselves as important players on the international stage. However, despite their newly augmented global economic and political power, the human rights obligations of corporations in terms of international law remain unclear.²⁰⁰ In actual fact, considered as accountability mechanisms, states “have ceased to be of singular importance”.²⁰¹ Looking to the state for mechanisms to hold TNCs accountable is a misapprehension which in effect does the whole international system of human rights a disservice; indeed it may in fact lead to further human rights violations and abuses. Smith reiterates that the traditional framework of international relations and law fails to recognise the multiplicity of key players in the current globalising context: “the multiplicity of actors in transnational relations, the proliferation of new forms of governance and the permeability of domestic legal orders by international norms’ have made this structure unsuitable for the complex globalised world”.²⁰²

Not only are TNCs becoming arguably more powerful than most states, they are de facto also acquiring certain rights in terms of certain international and bilateral treaties. It follows that TNCs should have corresponding duties in relation to such rights: “[i]t would seem more than reasonable to argue for symmetry, that power, authority and rights should imply duties, obligations and liabilities. More specifically, that TNCs

¹⁹⁷ *Ibid*, at 201.

¹⁹⁸ *Ibid*, at 206.

¹⁹⁹ T. Campbell, “A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations”, *Business Ethics Quarterly* 16(2) (2006), p.258.

²⁰⁰ A.C. Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organisation, A Crisis of Legitimacy”, *Review of International Studies*, Cambridge University Press (2001), 27, p.133-150.

²⁰¹ A.C. Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organisation, A Crisis of Legitimacy”, *Review of International Studies*, Cambridge University Press (2001), 27, p.133-150.

²⁰² C. Smith, “International Trade and Globalisation”, (3rd ed.) Stocksfield: Anforme, 2007, p.135.

should be held responsible *directly* for complicity in violations of human rights law”²⁰³ (emphasis added). Therefore at present, states and international law are not wholly effective in providing the required accountability mechanisms in relation to TNCs. The prospects for state-based accountability mechanisms are difficult to predict, however, given the reluctance or resistance of states to prosecute malfeasant corporations, due to the augmented power of corporations, the prospects are far from promising.

3.3 International Conventions: “Soft Law” Corporate Accountability Mechanisms

It is manifest, that state-based accountability mechanisms are not sufficient to address the issue of corporate accountability for complicity in human rights violations. Accordingly, aside from state responsibility in terms of international law, there are also a number of international instruments which attempt to increase corporate accountability for human rights violations.

In conjunction with new forms of corporate self-governance there has recently been the development of a number of International Conventions or “soft law” (voluntary, non-binding) instruments for holding corporations accountable for human rights violations. Currently there are four key instruments which deal with transnational corporations, namely; (i) the Organisation for Economic Cooperation and Development (OECD) Guidelines;²⁰⁴ (ii) the International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multi-national Enterprises and Social Policy (ILO Tripartite Declaration),²⁰⁵ (iii) the United Nations Global Compact;²⁰⁶ and the (iv) Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft Norms).²⁰⁷ We will briefly consider each of these as possible accountability mechanisms relevant to corporate complicity in human rights violations.

OECD Guidelines

The Organisation for Economic Cooperation and Development (OECD) Guidelines were adopted on 21 June 1976. They serve, as their name suggests, merely as a guideline in terms of good corporate behaviour for OECD-based companies. The principles underlying the OECD Guidelines are relevant to a wide range of topics, including the environment, employment or labour, consumer protections, competition, and science and technology.²⁰⁸ But *inter alia* they could also be considered as providing for possible accountability mechanisms in relation to the growing number of human rights violations committed by TNCs that had begun

²⁰³ Stephen J. Kobrin “Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms, and Human Rights”, *Business Ethics Quarterly* 19:3 (July 2009), p.355.

²⁰⁴ OECD, *Guidelines for Multinational Enterprises*, Revision 2000, Vol. 2006. Paris (2000) retrieved at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> on 12 December 2010.

²⁰⁵ Retrieved at <http://www.ilo.org/public/english/employment/multi/download/english.pdf> on 12 December 2010.

²⁰⁶ Retrieved at www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/index.html on 12 December 2010.

²⁰⁷ E/CN.4/Sub.2/2003/12 (2003).

²⁰⁸ J. Karl “The OECD guidelines for multinational enterprises” in M.K. Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), p.90-92.

to emerge. However, such accountability mechanisms would clearly have to take the form of corporate self-governance rather than any externally imposed accountability under international law.

The OECD Guidelines established a relatively sound monitoring system, making use of (i) “national contact points” who enforce the OECD Guidelines and address any pertinent matters within specific states; as well as (ii) the Committee on International Investment and Multinational Enterprises whose members are representative of different states, and refine matters regarding the OECD Guidelines.²⁰⁹

However, it is not clear that much can be expected from such accountability mechanisms based on self-governance in actual practice. The OECD Guidelines have been heavily criticized for (i) not effectively and clearly delineating the human rights obligations of transnational corporations; (ii) not including any penalties for non-compliance; and (iii) providing a monitoring mechanism which does not appear to be sufficiently independent.²¹⁰ Implementation has been weak and the OECD Guidelines consequently appear to have had limited success in actually reducing human rights abuses by corporations.²¹¹

ILO Tripartite Declaration

The ILO Declaration, approved in 1977, relates primarily to labour rights and labour issues, including health and safety standards.²¹² It is non-binding and voluntary, although it has a monitoring system which includes a routine survey of the success and extent of the implementation of its provisions. It has had limited effect in relation to corporate accountability for human rights. The key critiques of the ILO Tripartite Declaration are that (i) it relates specifically and solely to labour rights (and consequently neglects other human rights); (ii) only a small number of parties have adopted the ILO Declaration; and (iii) its monitoring mechanisms are not effective.²¹³

Global Compact

The Global Compact was proposed at the Davos World Economic Forum in January 1999, by Kofi Annan, Secretary General of the UN at the time, as a voluntary “global compact of shared values and principles.”²¹⁴ The Global Compact “asks companies to embrace, support and enact, within their sphere of influence a set

²⁰⁹ Part II of the OECD Guidelines, retrieved at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

²¹⁰ Danwood Mzikenge Chirwa “The long march to binding obligations of transnational corporations in international human rights law” (2006) 22 SAJHR 76 at 88; Olivier De Schutter, “The challenge of imposing human rights norms on corporate actors” in Olivier De Schutter (ed.) *Transnational Corporations and Human Rights: Studies in International Law* (2006) 1, p.6-9.

²¹¹ J.L. Cernic, “Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises”, *Hanse Law Review*, Vol. 4, No. 1, 2008, p.71-100.

²¹² See the ILO Declaration at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

²¹³ Danwood Mzikenge Chirwa “The long march to binding obligations of transnational corporations in international human rights law” (2006) 22 SAJHR 76 at 84-5; Olivier De Schutter, “The challenge of imposing human rights norms on corporate actors” in Olivier De Schutter (ed.) *Transnational Corporations and Human Rights: Studies in International Law* (2006) 1, p.8-9.

²¹⁴ Kofi Annan, “Business and the UN: A Global Compact of Shared Values and Principles”, 31 January 1999, World Economic Forum, Davos, Switzerland, reprinted in *Vital Speeches of the Day* 65(9) (15 February 1999), p.260-61.

of core values in the areas of human rights, labour and the environment”.²¹⁵ The Global Compact contains ten principles focused on: human rights (two principles);²¹⁶ labour “standards” (four principles); the environment (three principles); and corruption (one principle). Companies that have voluntarily joined the Global Compact, undertake to observe its ten principles, and to report their degree of successful compliance and enforcement therewith either in their annual reports or similar public corporate reports; and must in addition submit a short description of (or post an internet link to) this report on the Global Compact website. This Communication on Progress (COP), which is an annual progress report to be submitted by participants, must highlight or outline the implementation of the ten principles. Should a signatory fail to submit the COP this will result in the participating business being delisted as a participant from the Global Compact’s public database.²¹⁷ The submission must be made by a signatory within two years of becoming a signatory to the Compact (and every two years thereafter).

The Global Compact at present has close to 6000 participants from more than 135 countries.²¹⁸ Apart from this limited success, it has come under heavy fire for not having a monitoring system or body in place. In addition it has been alleged that the ten principles are somewhat vague and indistinct. Moreover, the Global Compact is not binding on participants (but voluntary); therefore no severe repercussions are likely from any failure to adhere to its principles or to its reporting mechanism. That being said, the Global Compact has garnered substantial public interest and participation from the business sector.

UN Draft Norms

The first tentative attempt at articulating the human rights obligations of transnational corporations as a basis for their accountability for human rights violations was made with the proposal of a set of Draft Norms. The Draft Norms were adopted in August 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the UN Commission on Human Rights²¹⁹ and paved the way for future human rights accountability in relation to corporate behaviour.²²⁰ However, in April 2004, the UN Commission

²¹⁵ See UN Global Compact, “The Ten Principles” at www.unglobalcompact.org/AbouttheGC/TheTenPrinciples/index.html, retrieved 12 December 2010.

²¹⁶ “Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses.” “The Ten Principles” retrieved from <http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html> on 23 December 2010.

²¹⁷ Between the period 1 October 2009 to 1 January 2010, 859 companies were removed from the list of participants, and as of 1 February 2010 the total number of delisted participants stood at 1840. See/ <http://www.unglobalcompact.org/news/8-02-01-2010> (last accessed on/retrieved 12 December 2010).

²¹⁸ See/ <http://www.unglobalcompact.org/news/8-02-01-2010> (last accessed on/retrieved 12 December 2010).

²¹⁹ In 2006 the UN Commission on Human Rights was replaced by the UN Human Rights Council.

²²⁰ See United Nations Sub-Commission Norms on business & human rights: Explanatory materials” retrieved at <http://www.business-humanrights.org/Documents/UNNorms> on 2 January 2011.

on Human Rights chose not to approve the Draft Norms and held that the Draft Norms had “no legal standing”.²²¹

In terms of the Draft Norms TNCs were to apply the Norms to all their contracts and agreements:

Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.²²²

The Draft Norms did, however, make use of the oversight function of the state, as TNCs were subject to a system monitoring their implementation of the Norms as well as a reporting mechanism, indicating their degree of compliance with the Norms.²²³ Therefore a recommendation in the Draft Norms was that states enforce implementation and enforcement of the Norms by TNCs, as well as ensuring their adherence to both international and domestic law:

States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.²²⁴

The Draft Norms were somewhat controversial in that they conferred obligations onto corporate actors that were traditionally considered to be the preserve of states; in particular by recognizing a duty on “transnational corporations”²²⁵ and “other business enterprises”²²⁶ to protect and respect “human rights”.²²⁷ However, states were still regarded as the primary accountability mechanism for corporate human rights violations and complicity –

²²¹ Office of the High Commissioner for Human Rights, “Responsibilities of transnational corporations and related business enterprises with regard to human rights” (2004/116), retrieved at <http://www.business-humanrights.org/Documents/UNNorms>, retrieved on 2 January 2011.

²²² Norms without Commentary, Preamble, para.15.

²²³ *Ibid*, paras.15-16.

²²⁴ *Ibid*, para.17.

²²⁵ In terms of the Norms, “[t]he term ‘transnational corporation’ refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively”, *Ibid*, para.20.

²²⁶ In terms of the Norms, “[t]he phrase “other business enterprise” includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4”, *Ibid*, para. 21.

²²⁷ In terms of the Norms, “[t]he phrases ‘human rights’ and ‘international human rights’ include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system”, *Ibid*, para. 23.

States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, 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.²²⁸

Therefore in terms of the Draft Norms, although corporations had these human rights obligations, states retained their position as primary duty-bearer and accountability mechanism in relation to human rights issues.²²⁹

A number of critiques have been leveled at the Draft Norms. Although the Draft Norms represent a mechanism for augmenting TNC accountability for human rights abuses, they do not go far enough in guaranteeing the preservation of these regulations by the host state; primarily because they are (i) merely voluntary, and (ii) no real punitive measures are in place for non-adherence to the Draft Norms.²³⁰ Moreover, there is considerable incentives for states to ignore these Draft Norms in order not to alienate their corporate benefactors (as TNCs are often more powerful than states), particularly in developing countries.²³¹ This line of thinking is evident in the South African government's initial submission in the *Khulumani* case, staunchly opposing the litigation, and arguing that it could harm present and future foreign direct investment by large corporations.²³²

Although the Draft Norms were not adopted by the UN Commission on Human Rights due to the discontent, particularly from the business community, surrounding them; instead the Sub-Commission requested the appointment of a Special Representative on the issue of business and human rights.²³³ The Draft Norms, nevertheless, represented an important step forward, as they delineated an extensive list of human rights that corporations had to observe in their operations.²³⁴ The Draft Norms may be regarded as representing represent the first step towards creating international human rights standards for corporate actors.²³⁵

²²⁸ *Ibid*, para. 1.

²²⁹ See Preamble to the Draft Norms.

²³⁰ Menno T. Kamminga, "Corporate Obligations Under International Law", p.2-3. Accessed 23 September 2010. <http://www.businesshumanrights.org/Links/Repository/928980>.

²³¹ *Ibid*, p.3-5.

²³² See Ministry of Justice and Constitutional Development Republic of South Africa, "Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States", 11 July 2003 retrieved from <http://www.info.gov.za/view/DownloadFileAction?id=70180> on 3 August 2010.

²³³ It has been argued that the reluctance to adopt the Draft Norms was a result of the recalcitrance of corporations to adopt human rights obligations, see Kinley David, Justine Nolan and Natalie Zerball, "The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations", *Company and Securities Law Journal*, Vol. 25, No. 1, (2007),p.33.

²³⁴ See Preamble to the Draft Norms.

²³⁵ C. Hillemanns, "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", *German Law Journal*, Vol. 4(10), (2003), para 1.

3.4 Corporate Governance Mechanisms

Although these soft law instruments have been instrumental in terms of prescribing particular duties and standards in relation to human rights that corporations may adhere to, a number of corporations have adopted an alternative approach of creating their own internal accountability mechanisms, which are not subject to external control or monitoring. Therefore these accountability mechanisms are predicated on self or internal regulation as opposed to external accountability or regulation and do not involve the state, or international law, or judicial accountability, but seek to promote an alternative self-governance based approach to corporate accountability..

Corporate social responsibility (CSR)

While the notion of corporate social responsibility (CSR) has not been specifically concerned with corporate accountability for human rights violations, and in important ways pertain to a quite different domain (e.g. in being generally policy-oriented and forward-looking rather than being justice-oriented and backward-looking), it nevertheless provides a significant example of an alternative approach to corporate self-governance and possible accountability mechanisms. CSR has been defined in varying ways and in fact comes in many forms, but at its core it relates to corporations undertaking an endeavour or project not solely related to profit-making but aimed at (i) perpetuating a social good, as well as (ii) being more conscientious and ethical in its profit-making ventures. A cogent definition of CSR has been proffered by The World Business Council for Sustainable Development:

“Corporate social responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large...”²³⁶

Therefore CSR programmes are aimed at addressing the needs not only of company shareholders, but also those of other stakeholders, such as the community affected by company operations, as well as the environmental impact, and sustainability of the operations. CSR represents a move towards an accountability mechanism in the context of the relationship between corporations and the environment and society within which they operate.²³⁷

A number of key criticisms have, however, been leveled at CSR; in particular that it is simply a form of ‘green-washing’ by corporations, while no real effective changes are made, as ultimately the monetary interests of the corporation continue to outweigh those of other stakeholders or of the environment when

²³⁶ Richard Holme, and Phil Watts, “Corporate Social Responsibility: Making Good Business Sense”. The World Business Council for Sustainable Development (2000). Accessed 23 December 2010. <http://www.wbcasd.org/DocRoot/lunSPdIKymYH5HjbN4XC/csr2000.pdf>.

²³⁷ C.M. Dickerson, “Corporations as Cities: Targeting the Nodes in Overlapping Networks”, *Journal of Corporation Law* 29 (2004) p.534.

there is a conflict of interests.²³⁸ Moreover, in most jurisdictions, directors owe a fiduciary duty to act in the best interests of the company²³⁹ which usually implies making profitable decisions on behalf of the company; particularly where the profit benefits outweigh the potential negative publicity fallout. In addition, often CSR reporting mechanisms are weak and ineffective, as no clear reporting standards have been delineated.²⁴⁰

Voluntary self-regulatory mechanisms

In line with the general notion of corporate self-governance voluntary self-regulatory mechanisms have proved to be attractive to TNCs and governments alike.²⁴¹ These mechanisms are adopted voluntarily by the corporation concerned (i.e. the corporation is not legally bound to adopt such mechanisms) while compliance with the relevant principles or policy is self-monitored.²⁴² A number of large TNCs, such as Royal Dutch/Shell and British Petroleum plc have such voluntary mechanisms in place.²⁴³

There are, however, a range of such voluntary accountability regimes, not all of which have been exclusively developed by corporations themselves; a number of such regimes have been created in collaboration with NGOs, inter-governmental organisations, and “multi-stakeholder groups”.²⁴⁴ For example, the *Voluntary Principles on Security and Human Rights* (VPs) were established in 2000 through a “tripartite multi-stakeholder initiative” between states (including the U.S., United Kingdom; Canada, Switzerland), NGOs (including Amnesty International; Human Rights Watch), and organizations with observer status (including the International Committee of the Red Cross).²⁴⁵ It relates specifically to companies involved in the extractive industry (for example mining) who make use of third party security personnel.²⁴⁶ The VPs were established to ensure that in the protection of the resources of the extractive industry no human rights are infringed upon. Companies who are currently participants in the VPs include AngloGold Ashanti, Anglo American, BHP Billiton and most recently Barrick Gold Corporation.²⁴⁷ The VPs are not binding, and the VPs ability to adequately regulate the implementation of the principles has been called in question.²⁴⁸ In addition

²³⁸ C.A.Williams, and J.M. Conley, “An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct”, *Cornell International Law Journal*, 38 (2005), p.501-502.

²³⁹ For example, in terms of South African law, directors stand in a fiduciary relationship to the company, see M.S. Blackman, *LAWSA*, vol. 4(2), “Companies”, para 16.

²⁴⁰ Larry C. Backer, “From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations”, *Georgetown Journal of International Law*, Vol. 39, (2008) p.591-600.

²⁴¹ Penelope Simons “Corporate Voluntarism and Human Rights: The Adequate and Effectiveness of Voluntary Self-Regulation Regimes”, *Relations Industrielles/Industrial Relations*, (2004), Vol. 59, No.1, p.105.

²⁴² *Ibid*, p.106.

²⁴³ *Ibid*, p.107.

²⁴⁴ Penelope Simons “Corporate Voluntarism and Human Rights: The Adequate and Effectiveness of Voluntary Self-Regulation Regimes”, *Relations Industrielles/Industrial Relations*, (2004), Vol. 59, no.1, p.108-109.

²⁴⁵ See *Voluntary Principles on Security and Human Rights*, retrieved from <http://voluntaryprinciples.org/> on 22 February 2011.

²⁴⁶ See “The Principles” retrieved from <http://voluntaryprinciples.org/principles/introduction> on 22 February 2011.

²⁴⁷ See List of Participants, retrieved from <http://voluntaryprinciples.org/participants/> on 23 February 2011.

²⁴⁸ See “Voluntary Principles on Security and Human Rights”, retrieved at <http://www.business-humanrights.org/ConflictPeacePortal/Specialinitiatives/VoluntaryPrinciples> on 23 February 2011.

the VPs have been criticized for the “permissive language” employed therein in relation to corporate human rights obligations.²⁴⁹

Such voluntary mechanisms for corporate accountability are problematic for a number of reasons. Firstly, there is no uniformity or real universal standard of corporate accountability for human rights in terms of such instruments; secondly the human rights provisions are somewhat lenient and watered down.²⁵⁰ A key problem with such voluntary, self-regulation mechanisms is precisely the fact that they are voluntary, rarely with an independent monitoring or reporting body, thereby reducing the transparency of such instruments.²⁵¹ Therefore although such mechanisms are a step in the right direction, they fail to effect any semblance of legitimate corporate accountability.

Human rights-based voluntary codes of conduct for corporations are not as novel a notion as they may first appear; rather there has been a gradual awareness within the international community of the need to move towards some form of accountability mechanism for big business. A landmark voluntary code of conduct was the Sullivan Principles.²⁵² The Sullivan Principles were not widely ratified: only twelve large American corporations operating in South Africa at the time adopted the Sullivan Principles. Still the Sullivan Principles, even if not wholly successful, can be considered one of the first instances of adopting ethical standards for corporate conduct in the context of transitional justice.

The Ruggie Framework

The UN Draft Norms had been strongly criticized in particular by the corporate community, primarily for placing onerous duties on TNCs in terms of their human rights obligations, and thereby conflating the role of states and non-state actors (given that states are traditionally the primary actors in terms of international law).²⁵³ The Draft Norms, however, ultimately became a relic of the past, due to pressure from corporate lobby groups in particular. In the event this led to the appointment of a Special Representative of the UN Secretary-General on the issue of Human Rights and Transnational Corporations. In July 2005, John Ruggie was appointed as the Special Representative of the UN Secretary-General on the issue of Human Rights and Transnational Corporations. Ruggie was mandated to investigate and make recommendations in relation to improving the current protections against human rights abuses by TNCs, and to canvas the views of multi-stakeholders in order to create a comprehensive corporate governance framework.

²⁴⁹ *Op cit* Simons, (2004), p.110.

²⁵⁰ *Ibid*, p.106-107.

²⁵¹ *Ibid*, p.129-131.

²⁵² See paragraph 1.7 above.

²⁵³ Larry C. Backer, “Multinational Corporations, Transnational Law: the United Nations’ Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility”, *Columbia Human Rights Law Review*, Vol. 37 (2006) p. 374-380; Nancy L. Mensch, “Codes, Lawsuits or International Law: How Should the Multinational Corporation Be Regulated with Respect to Human Rights?”, *University of Miami International and Comparative Law Review*, Vol. 14, (2006) p.265-266; *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Document E/CN.4/2005/91 (15 Feb 2005), see in particular , paras 20-21 for the arguments for and against the Norms.

Ruggie, in consultation with interested parties, went on to establish the ‘*Protect, Respect and Remedy*’ Framework (Ruggie Framework). The Ruggie Framework is voluntary and non-binding (“soft law”). It is founded on three principles: (a) the duty to protect; (b) the responsibility to respect, and (c) access to remedy:

- (a) **Duty to protect**: In terms of the Ruggie Framework states are entrusted with the primary duty to protect individuals and groups against the commission of human rights violations within their territory. This duty requires states to take active measures needed to prevent and/or investigate human rights violations and to provide access to remedial measures.²⁵⁴ In terms of international law, this state duty to protect is linked with the notion that other states may intervene and undertake this duty to protect if the state omits to do so itself.²⁵⁵
- (b) **Responsibility to respect**: Corporations, for their part, are simply required to respect human rights, and failure to do so may result in negative public opinion.²⁵⁶ This is not simply a responsibility not to disrespect human rights but entails taking active measures. The primary problem with this responsibility, however, is that there are no serious repercussions should a corporation fail to adhere hereto. Moreover, the use of the word “responsibility” rather than “duty” suggests that this is a far less onerous obligation than the state’s duty to protect human rights.
- (c) **Access to remedies**: Associated with the state’s duty to protect, is the duty to provide access to legal recourse for victims.²⁵⁷

In 2008, the UN Human Rights Council endorsed the Ruggie Framework and extended the Special Representative’s mandate until June 2011 in order to ‘operationalize’ and ‘promote’ the Framework. On 22 November 2010, Ruggie presented the draft *Guiding Principles for the Implementation of the ‘Protect, Respect and Remedy’ Framework* (Principles), for comments by stakeholders. The Principles were created in order to guide states, corporations, and stakeholders in the implementation of the Ruggie Framework, as well as stating what practical reforms said parties need to make. In June 2011, the Special Representative will present the principles to the UN Human Rights Council.

3.5 Corporate Accountability Mechanisms in Domestic Law

Although international law has represented the main forum in the quest for corporate accountability, the domestic sphere also represents an alternative avenue, particularly through criminal prosecutions. The fact

²⁵⁴ See “Protect, Respect and Remedy: A Framework for Business and Human Rights”, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/8/5, April 2008.

²⁵⁵ Doris König, “International law today: new challenges and the need for reform?” *Springer*, 2007, Vol. 193, p.5.

²⁵⁶ *Op cit* “Protect, Respect and Remedy: A Framework for Business and Human Rights”, p.17.

²⁵⁷ *Ibid*, p.7, para 18.

that individual members of corporations are now being held accountable for the complicity of their companies in human rights violations is itself evidence of the trajectory of domestic law, which appears to be moving towards stricter accountability for corporations (and their members) in relation to human rights. Indeed, what may be gleaned from current precedents is that domestic law may be one of the more successful mechanisms for holding corporations accountable for complicity in human rights violations.

Although the majority of domestic cases have centred on the prosecution of individual members of corporations, strides have been made, particularly in the US jurisdiction, of holding corporations accountable. A topical example of prosecution for human rights violation under domestic law is the case of Frans Van Anraat, who in December 2004 was charged with being an accomplice in relation to the genocide and war crimes committed by Saddam Hussein (Van Anraat had allegedly supplied Hussein with a substance used in the manufacture of mustard gas). The District Court of The Hague held that van Anraat was indeed an accomplice in war crimes, through his supply of a substance used in the manufacture of chemical weapons which caused serious injury or death to civilians, in violation of international law.²⁵⁸ Van Anraat was, however acquitted of being an accomplice in the genocide charge, due to lack of evidence of his knowledge of the genocidal intent of the Iraqi government towards the Kurds.²⁵⁹ Van Anraat received a sentence of fifteen years imprisonment by The Hague District Court.²⁶⁰ This sentence was later increased to seventeen years by The Hague Court of Appeal.²⁶¹

Although domestic law represents an avenue for corporate accountability for human rights violations, it is nevertheless a difficult mechanism to employ in relation to TNCs in light of their ability to transcend domestic corporate law, because of their global and transcontinental network; moreover, corporate law is not globally consistent or globally enforceable.²⁶²

Historically, both in terms of international and of domestic law, the focus has been on the prosecution of individuals rather than corporations themselves. However USA tort law appears to stand in strong contrast to this tradition, as in terms of the Alien Tort Claims Act (ATCA) *corporations* can in fact be held liable for "international crimes".²⁶³ A number of victims of human rights abuse have in recent times sought redress through the alternative avenue of domestic civil law, in particular the ATCA²⁶⁴.

²⁵⁸ *Public Prosecutor v Van Anraat*, LJN AX6406, The Hague District Court, 23 December 2005, para 17.

²⁵⁹ *Ibid.*

²⁶⁰ *Public Prosecutor v Van Anraat*, LJN AX6406, The Hague District Court, 23 December 2005.

²⁶¹ *Public Prosecutor v Van Anraat*, LJN BA6734, The Hague Court of Appeal, 9 May 2007.

²⁶² See D.M. Branson "The Social Responsibility of Large Multinational Corporations", *Transnational Lawyer*, Vol. 16 (2002), p.128-132; S. Pillay, "And Justice for All? Globalization, Multinational Corporations and the Need for Legally Enforceable Human Rights Protection", *University of Detroit Mercy Law Review*, Vol.81, (2004), p.499; S.R. Ratner, "Corporations and Human Rights: A Theory of Responsibility", *Yale Law Journal*, Vol. 111, (2001) p.535-536.

²⁶³ Jonathan A. Bush "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said", *Columbia Law Review*, Vol. 109:1094 (2009), p. 1101.

²⁶⁴ Alien Tort Claims Act, 28 U.S.C S1350.

Alien Tort Claims Act (ATCA)

The ATCA is a 200 year old domestic statute in the USA which at the time had been promulgated in order to deal with the burdensome problem of sea piracy outside the territorial jurisdiction of the US. More recently use of the ATCA has been extended to cases of human rights violations (committed by natural or juristic persons) in a foreign country. The ATCA allows for the civil prosecution of non-state actors in US courts, even where the applicant is not a citizen of the USA; however the respondent or alleged perpetrator must have some minimum contact or presence in the USA. The ATCA is therefore fairly narrow in its scope with respect to the parties allowed to bring such an action as well as in the kinds of human rights violations it covers.²⁶⁵ But it does provide a legal basis for prosecution of those involved in human rights abuses in different jurisdictions. Use of the ATCA in relation to foreign parties came to prominence as a result of the *Filatiga*²⁶⁶ case in the early 1980s, which was the first case in which the ATCA was used against an individual currently based in the USA, but who had committed a human rights violation in another country.

The majority of the civil lawsuits launched in terms of the ATCA involve a TNC that did not commit any human rights abuses itself, but was rather complicit (particularly complicity in the form of “aiding and abetting”²⁶⁷) in the commission of such abuses. These are the circumstances and cases regarding accountability for corporate complicity in human rights abuses of particular relevance to the topic and research question of this thesis.

The first key victory against a TNC (for complicity in the form of “aiding and abetting” a human rights violation) pursuant to the ATCA came in 1997 with the *Doe v Unocal* case.²⁶⁸ The *Unocal* case was the first case in which a corporation had been indicted in terms of the ATCA.²⁶⁹ The *Unocal* case was, however, exceptional in that there was a clear, direct link between the corporation involved, Unocal, and the Burmese army’s patterns of abuse of pipeline workers employed by Unocal. Moreover it could be shown that Unocal had been aware of the soldiers’ behaviour. It was also shown that Unocal not only knew of, but profited from such human rights violations.²⁷⁰ Therefore Unocal’s extensive complicity with human rights abuses could be

²⁶⁵ International Restructuring Education Network Europe (IRENE), “Controlling Corporate Wrongs: The Liability of Multinational Corporations”; A Report of the international IRENE seminar on corporate liability and workers’ rights held at the University of Warwick, Coventry, United Kingdom, 20 and 21 March 2000, p.4.

²⁶⁶ *Filatiga v Pena-Irala* 630 F.2d 876 (2d Circ. 1980).

²⁶⁷ Aiding and abetting liability has been defined as “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime” *Doe v. Unocal Corp.*, 395 F.3d 932, 945 (9th Circ. 2002), para 947.

²⁶⁸ *Doe v. Unocal Corp* 963 F.Supp.2d (C.D.Cal.1997). In this case the plaintiffs alleged that Unocal had been complicit in a number of gross human rights violations committed by Burmese soldiers, who were hired as guards by Unocal for the duration of the construction of a natural gas pipeline in a Burmese province, against the pipeline workers, (paras 880 and 883).

²⁶⁹ Tarek F. Maassarani, “Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act”, 38 *New York University Journal of International Law and Politics* 9, 40 (2005).

²⁷⁰ *Doe v. Unocal Corp* 963 F.Supp.2d at 891-9, para 896.

concretely proven in court in that a direct and substantial link was shown between Unocal's behaviour and that of the Burmese army.²⁷¹

In several cases, launched in terms of the ATCA, it has been held that "aiding and abetting" is an actionable ground.²⁷² Richard Herz contends that there is sufficient legal precedent for corporate complicity in human rights violation, in particular "aiding and abetting", as a ground for civil actions, particularly under the ATCA.²⁷³ The two rare exceptions were the first *Khulumani* case²⁷⁴ and *Doe v. ExxonMobil*.²⁷⁵ Moreover, Herz furthers that "[a]iding and abetting is a universally recognized norm of customary international law".²⁷⁶

The above cases all sought reparations or some form of redress from the TNCs involved. Reparations appear to be a fitting remedial mechanism, as corporations' primary motivation for committing, or being complicit in, the commission of human rights violations is profit or an increase in profit yield. Accordingly, holding them accountable by having them repay such victims (monetarily) seems to be particularly fitting. That being said, reparations (as a means of rectifying a moral wrong) are often controversial; but may nevertheless be appropriate in circumstances of political transition, where corporations have been complicit in the commission of human rights abuses by the former regime.

The US Supreme Court reiterated its stance on the legal standing of the ATCA in the 2004 decision of *Sosa v. Alvarez*²⁷⁷ when it held that it is permissible for people to bring individual claims for human rights violations, no matter where they occurred in the world, pursuant to the ATCA. However, in *Sosa* the Supreme Court held that the aim of the ATCA was "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."²⁷⁸ Therefore the scope of the ATCA was limited to those acts that could possibly lead to "serious consequences under international law"²⁷⁹ or that breached "definable, universal, obligatory, norms".²⁸⁰ Furthermore, the court went on to caution against the judiciary dealing with political matters (the court singled out the Apartheid reparations litigation specifically²⁸¹) as these were issues

²⁷¹ Richard L. Herz, "The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement." *Harvard Human Rights Journal*, Vol. 21, (2008), p.9.

²⁷² Including, most prominently: *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-1356 (N.D. Ga. 2002); *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 112-21, 132-35 (E.D.N.Y. 2005); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1173, n. 6 (C>D>Cal. 2005); *Presbyterian Church v. Talisman Energy Inc.*, 374 F.Supp.2d 331, 337-41 (S.D.N.Y. June 13, 2005).

²⁷³ Richard L. Herz, "The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement." *Harvard Human Rights Journal*, Vol. 2 (2008), p. 8 -9.

²⁷⁴ *In re South Africa Apartheid Litigation*, 346 F.Supp.2d 538, 549-51 (S.D.N.Y. 2004)

²⁷⁵ *Doe v. ExxonMobil Corp.*, 393 F.Supp. 2d20, 24 (D.D.C. 2005).

²⁷⁶ Richard L. Herz, "The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement." *Harvard Human Rights Journal*, Vol. 21 (2008), p.15.

²⁷⁷ *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004).

²⁷⁸ *Ibid*, at 720.

²⁷⁹ *Ibid*, at 715.

²⁸⁰ *Ibid*, at 765.

²⁸¹ *Ibid*, at 766.

best suited to the executive branch – ‘the political question doctrine’²⁸² – and doing otherwise would constitute a usurpation of powers by the judiciary (in terms of the separation of powers doctrine). In the *Sosa* case, the US Supreme Court also narrowed the categories of lawsuits that may be brought in terms of the ATCA and held that the ATCA only applies to prosecuting a very limited class of corporate complicity cases.²⁸³

Critics of the ATCA believes it goes too far in holding TNCs liable for the complicity of subsidiaries involved in human rights abuses in host states and argue that this could have a damaging effect on foreign exchange and investment and the global economy as a whole, as plaintiffs should be seeking redress within their domestic courts, and by hearing such claims US courts are superseding another country’s sovereign right to judicially adjudicate upon domestic matters.²⁸⁴ These critics’ argue that corporations are not states (and should therefore not have to adhere to or abide by the same standards); their primary objective and task is profit-making and thus they cannot be held accountable for direct host state actions from which they (corporations) might indirectly benefit. Furthermore, some academics believe that the extension of the scope of the ATCA to deal with human right violations committed in other countries is merely an attempt by some opportunistic lawyers and law firms to be involved in a landmark case, or to gain the highest reparations award for their own profit, and that it is not ultimately about reparation for the victims.²⁸⁵

In principle, the ATCA could, however, force companies to adhere to a certain code of human rights ethics in the course of doing business, similar to that applicable to states. Therefore having an accountability mechanism such as the ATCA may engender greater adherence by corporations to human rights principles, thereby making them more reluctant to be complicit in human rights violations, for fear of potential civil prosecution. That being said, the huge expense involved in lengthy litigation is an expense a large corporation may find easier to bear than the affected applicants who are most likely to be poor and from developing countries. Moreover, in light of the *Sosa* case, there are strict criteria to meet in order to proceed in terms of the ATCA, therefore although ATCA represents an option in terms of accountability mechanisms, it may be too onerous an accountability mechanism for applicants to utilize. In addition, recent ATCA cases suggest that use of the ATCA is available for very restricted use and that US courts may be adopting a very restrictive approach in terms of the applicability of the ATCA.²⁸⁶

²⁸² Michael Osborne, ‘Apartheid and the Alien Torts Act: Global Justice Meets Sovereign Equality’ in (Max du Plessis and Stephen Pete, ed.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*. Oxford, UK: Intersentia (2007), p.247.

²⁸³ “[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized, *Sosa*, at 725.

²⁸⁴ See Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *The Awakening Monster: The Alien Tort Statute of 1789*. Institute for International Economics: Washington, DC (2003).

²⁸⁵ Arthur Fergenson and John Merrigan, ‘There They Go Again: The Trial Bar’s Quest for the Next Litigation Bonanza’ in *BRIEFLY: Perspectives on legislation, regulation and litigation*, Vol. 11, No. 1(January 2007), p. 1.

²⁸⁶ In *Kiobel et al v. Royal Dutch Petroleum Co, Shell Transport and Trading Company Plc*, 06-4800-cv, 06-4876-cv (2d Cir. Sept. 17, 2010) (*Kiobel*) the plaintiffs alleged that the defendant company had been complicit in the commission of human rights violations by the

3.6 Concluding Remarks

It would be an overstatement to say that the behaviour of corporations is completely unpoliced and that they enjoy complete unaccountability in current circumstances. However at best there is a form of 'soft' corporate accountability, as the majority of accountability mechanisms are voluntary and non-binding. This evidently limits the degree of accountability and transparency required of corporations in relation to their human rights conduct. That being said, a discernable effort is being made in order to bolster these mechanisms.

Ultimately, what may be gleaned from the above is that international law accountability mechanisms and accountability mechanisms in general, are in a state of flux. But it is clear from that there are no ready-made answers. In principle international human rights law should provide appropriate accountability measures in respect of TNCs, particularly as international law is not limited by the same territorial bounds as domestic law, as it can circumvent territorial jurisdiction. But in practice international law remains heavily state-centric, with very limited accountability mechanisms (voluntary, non-binding accountability mechanisms) currently in place for corporations. Nevertheless alternative accountability structures and mechanisms are being tabled; new accountability mechanisms may be on the horizon, but any such mechanisms would need the support of states and corporations alike.

Historically, accountability has centered primarily on the individual or natural person, and the state. Accordingly, having corporations themselves being held accountable would be a significant departure from tradition; and as may be gleaned from the above, any attempts to move away from this tradition have been met with resistance. Hence the abundance of 'soft law' and corporate accountability mechanisms, as these present a less stringent accountability mechanism for corporations, and accordingly relieves some of the burden on states who are reluctant to lose the good will and investment of corporations who now wield extensive power. Therefore the prospects of success of each of these accountability mechanisms is limited as all the major parties concerned, corporations and states alike, are reluctant to push for serious change, as both have a vested interest in the status quo; as states can still give the illusion of having some control over the operations of TNCs, while TNCs can give the appearance of moving towards a corporate culture more respectful of human rights.

This chapter has canvassed the general legal terrain in terms of the accountability of corporations for human rights abuses. Against the background the focus needs to be shifted to the specific location and role of corporations in periods of political transition. The following chapter will therefore contextualize the business-human rights interplay, and corporate accountability for complicity in human rights violations, within the

Nigerian military regime. The US Court of Appeals for the Second Circuit held that corporate liability has not attained universal acceptance as a rule of customary law, and is accordingly not a rule of customary international law that may be applied under the ATCA. The Court accordingly ruled against the plaintiffs on the basis they had attempted to hold only the corporations, as opposed to the individual members of the corporations, accountable for complicity in the commission of human rights violations, *Kiobel*, p.25-43.

specific context of political transitions from authoritarian to democratic regimes; in particular in the South African transitional context.

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Chapter Four: Corporate Complicity in the Transitional Context

Authoritarian regimes as well as transitions from authoritarian rule to new democracies represent distinctive and challenging contexts for corporations to operate within: they may provide enticing opportunities for profitable enterprises but also serious risks that corporations may become involved, directly or indirectly, in the human rights violations perpetrated by such authoritarian regimes. Corporate complicity in human rights abuses also poses special challenges to transitional justice. As discussed in the preceding chapters states are still regarded as the primary bearers of rights and obligation in terms of international human rights law. Accordingly states are the mechanism through which issues of corporate accountability are supposed to be addressed. However, in the context of political transitions from authoritarian rule, the host state may be unwilling or incapable to address issues of corporate complicity in the human rights violations under the prior autocratic regime. Corporations operating in these contexts may thus have been complicit in the human rights violations of the prior authoritarian regime; and yet there is no competent state to hold corporate actors accountable for the malfeasance, save perhaps for the home state.

How is one to govern corporate behaviour and who can ensure corporate accountability for human rights violations in circumstances that are in flux and where all forms of accountability mechanisms – legal; political; societal -- are in flux or disarray? This is the unique problem posed by the context of transition from authoritarian rule where accountability mechanisms such as soft law, domestic law, or international law are not available. Therefore where does one turn?

Drawing on the recent example of South Africa, this chapter will review how South Africa, as a country in political transition, attempted to address corporate accountability for human rights violations committed by the prior regime, and what lessons may be learned from the South African experience.

4.1 Transitions from authoritarian rule

Periods of transition, particularly of transitions from authoritarian rule, are not easy to navigate, given the number of issues that warrant addressing. How to deal with the quagmire of issues within this space is a question that has plagued political theorists and legal rights activists alike. In the words of José Zalaquett: "*Experience has shown that dealing with transitional political situations is a new area of human rights practice that poses some complex ethical, legal and practical questions.*"²⁸⁷ Transitional justice is not, however, an invention of the mid-twentieth century, and war crimes tribunals go back for several centuries.²⁸⁸

²⁸⁷ José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in *State Crimes: Punishment or Pardon* (Justice and Society Program of The Aspen Institute ed., 1989), p.26.

²⁸⁸ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton University Press (2001).

How newly democratic governments are to respond to human rights violations committed under the prior authoritarian regime presents ethical, legal and political dilemmas. Political transition is a juggling act of “settling a past account without upsetting a present transition”.²⁸⁹

A key dilemma or issue emanating from such moments of political transition is the question whether the successor regime should either in the name of (retributive) justice prosecute perpetrators of human rights violations associated with the outgoing regime, or alternatively for the sake of political stability and to ensure the democratic transition forgive their actions – “the torturer’s dilemma”.²⁹⁰ For transitional justice the question is ultimately one of whether to use punitive justice mechanisms (such as prosecution) or restorative justice mechanisms (such as truth commissions) in order to address these past human rights violations. Huntington, however, argued that in reality the type of transition concerned – whether an insurrectionary ‘overthrow’, a ‘negotiated settlement’, or a top-down ‘reform’ -- determines the choice of transitional justice options adopted²⁹¹ so that neither mechanism (prosecution or amnesty/forgiveness) represents a panacea for the successor regime.²⁹²

Although Huntington as a political scientist argued for a cautious approach to prosecutions of the perpetrators of human rights violations post-transition, human rights lawyers and theorists have argued that, the constraints of international law demand the prosecution of those who commit violations in terms of international law.²⁹³ Thus Diane Orentlicher contended that although newly democratic states in the transitional context may be in a state of political, legal, and societal flux, they are not, however, relieved of their duties and obligations in terms of international law. Accordingly the successor regime is bound by its international law obligations, and where the prior regime failed to discharge certain international law duties, (for example the protection of human rights and the punishment thereof) it is incumbent on the successor regime to do so and may not ignore such international obligations through the promulgation of contrary domestic legislation.²⁹⁴ Orentlicher was prepared to concede that international law does not, however, place this obligation on states where such action would negatively impact on that state’s “national interests”; there are however stringent criteria for any such exceptions.²⁹⁵ In this principled human rights law view the special

²⁸⁹ Guillermo O'Donnell Philippe C. Schmitter and Laurence Whitehead, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Vol. 4). John Hopkins University Press (1986), p.28.

²⁹⁰ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*. Norman and London: University of Oklahoma (1991), p.211-214.

²⁹¹ “If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations. The political costs of such an effort will outweigh any moral gains; if replacement occurred and you feel it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within one year of your coming into power) while making clear that you will not prosecute middle – and lower-ranking officials; and devise a means to achieve a full and dispassionate public accounting of how and why the crimes were committed”. Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Norman and London: University of Oklahoma, 1991), p.231.

²⁹² *The Third Wave: Democratization in the Late Twentieth Century*. Norman and London: University of Oklahoma (1991), p.228-231.

²⁹³ See Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *The Yale Law Journal*, Vol. 100. No. 8, Symposium: International Law (1991).

²⁹⁴ *Ibid*, p.2595-2596.

²⁹⁵ *Ibid*, p.2595.

circumstances of transitions from authoritarian rule thus generally do not detract from the obligations on states to ensure accountability for human rights violations. Evidently this would apply to accountability for corporate complicity in human rights violations as well.

4.2 South Africa: A Case Study

4.2.1 Apartheid South Africa

Ironically, in the same year (1948) that the Universal Declaration of Human Rights (UDHR) was adopted by the United Nations, the National Party was elected into power and began to implement its policy of apartheid, premised on racial segregation in South Africa. The term 'apartheid' means "separateness" in Afrikaans; as a political system and ideology apartheid was developed "as the solution to ethnic or racial pluralism".²⁹⁶ At its core the apartheid system was an attempt to keep indigenous ethnic groups and 'races' (in the South African context classified as 'African'/'Black', 'Coloured', 'Indian', and 'White') apart in all spheres of political, social and economic life leading to 'independent' ethnic homelands, separate residential areas and racially differentiated education systems, in particular. In principle as well as in many concrete particulars apartheid involved sustained violations of human rights. Thus in 1948, the UDHR as a bastion of human rights came into force at the same time that a goliath of racial discrimination and human rights violation came into its own and found its stride in South Africa.

The world community took notice of the human rights abuses taking place under apartheid. On 30 November 1973 the UN General Assembly adopted the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (Apartheid Convention)²⁹⁷ stating that apartheid was a "crime against humanity".²⁹⁸ In terms of the Apartheid Convention, States Parties to the Convention had to (a) prevent the occurrence of the crime of apartheid through the enactment of legislation "or other measures" in order to prevent the commission or "encouragement" of the crime of apartheid, as well as punish any persons who were guilty of such an offence; and (b) through the adoption of "legislative, judicial and administrative measures" prosecute those found guilty of the crime of apartheid "whether or not such persons reside in the territory of the State in which the acts are committed or are

²⁹⁶ Mzamo P. Mangaliso, "The Corporate Social Challenge for the Multinational Corporation", *Journal of Business Ethics*, Vol.11 (1992) p.492.

²⁹⁷ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S., entered into force July 18, 1976, retrieved from <http://www1.umn.edu/humanrts/instreet/apartheid-supp.html> on 10 January 2011. 91 states voted in favour of its adoption, 26 states abstained, and four voted against its adoption; namely South Africa; Portugal; the United States; and the United Kingdom, see John Dugard, "Convention of the Suppression and Punishment of the Crime of Apartheid", p.1, retrieved at http://untreaty.un.org/cod/avl/pdf/ha/cspca/cspca_e.pdf on 22 December 2010.

²⁹⁸ In addition in 1976 the General Assembly adopted a resolution stating that any company that did not remove itself from South African shores was in effect aiding the proliferation of such atrocities, see General Assembly Resolution, *Policies of Apartheid of the Government of South Africa: Economic Collaboration with South Africa*, A/RES/31/6 H, 9 November 1976.

nationals of that State or of some other State or are stateless persons”.²⁹⁹ Therefore only states party to the Apartheid Convention were bound by its provisions; accordingly if one was not a state party, one was not bound; and needless to say South Africa did not ratify the Apartheid Convention.

4.2.2 The Truth and Reconciliation Commission (TRC)

Following the negotiated settlement and adoption of the Interim Constitution in 1993 and the founding democratic election and establishment of the Government of national Unity in 1994 the Truth and Reconciliation Commission (TRC) was established in 1996 under the auspices of the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act). The Commission operated for an 18-month period, which was later extended to mid-1998, while the Amnesty Committee continued functioning until 2001.

The TRC’s primary mandate was to investigate and determine “as complete a picture as possible of the nature, causes and extent of gross violations of human rights” committed during Apartheid, solely during the period considered to be the height of Apartheid (1960 and 1994) “within or outside the Republic [of South Africa], emanating from the conflicts of the past”.³⁰⁰ In terms of the TRC Act, a gross human rights violation was defined to include the killing, abduction, torture or severe ill-treatment of any person (or conspiracy, incitement or instigation to commit such acts) while acting with a political motive.³⁰¹ Delimiting the term “gross human rights” to this narrow categorization resulted in the exclusion of the structural and systemic features of the apartheid state; and moreover resulted in the exclusion of issues of corporate complicity in relation to the apartheid system. Accordingly, with this definition of gross human rights violations, the TRC limited the categories of accountability, and accountable actors, to a very limited class. This sentiment is echoed by Mahmood Mamdani who observes that this restricted focus of the TRC on this narrow category of rights neglected or failed to address the systemic nature of the apartheid system and the daily human rights violations perpetuated therein.³⁰² Mamdani also brings forward the argument that a distinction must therefore be drawn between the “perpetrator and the victim” and the “beneficiary and the victim”,³⁰³ although the TRC address the former, it failed largely to hold those who may have benefitted accountable. However, if using Mamdani’s model, the categories of those who benefitted

²⁹⁹ See Article IV of the Apartheid Convention.

³⁰⁰ Preamble of the Promotion of National Unity and Reconciliation Act 34 of 1995.

³⁰¹ “...‘gross violation of human rights’ means the violation of human rights through – (a) the killing, abduction, torture or severe ill treatment of any persons; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to 10 May 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive”, section 1(1)(ix) of the TRC Act.

³⁰² Mahmood Mamdani, ‘Reconciliation without Justice’, *Southern African Review of Books*, November/December 1996.

³⁰³ See *ibid.*

would not be easy to distinguish along racial lines, as some segments of the Black/African population, Indian, and Coloured communities also benefited from the racially stratified community; for example through reduced competition in certain areas; and the bureaucrats of the homelands.

Secondly the Commission had the objective to seek out the victims of such atrocities and set up a system of reparations. Thirdly, the Commission would confer amnesty to the perpetrators of gross human rights violations as politically motivated crimes who individually applied for amnesty and gave full disclosure of their involvement in political atrocities (amnesty hearings). At the end of the process a report would be compiled, including notes on future strategies that could be implemented to ensure that such gross human rights violations would not occur or be permitted again in the future.

A number of important characteristics distinguish the South African TRC from other truth commissions; in particular its emphasis on 'public participation' in victims' hearings, and it was in fact the first Commission to do so.³⁰⁴ In addition, unlike other truth commissions, the TRC had certain judicial powers: (i) it had an investigative arm charged with uncovering the veracity of claims and powers of search and seizure; (ii) it could also subpoena or call witnesses to testify; and (iii) it could grant amnesty to. The TRC, unlike its Latin American counterparts did not apply blanket amnesties; rather amnesty was granted to applicants on an individual basis and contingent upon the satisfaction of full disclosure and other requirements. Significantly perpetrators did not have to be remorseful in their exposition of the truth; however, in order to be granted amnesty they had to fully disclose the particulars of the gross human rights violation, and the crime had to be politically motivated.³⁰⁵ Through full, open and frank disclosure of their involvement in political atrocities individual applicants could thus avoid criminal prosecution. Significantly, for our purposes, the amnesty hearings only related to individual perpetrators and those who had been *directly* involved in politically motivated human rights violations. Accordingly the TRC did not provide for the question of corporate complicity or indirect involvement in human rights violations to be addressed within the ambit of the amnesty hearings. Certainly there was no provision for corporations to apply for amnesty to the TRC and so to meet the requirement of full disclosure of their possible involvement in human rights violations.

Beyond the amnesty hearings, the Commission also conducted a series of sectoral hearings, related to particular areas of society, in order to investigate the extent of their involvement with the apartheid regime; including the (i) business hearings; (ii) chemical and biological warfare hearings; (iii) faith community hearings; (iv) health sector hearings; (v) media hearings; (vi) political party hearings; (vii) prison hearings; and (viii) women's hearings.³⁰⁶ For our purposes the significance of these sectoral

³⁰⁴ Lyn S. Graybill, 'Pursuit of truth and reconciliation in South Africa', *Africa Today*, 45, 1, 1998, p. 104.

³⁰⁵ Andrew Rigby, Chapter 1: 'Reconciliation and Forgiving the Past', in *Justice and Reconciliation: After the Violence*, Andrew Rigby, p.132.

³⁰⁶ For a full list of all special hearings see "Special Hearings Transcripts", <http://www.justice.gov.za/trc/special/>. (retrieved on 14 January 2010).

hearings is that they did not focus exclusively on individuals, but rather on the systemic pervasiveness of apartheid and structural injustice. The focus in this work will be primarily on the business hearings, as they were intended to serve as a vehicle through which corporations could acknowledge any involvement with the apartheid regime.

4.2.3 Corporations & the TRC: The TRC Business Hearings

The TRC Business Hearings were held over the course of three consecutive days in Johannesburg from 11 November to 13 November 1997. Approximately 55 submissions (from the business sector and interested parties such as trade unions) were received by the TRC. A glaring omission was the failure by any of the multinational oil corporations, such as BP and Shell, to submit submissions to the TRC for the Business Hearings.³⁰⁷ In addition no representatives of the commercial agricultural sector participated in the hearings either.³⁰⁸ Furthermore, no TNCs made submissions before the Business Hearing. This was held by the TRC to be a grave omission, “in view of their prominent role in South Africa’s economic development under apartheid”.³⁰⁹

Two key arguments arose at the hearings: representatives of the business sector argued that they had not benefited from apartheid. In their view apartheid had in fact been more economically detrimental to their activities and operations than beneficial, due to the lack of a skilled workforce. An opposing argument, evidenced in the submissions of liberal associations and organizations such as the African National Congress (ANC), and the Congress of South African trade Unions (COSATU), was that business ultimately benefitted from the racially skewed economic and commercial structure of the apartheid system, due particularly to the racial bias towards white economic growth, and the exploitative use of cheap black labour.³¹⁰ While these arguments pertained to general notions of the economic and social injustice of the apartheid system, they did not focus on the more specific issue of corporate complicity in gross violations of human rights as defined in the TRC Act.

It was also further argued by some in the business sector that the realm of business was not the place to be enforcing the protection of human rights, as there were other mechanisms (introduced post-transition) such as the Constitution, the new Human Rights Commission and even elections which could lead to social reform and policy change.³¹¹

³⁰⁷ Truth and Reconciliation Commission of South Africa (TRC), *Truth and Reconciliation Commission of South Africa Report*, Vol.4 (Distributed by Juta, Cape Town, 1998), paragraph 5, p.18.

³⁰⁸ *Ibid*, para 42, p.28.

³⁰⁹ *Ibid*, para 131, p.50.

³¹⁰ *Ibid*, paras 6-7, p.19.

³¹¹ *Ibid*, para 105, p.44.

In its eventual Report the Commission, in its account of the Business Hearings, differentiated between three tiers of involvement in the human rights violations under apartheid, in order to differentiate between the different levels of accountability and to identify the sense in which corporations could be held accountable:

- (i) *First order involvement:* businesses (for example the mining industry)³¹² which had directly assisted the apartheid government to “design and implement apartheid policies”³¹³ were distinguished from those who had merely benefited from the policies of the apartheid regime. Accordingly, such businesses were held to have a higher degree of accountability than other companies.
- (ii) *Second order involvement:* businesses which provided certain services or goods to the state, thereby indirectly contributed to the apartheid regime through their dealings or involvement with the state³¹⁴ (for example, armaments suppliers,³¹⁵ and financial institutions).³¹⁶ Therefore by actively engaging with the repressive apartheid state through their supply of goods or services, such businesses should have been aware of the possible repressive use such goods could be put to [and how such goods and services would assist in maintaining the apartheid regime], and should accordingly not have had business dealings with the state. Consequently, such businesses were accountable as a result of their knowing contribution to the repressive practices of the apartheid state – “[s]econd-order involvement hinges to some extent on people knowing that their products or services would be used for morally unacceptable purposes”.³¹⁷ In the view of the Commission TRC complicity of this nature by companies with state repression raised accountability issues.
- (iii) *Third order involvement:* this referred to companies (for example white-owned businesses)³¹⁸ which had benefited “by virtue of operating within the racially structured context of an apartheid society”.³¹⁹ Even if they had not directly assisted the state in the creation of apartheid policy, or supplied goods or services

³¹² See *Ibid*, paras 62-72, p.33-36.

³¹³ *Ibid*, para 24, p.24.

³¹⁴ These were companies that although they conducted business with the state, their “business dealings could not have been reasonably expected to contribute directly or subsequently to repression”, *Ibid*, para 26, p.25.

³¹⁵ See *Ibid*, paras 73-80, p.36-37. “The moral case against the armaments industry is essentially that business willingly (and for profit) involved itself in manufacturing products that it knew would be used to facilitate human rights abuses domestically and abroad”, *Ibid*, para 75, p.36.

³¹⁶ *Ibid*, para 26, p.25, and paras 29-31, p.26.

³¹⁷ *Ibid*, paras 27-28, p.25.

³¹⁸ *Ibid*, paras 81-97, p.37-43.

³¹⁹ *Ibid*, para 32, p.26.

contributing to the repressive practices of the apartheid government, these companies had operated within the apartheid regime, and thus had a degree of involvement with it. Given the racially biased nature of the apartheid system, all white-owned business had benefitted from it, even without being directly involved with the state, inasmuch as the apartheid system was biased in favour of white enrichment (thereby further entrenching and maintaining the general economic inequality of the system).³²⁰

As the TRC observed, although businesses lodged complaints and objections to the apartheid government in relation to the enforcement of apartheid policies, such objections were only lodged in relation to *aspects* of the apartheid machine, rather than in relation to the policy of apartheid as a whole. Therefore these objections against apartheid were generally self-interested, and only undertaken when business interests were negatively affected.³²¹

In its Report the TRC observed, with regard to the business sector, that although all 'white' businesses did not benefit equally they all nevertheless benefited to some degree from the racially biased structure of the apartheid regime, which ultimately benefitted all white people, at the expense of exploiting black people. And although the business sector may not have been intimately involved in the formation of apartheid policy, it nevertheless benefitted therefrom and appeared reluctant to dismantle or amend the system, save where it directly and negatively impacted upon them.³²²

In sum it appears from the TRC's sectoral hearing on the business sector that few companies were willing to acknowledge any malfeasance or complicity with apartheid repression on their part. Representatives of the business community were in fact overwhelmingly of the view that they had actually assisted and been instrumental in the dismantling of the apartheid regime, and had in fact been 'victims' of apartheid themselves in the sense that apartheid, rather than augmenting growth, had stymied economic development.³²³

Consequently, the sectoral hearings, and the business hearings in particular, are considered to be the nadir of the TRC process, as very little acknowledgement of complicity with the apartheid regime, or even indirect responsibility for state-sponsored human rights abuses, was tendered by any of

³²⁰ *Ibid*, paras 33-36, p.27.

³²¹ *Ibid*, para 87, p.39.

³²² "Again, not all businesses profited equally from apartheid. It is, however, difficult not to conclude that, between 1910 and 1994, government and business (despite periodic differences and conflicts between them) co-operated in building of an economy that benefited whites. On the one hand, they promoted and maintained the structures of white power, privilege and wealth and, on the other, the structures of black (mainly African) deprivation, discrimination, exploitation and poverty. To this extent, business was part of the mindset of white South Africa." *Ibid*, para 97, p.42-43.

³²³ See for example, Anglo American Corporation, *Submission to the Truth and Reconciliation Commission* (1997); A. Rupert, *Submission to the Truth and Reconciliation Commission* (October 1997), and Council of South African Banks (COSAB), *The Banking Industry: Submission to the Truth and Reconciliation Commission for the Period March 1960 to May 1994* (1997).

those involved in the proceedings, and few participants were contrite about their actions under the apartheid regime. Moreover, the participants asserted the view that business is about money-making and is far removed from the political arena, and accordingly they could not be accused of having been involved in political atrocities and the gross human rights violations committed by the government.³²⁴ The lack of accountability of participants in the sectoral hearings was not lost on the Commission, and they acknowledged in the TRC Report the overarching lack of accountability emanating from the hearings.³²⁵

Ultimately, in its findings on the Business Hearing the Commission held that the business sector had in fact (i) aided in the economic growth and sustainability of the apartheid regime;³²⁶ (ii) failed to acknowledge, and was not open to disclosing, the extent of its involvement with the apartheid government, as well as the extent of its benefitting therefrom;³²⁷ (iii) the white agricultural sector had benefitted extensively from the racially biased distribution of land, and exploitation of cheap black labour;³²⁸ (iv) institutes such as the Land Bank and the Development Bank of South Africa were “directly involved in sustaining the existence of former homelands”;³²⁹ (v) the mining industry benefitted extensively from the migrant labour system, exploitative wages for black workers, and poor health and safety standards;³³⁰ the “denial” of collective bargaining rights to black workers was a human rights violation; and “actions taken against trade unions by the state, at times with the cooperation of certain businesses, frequently led to gross human rights violations”.³³¹

In its findings, the TRC held that no sector of South African society was unaffected by apartheid, and all sectors had in fact played a role in its proliferation and maintenance, particularly through their complicity, and stated that this complicity “relates both to the continuing perpetuation of race-based systems and structures and to a failure to speak out against the gross violations of human rights occurring throughout the society.”³³²

Despite these findings by the TRC, no real tangible results emanated from either the TRC’s sectoral hearings nor the Commission’s Report; certainly not a wholesale apology from the business sector.

³²⁴ See Beth S. Lyons, “Getting to Accountability: Business, Apartheid and Human Rights,” 17 *Netherlands Quarterly of Human Rights* (1999), p.135-160.

³²⁵ See Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, Vol.5, (Distributed by Juta, Cape Town, 1998) ch. 6, para 15.

³²⁶ “Business was central to the economy that sustained the South African state during the apartheid years.” *Op cit, Truth and Reconciliation Commission of South Africa Report*, Vol.4, para 161, p.58.

³²⁷ *Ibid*, paras 162 and 166, p.58.

³²⁸ *Ibid*, para 167, p.58.

³²⁹ *Ibid*, para 163, p.58.

³³⁰ *Ibid*, para 165, p.58.

³³¹ *Op cit, Truth and Reconciliation Commission of South Africa Report*, Vol.5, para 156, p.252.

³³² *Ibid*, para 152, p. 252.

Therefore few tangible outcomes emerged from the Business Hearings, whether directly or in the form of substantial recommendations by the Commission. In the course of the Business Hearings Professor Sampie Terreblanche proposed the levying of a 'wealth tax' on businesses, in order to remedy the unequal wealth distribution in South Africa and to further reconciliation, social stability and economic growth.³³³ Although this proposal for a wealth tax was considered by the TRC, it made no specific recommendation to this effect³³⁴ and the proposed wealth tax is yet to be levied against any companies.

Nicoli Natrass, a key advisor during the setting up of the TRC's Business Hearings, and also during the compiling of the final report³³⁵, concluded that this form of compensatory tax would be a too onerous burden for corporations to bear.³³⁶ She argued that an undifferentiated approach to a 'wealth tax' fails to take into account the nuanced nature of involvement of business in apartheid repression, which the TRC itself acknowledged through its distinction of the three classes of involvement. This could ultimately result in the most blameworthy businesses being able to escape full liability for their actions, while more liberal companies are left the scapegoats for acts they were not involved in.³³⁷

The TRC itself acknowledged the limited success of the sectoral hearings (including the business hearings), as well as the lack of buy-in by business. A minimal number of South African corporations (no multinational firms or banks) actually participated in the business hearings. The TRC received written submissions from only fifty-five South African companies, and those who did participate continued to assert the view, as advanced by Friedman that the "business of business is profit", and is accordingly apolitical.³³⁸ Altogether this may actually have contributed to the "overarching sense of denial" stemming from the hearings.³³⁹

4.2.4 Critiques of the TRC's Business Hearings on Corporate Accountability

A primary criticism of the TRC process in general is that it produced a sanitized version of the history of apartheid violence itself, as it neglected the systemic nature and structural violence of apartheid and focused solely on specific incidents of gross human rights violations. This narrow focus negated

³³³ See "Truth and Reconciliation Committee Business Sector Hearings", 11 November 1997, Johannesburg, p.10, retrieved at <http://www.justice.gov.za/trc/special/business/busin1.htm> on 7 January 2011.

³³⁴ "Further, the Commission recommends that a scheme be put into place to enable those who benefitted from apartheid policies to contribute towards the alleviation of poverty. In submissions made to the Commission, a wealth tax was proposed. The Commission does not, however, seek to prescribe one or other strategy, but recommends that urgent consideration be given by government to harnessing all available resources in the war against poverty." See *Op cit, Truth and Reconciliation Commission of South Africa Report*, Vol.5, para 14, p.308; and *Op cit, Truth and Reconciliation Commission of South Africa Report*, Vol.4, para. 154-155, p.56.

³³⁵ Nicoli Natrass, "Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation", *African Affairs*, Vol. 98 (1999), p.386.

³³⁶ *Ibid*, p.388.

³³⁷ *Ibid*.

³³⁸ *Op cit*, Beth S. Lyons, p.135-160.

³³⁹ See *Op cit, Truth and Reconciliation Commission of South Africa Report*, Vol.5, ch. 6, para. 15..

the pervasive role apartheid played in every sector of life and the impact it had on the movements and way of life of every black (and arguably also white) South African. The few who had been victims of gross human rights violations represented only a microcosm of a larger problem; in its exclusive concern with the relatively small number of *perpetrators* and *victims* of gross human rights violations the TRC neglected the relevant roles of much larger numbers of *beneficiaries* and *bystanders*. The Final Report has accordingly been criticized for failing to recognize the full gravity of the human rights violations, in that it focused solely on gross human rights violations, and neglected the omnipresent system that permitted these human rights violations on a daily basis affecting every aspect of society.³⁴⁰ The TRC failed to expand its purview beyond individual, politically motivated actions, thereby failing to adequately address other accountable actors and entities, such as businesses in general, and TNCs specifically.

In his trenchant critique of the TRC, Mamdani observes, in regard to the TRC and its focus on this narrow category of human rights violations, “[w]e thus have a crime against humanity without either victims or perpetrators”.³⁴¹ Consequently, scant attention was also paid to accountability for indirect involvement or complicity in gross human rights violations³⁴² (as evidenced by the creation of separate Business Hearings as opposed to the business sector’s involvement in the amnesty hearings). The TRC therefore appeared to focus on one aspect of the apartheid regime (gross human rights violations committed against particular victims), rather than on the systemic violations perpetrated against a large proportion of citizens daily.³⁴³ The TRC accordingly skirted abuses that did not qualify as gross human rights abuses, such as those embedded in apartheid legislation, including segregation, and forced removals.

4.3 Launch of the Khulumani case

It may be argued that the lack of accountability for TNCs at the TRC, due its focus on individual perpetrators of gross human rights violations, led to the Khulumani and South African Reparations cases which addressed issues of TNC accountability for their complicity in human rights violations. In light of the failure of large TNCs to appear before the TRC and the Business Hearings, and the failure to effectively address the accountability of TNCs for their complicity in state-sponsored human rights violations; a group of South African plaintiffs attempted to seek redress through the civil law remedy of the American ATCA.

³⁴⁰ Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa,” 32 *Diacritics* (2002), p.33-59; Deborah Posel, “The TRC Report: What Kind of History? What Kind of Truth?” Paper presented at conference “The TRC: Commissioning the Past,” University of the Witwatersrand, Johannesburg, 11-14 July (1999); Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge, UK: Cambridge University Press (2001).

³⁴¹ Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa,” 32 *Diacritics* (2002), p.54.

³⁴² Rosemary Nagy, “Post-Apartheid Justice: Can Cosmopolitanism and Nation-Building be Reconciled?”, *Law & Society Review*, Vol. 40, Issue 3 (2006), p.645.

³⁴³ Mahmood Mamdani, “Reconciliation without Justice.” *Southern African Review of Books*, No. 46 (November/December 1996), p.22-25; Robert Meister, ‘Human Rights and the Politics of Victimhood’, 16 *Ethics & International Affairs*, 91 (2002).

The *Khulumani* case was instituted in 2002, with the cause of action being that the defendant corporations had aided-and-abetted the Apartheid state in South Africa, particularly in its execution of programs of human rights abuse. This action was brought under the ATCA. Initially three groups of plaintiffs (the Digwamaje Plaintiffs; Ntsebeza Plaintiffs; Khulumani Plaintiffs) filed separate motions in US federal district courts against fifty defendant corporations who were alleged to have aided-and-abetted the Apartheid state.³⁴⁴ The Khulumani Plaintiffs (comprised of ninety-one individual plaintiffs) instituted their action against twenty-three domestic and foreign corporations for the alleged commission of human rights violations under international law. In contrast, the two other Plaintiff groups brought separate class actions suits (on behalf of an unspecified class and number of victims) against the defendant corporations. The *Khulumani* case aimed to hold accountable and receive reparations from all those companies that failed to appear before the TRC and admit the truth with regard to any complicity with the Apartheid regime in terms of the commission of state sponsored human rights abuses. The Khulumani Group is representing two groups of Apartheid victims: those who went before the TRC as well as those who failed to get an opportunity to do so.

In the end the list of defendant transnational corporations (TNCs) was short-listed to a group of twenty-three; including major banks and corporations. These were further divided into those banks and corporations respectively incorporated in the United States of America; the United Kingdom; Germany; Switzerland; France; and the Netherlands. None of the defendant corporations are South African but all of them had South African subsidiaries or operations. The Plaintiffs' claims were later transferred to the Southern District of New York on application by the Ntsebeza Plaintiffs in 2002; all the claims now fell under the collective title of *In re S. African Apartheid Litigation*³⁴⁵.

In July 2003 then South African Minister of Justice, Penuell Mpapa Maduna, submitted a scathing *ex parte* declaration to the New York district court on behalf of the South African government, stating that the court was interfering with a domestic matter; a matter in which South Africa, a sovereign state, had the most pertinent interest. Maduna contended that the court was therefore interfering with the South African state's and judiciary's ability to adjudicate on this matter within its domestic jurisdiction. In turn the US Department of State, on request from the district court, issued a Statement of Interest stating that the litigation of the matter would potentially negatively impact upon American interests and foreign relations. The USA was therefore hesitant to overstep the bounds of international comity. The doctrine of comity is an international norm holding that a state shall respect the sovereignty of another state and should not unduly interfere with its domestic matters within its territorial jurisdiction but afford the foreign sovereign the opportunity and respect to deal with its domestic situation itself and on its own terms.

³⁴⁴ *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 542 (S.D.N.Y 2004).

³⁴⁵ *In re S. African Apartheid Litig.*, 238 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2002).

On 29 September 2004 the federal court granted the defendants' motion to dismiss, and the *Khulumani* case was, along with the other Apartheid Reparation cases³⁴⁶, dismissed. The presiding judge (Judge Sprizzo) held that the applicant had failed to establish a substantial link between the corporations and the government's human rights violations. Judge Sprizzo dismissed the case on the basis that, although the corporations had benefited from Apartheid, they had not actively participated in the atrocities orchestrated by the then government.³⁴⁷ Moreover, mere collaboration with the offending government was not a sufficient ground in terms of international law upon which to institute an action; active conspiring and participation is needed³⁴⁸. In addition, the court held that the international conventions relied upon by the Khulumani Group, which condemned Apartheid as a crime against humanity and criticized any collaboration with the Apartheid government, were applicable only to states, not to non-state actors³⁴⁹.

Judge Sprizzo's reasoning turned primarily on the issue of states being the only actors under international law, therefore the only entities capable of being held liable under international law for violations of international law. In addition, he held that the plaintiffs had not been able to prove a substantial link between the actions of corporations and the discriminatory machinations of the state; there was no evidence that these corporations were acting on behalf of the state³⁵⁰. In addition, he concluded that even if one could find a tenuous link between the Defendant corporations aiding and abetting state actions involving human rights abuse, any direct or indirect assistance given by said corporations was irrelevant as grounds for holding the defendants liable as this form of assistance was not yet an international norm akin to the one referred to in *Sosa*.³⁵¹ Moreover, the Apartheid Convention³⁵² had been ratified by only a handful of countries and could therefore not even be considered 'binding international law', and so the Apartheid Convention did not meet the standard set out in *Sosa*³⁵³.

Ultimately the Court felt that by trying the matter as a US court it would be infringing upon South African domestic jurisdiction and its state sovereignty; and that it would weaken foreign economic interest in South Africa.³⁵⁴ Moreover, the US government had expressed equal disquiet as the South African government in terms of the effect this litigation would have with regard to its international relations.³⁵⁵ Therefore it was held

³⁴⁶ *In re South African Apartheid Litigation*, MDL No. 1499 (S.D.N.Y)

³⁴⁷ *Khulumani et al v. Barclays et al*, Nos. 05-2141-cv, 05-2326-cv (2nd Circ.) (Nov. 2002), 549.

³⁴⁸ *Ibid*, 548.

³⁴⁹ *Ibid*, 551-552. The Rome Statute of the International Criminal Court also recognises apartheid as a crime against humanity.

³⁵⁰ *In re South African Apartheid Litigation* 346 F. Supp. 2d 549 (S.D.N.Y. 2004).

³⁵¹ *Ibid*, 548 (quoting *Sosa*, 2761-762).

³⁵² *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S, entered into force July 18, 1976, retrieved from <http://www1.umn.edu/humanrts/instree/apartheid-supp.html> on 10 January 2011.

³⁵³ *Ibid*, 550.

³⁵⁴ *Ibid*, 553.

³⁵⁵ *Ibid*, 553.

by the Court that it would be trespassing into the realms of executive decision-making were it to adjudicate on this matter.³⁵⁶

Following this decision, the plaintiffs in April 2005 filed for leave to appeal to the U.S. Circuit Court of Appeals for the Second Circuit in New York.³⁵⁷ The appeal³⁵⁸ was heard and argued on 24 January 2006, and on 12 October 2007 the majority of the United States Court of Appeals for the Second Circuit held that the district court had erred in its judgment and therefore overruled the majority of its decision as it felt the lower court had misconstrued the key issues. On appeal this higher court therefore reversed the dismissal of the complaint. On 10 January 2008, the defendants petitioned the US Supreme Court for leave to appeal the US Court of Appeals for the Second Circuit's decision of October 2007. The US Supreme Court held that it could not rule on the matter as it lacked the necessary quorum, as four of its nine justices had to recuse themselves due to conflicts of interest. Consequently in May 2008 the Supreme Court upheld the decision of the United States Court of Appeals for the Second Circuit, permitting the lawsuit to continue. On 8 April 2009, the (Southern District of New York) federal district court, in a judgment delivered by Justice Shira Scheindlin, held that the complaint would have to be limited to five defendants; namely Daimler, Ford, General Motors, IBM and Rheinmetall Group in order to proceed.³⁵⁹ Therefore only those defendants who had been clearly shown by the plaintiffs to have aided and abetted the apartheid state in the commission of gross human rights violations remain; corporations who had merely had business ties with the Apartheid South African government has been dismissed.

In stark contrast to its earlier position, a further letter was sent in September 2009 to the court of Justice Scheindlin by the incumbent Justice Minister Jeffrey Radebe, on behalf of the South African government which, in light of the amended nature of the lawsuit, now unequivocally expressed its support of the case and its pursuance in American courts.³⁶⁰

4.4 Prospects of Success

There have been few successful cases against corporations pursuant to the ATCA (the majority of potentially successful cases have been settled out of court), and of the ones that have been successful, none was brought on the grounds of corporate complicity in human rights abuses.³⁶¹ There are, however, clearly other

³⁵⁶ *Ibid*, 553.

³⁵⁷ *Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler Corp.* 05-2141-cv, 05-2326-cv.

³⁵⁸ *Khulumani v. Barclay National Bank, Ltd., Ntsebeza v. Daimler Chrysler Corp.* 05-2141-cv, 05-2326-cv.

³⁵⁹ *In re South African Apartheid Litigation*, 02 MDL 1499.

³⁶⁰ See Minister of Justice and Constitutional Development, South Africa Jeffrey Radebe, 'Letter to Judge Shira Scheindlin regarding In Re South African Apartheid Litigation', 1 September 2009.

³⁶¹ Michael Osborne, "Apartheid and the Alien Torts Act: Global Justice Meets Sovereign Equality" in (Max du Plessis and Stephen Pete, ed.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*. Oxford, UK: Intersentia, (2007), p.244.

forums in which such legal actions can be brought (the ATCA is not the only avenue) but the ATCA remains the most popular avenue for redress.

In the USA there is, however, an abundance of precedents in relation to TNC culpability for state-related human rights violations. An important court ruling in the *Unocal*³⁶² case held that mere participation by a corporation with a malfeasant government (involved in the commission of human rights violations), with the knowledge of such malfeasance, is sufficient to hold that corporation liable for such violations in terms of the ATCA.³⁶³ But the overwhelming burden in terms of the ATCA is that in order for a perpetrator to be held liable, pursuant to the ATCA, said perpetrator must have committed such acts on behalf of or in collaboration with the state. The only crimes a perpetrator can be held liable for, without any relationship or involvement with the state, are the crime of genocide and war crimes.³⁶⁴

Morris Ratner has outlined four factors that he asserts determine the success of a reparations or ATCA suit.³⁶⁵ The first factor he defines is “historical research or informal discovery” this entails learning about the history (including print and media sources) of the relevant alleged atrocities, speaking to witnesses, and clarifying specifics about events and timelines, in order to identify principal defendants prior to launching the suit. Secondly, one has to determine whether the statute of limitations has run out on these claims, this means whether the time within which one could have instituted such an action against this entity or person has prescribed. In terms of the ACTA a plaintiff has ten years (from the date they had knowledge of the human rights violation) to institute their action, before their claim prescribes.³⁶⁶ Thirdly, the plaintiffs must show that the USA does indeed have jurisdiction to hear the matter and is the correct forum in which to do so. Therefore after identifying the alleged perpetrator, the plaintiff, must prove either a substantial link between the defendant and the USA, or show that defendant is in wrongful possession of certain assets, seized as a result of the human rights abuse or profited from said abuse; or plaintiffs must show that either the entity had a presence or was operating in or was incorporated in the USA or that the looted assets were deposited in the USA.³⁶⁷ Finally, and most importantly, the plaintiff bears the onus of proving the jurisdiction of the US Court to hear the matter.

4.5 Concluding Remarks

Chapter four has aimed to highlight the role of corporations in the context of transitional justice, and how accountability is a multifaceted concept, not least in relation to corporations. It has also attempted to

³⁶² *Doe v. Unocal Corp*, 395 F.3d, 952 (9th Cir. 2002).

³⁶³ *Ibid*.

³⁶⁴ *Bigio v. Coca-Cola*, 239 F.3d 440, 449 (2d Cir. 2001).

³⁶⁵ Morris Ratner, “Factors impacting the Selection and Positioning of Human Rights Class Actions in United States Courts: A Practical Overview”, *New York University Annual Survey of American Law*, Vol.58 (2003) p. 625-629.

³⁶⁶ *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002).

³⁶⁷ *Op cit*, Ratner, p.629.

demonstrate some of the shortcomings when dealing with issues of accountability, particularly in relation to the South African example.

This chapter aimed to relate the general issues in relation to the business-human rights paradigm, to the particular realm of political transitions; in particular the South African transition, in order to highlight, by way of a practical example, the manner in which such issues of accountability have been previously dealt with.

What may be gleaned from the South African example is that adequately addressing issues of corporate accountability in periods of political transition is a difficult task for the successor regime. Although a number of legal accountability mechanisms are theoretically available to victims, which one to use is a highly political question, and the choice may disturb the precarious political climate of the country or damage fragile reconciliation endeavours. Nevertheless, these challenges are not insurmountable, but care must be taken, and notice must be given to the nature of the political transition – there is no ‘one-size-fits-all’ solution.

Ultimately, it is clear from the above that the transitional space is dynamic, and often the solutions emanating therefrom do not serve as an end in themselves, but rather as a step on a longer path to true reconciliation and tangible outcomes.³⁶⁸ One of the most striking features of the *Khulumani* case was the choice by the plaintiffs not to seek civil redress through the domestic (South African) forum. The opportunity to seek criminal redress was precluded with the promulgation of the TRC Act and its amnesty provisions,³⁶⁹ which prevented the criminal or civil prosecution of perpetrators who were granted amnesty by the Commission.³⁷⁰ In the AZAPO case,³⁷¹ however, the applicants argued that the amnesty provisions of the TRC Act were in fact unconstitutional. The applicants in the AZAPO case argued that the provisions of s20(7) of the TRC Act were unconstitutional on the basis that they had a constitutional right to judicial redress.³⁷² The applicants furthered that the amnesty committee was merely empowered to grant amnesty and not to decide upon “justiciable disputes” as defined in terms of section 33(2) of the interim Constitution.³⁷³ The Constitutional Court held that the epilogue of the interim Constitution permitted the legislature to make such an amnesty

³⁶⁸ Chandra Lekha Sriram, *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition*. Frank Cass: New York, (2004), p.203.

³⁶⁹ In terms of section 20(7)(a) of the TRC Act: “No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.”

³⁷⁰ Section 20(7) of the TRC Act empowered the Amnesty Committee of the TRC to grant amnesty to a perpetrator of a gross human rights violation(s) and as a result of the conferring/‘granting’ of amnesty the perpetrator could not be criminally or civilly prosecuted in relation to the gross human rights violation(s); moreover the state or any other organ could not be held vicariously liable for such act. This provision of the TRC Act was held to be constitutional, by the Constitutional Court, see *Azanian Peoples Organization (AZAPO) and Others v President of South Africa and Others* (CCT 17/96) [1996]; 1996 (4) SA 672 (25 July 1996).

³⁷¹ *Azanian Peoples Organization (AZAPO) and Others v President of South Africa and Others* (CCT 17/96) [1996]; 1996 (4) SA 672 (25 July 1996) (AZAPO).

³⁷² In terms of s22 of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution), “[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum”, see AZAPO, para 8.

³⁷³ See AZAPO, paras 8-10.

provision.³⁷⁴ Ultimately, the Constitutional Court held that the TRC Act and s20(7) thereof were not in conflict with the interim Constitution, moreover they were in fact authorised by constitutional provisions.³⁷⁵ Therefore in light of the fact that there was no alternative avenue for redress in South Africa, the plaintiffs in the Khulumani case had no alternative but to seek redress extraterritorially. This makes the South African experience, and the *Khulumani* case unique, as the political transformation in a way prevented particular forms of justice, aside from those prescribed by the TRC, being pursued.

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³⁷⁴ The Constitutional Court observed to specific wording of the interim Constitution which stated that “Parliament under this Constitution shall adopt a law’ providing, inter alia, for the ‘mechanisms, criteria and procedures...through which...amnesty shall be dealt with’” AZAPO, (paras 14-21).

³⁷⁵ “In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an “amnesty” in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.” See AZAPO, para 50.

Chapter 5: Conclusion

At the outset of this thesis, the aim was primarily to determine (i) to what extent corporations in general, and TNCs in particular, are held accountable under international human rights law for possible complicity in human rights violations; (ii) to what extent there is an accountability lacuna in international law; and (iii) how such accountability may be better enforced against corporate actors, particularly in the context of transitions from authoritarian rule; and (iv) what lessons may be learnt in this regard from the South African transition from apartheid to democratic rule.

Ultimately what this thesis aimed to elucidate is that the terrain in relation to the interplay between business and human rights is not fixed, and a myriad of variables are involved in this interplay.

5.1 Issues of Accountability

After canvassing the literature, it would appear that in light of their increasing global power and their ability to affect human rights, it is axiomatic that corporations *should* be held accountable for their complicity in human rights violations; and that not having effective accountability mechanisms is a profound lacuna that requires urgent remedying. It is clear that this lacuna in international law is a result of the primacy given to state-based judicial accountability mechanisms. International law is state-centric, and consequently only states have obligations in terms of international law and have international law personality. Theoretically either the home state or host state could hold a TNC liable for human rights abuses in their respective jurisdictions. In practice there is no effective means for home states to hold transnational corporations liable for human rights violations they commit in host states; and there appears to be an overwhelming reluctance to do so. Moreover, given the nature of international law instruments, such as conventions and treaties, only states that have signed such instruments are bound by their provisions and may enforce them upon corporations either incorporated within their territory or operating therein.

Although the notion of *individual* accountability for human rights violations had its genesis at the Nuremberg Trials, the Nuremberg Trials did not, however, create room for corporate entities to be tried under international law – therefore states and individuals were to be the only human rights obligation and duty bearers.³⁷⁶ The Nuremberg judgement expressly excluded “abstract entities”³⁷⁷ (which would likely include juristic entities such as corporations) from the purview of accountability under international law. This philosophy – the criminal prosecution of the *individual* rather than of the *corporate entity* – has continued to inform the human rights accountability discourse, hence the reluctance of states to hold corporations accountable for their complicity in human rights violations. Therefore at present, it may be quixotic to assert

³⁷⁶ “[I]nternational law imposes duties and liabilities upon individuals as well as upon States...individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” International Military Tribunal, *Judgment*, reprinted in 41 *American Journal of International Law*, 172, 220-221 (1947)

³⁷⁷ *Ibid.*

that TNCs, given that they have global economic power rivalling that of states, should have human rights obligations mirroring those of state actors; as there appears to be a great unwillingness from states and corporations alike to have this happen.

The follow-up question of *how* to hold TNCs accountable, however, is not as readily answered, as the *how* of accountability has a number of hurdles to its effectiveness. Firstly, on the legal plane, accountability requires proof of a causal nexus between the harm and the actors, and this becomes more complex with regard to complicity for human rights violations as complicity entails knowledge and indirect involvement. Complicity is a difficult standard to prove. And, the issue of what mechanisms of accountability – punitive “hard law” remedies or lenient “soft law” mechanisms – are best suited to serve as a remedy, is in itself contentious. From the mechanisms canvassed above, it is clear that individuals can more readily be held accountable in terms of criminal law than corporations. Therefore civil remedies (for example punitive fines; reparations) appear to represent the most suitable accountability mechanism for corporate entities. Such issues are, however, further complicated in the context of political transitions from authoritarian to democratic rule.

5.2 The Context of Political Transition

The context of transitions from authoritarian rule to democracy is unique in that the transitioning state’s judicial and political institutions typically are in a state of flux; accordingly greater emphasis is necessary on international law and international law instruments to provide a semblance of guidance and a stable legal order. Furthermore, political transitions are an important context in terms of the business-human rights interplay as they represent a zone where TNCs can operate with relative impunity given the precarious state of the judicial and political system.

The South African case represents an interesting example of the rigours involved in such accountability attempts in transitions from authoritarian to democratic rule. The lesson that may be learnt from the South African experience is that there is no ‘quick fix’ to problems of this nature, no magic panacea. Rather incremental processes are required, as accountability for all actors will not emanate from a single accountability mechanism, such as a truth commission. The parameters of truth commissions, as may be gleaned from the South African experience, are primarily victim and individual perpetrator centred. Accordingly, other actors may be left out of the purview of the truth commission, thereby leaving a post-transition society where certain juristic actors may be held unaccountable for human rights violations.

Furthermore, within the South African example, no TNCs played a meaningful role in terms of acknowledging their complicity in human rights violations committed by the prior regime; as evidenced by their glaring absence from the TRC Business Hearings. Therefore this culminated in a later attempt by a number of victims to seek civil redress against such TNCs through the use of the ATCA. Accordingly, what may be gleaned from the South African experience is that one accountability mechanism may not be sufficient in order to address the involvement of and the varying degrees of accountability of all actors; consequently a number of accountability mechanisms may need to be used. Where does the TNC fit in the transitional

context? As observed above, attempts at meting out justice post-transition must be premised on the nature of the transition, therefore no uniform standard can be used for corporate accountability in the context of political transitions.

5.3 Post-Transition South Africa and transitional context outcomes

Post-transition South Africa is a constitutional democracy, with one of the most progressive constitutions in the world. Aside from the Constitution which enshrines a number of key human rights in its Bill of Rights (rights which have horizontal application), significant new legislation and corporate governance codes have been promulgated relating to both environmental, social responsibility and racial transformation in line with the constitutionally enshrined rights to equality and dignity.³⁷⁸ In particular, the King Report on Governance for South Africa - 2009 (King III Report) and the King Code on Corporate Governance for South Africa (King Code), published on 2 September 2009, which prescribe corporate governance principles for companies operating in South Africa to adhere to.³⁷⁹ The King III Report makes use of the triple-bottom line or “triple context” reporting mechanism, in that companies who adhere to the King III Report and its Code must report on all aspects of the business, and the performance of the company will be assessed not only on the (i) financial, but also the (ii) environmental and (iii) social impact and performance of the company.³⁸⁰

The King III Report is voluntary for private companies, however, public listed companies have stringent reporting requirements in relation thereto and are required to disclose their degree of compliance with the King Code (as amended from time to time), and are in addition required to adhere to certain prescribed corporate governance principles, as set out in paragraph 3.84 of the Johannesburg Stock Exchange (JSE) Limited Listings Requirements.³⁸¹ And a failure to adhere to these requirements may result in the JSE reviewing, suspending or terminating a listing of securities, or imposing a fine on a listed company.³⁸² In addition, since May 2004, the JSE has had a Socially Responsible Investment Index (SRI Index), and although participation on the SRI Index is voluntary, in order to participate listed companies must adhere to certain JSE criteria.³⁸³ The SRI Index serves to “recognis[e] those listed companies incorporating

³⁷⁸ Including, *inter alia*, the Broad-Based Black Economic Empowerment Act 53 of 2003; Basic Conditions of Employment Act 75 of 1997; Employment Equity Act 55 of 1998; Labour Relations Act 66 of 1995; Mineral and Petroleum Resources and Development Act 28 of 2002; National Environmental Management Act 107 of 1998.

³⁷⁹ The King I Report on Corporate Governance for South Africa, published in November 1994, and the King II Report on Corporate Governance of South Africa, published in March 2002. King III is more progressive than its predecessors and substitutes these previous King Reports.

³⁸⁰ Chapter 9 of the King III Report p11.

³⁸¹ See paragraph 3.84 read with paragraph 8.63(a) of the JSE Listings Requirements.

³⁸² Section 1 of the JSE Listings Requirements.

³⁸³ See http://www.jse.co.za/About-Us/SRI/Introduction_to_SRI_Index.aspx.

sustainability principles into their everyday business practices and to serve as a tool for investors to assess companies on a broader base” as well as to promote “responsible investing”.³⁸⁴

In addition, in terms of the Companies Act 71 of 2008 (Companies Act), effective date 1 April 2011, a purpose of the Companies Act is, *inter alia*, to “promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law” as well as to “promote the development of the South African economy by...encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation”.³⁸⁵ Therefore in terms of the Companies Act, companies operating in South Africa are required to observe the principles of the Constitution (including the Bill of Rights) when applying South African company law. South African common law also recognises the ‘enlightened shareholder value’ doctrine, accordingly directors of companies are entitled to take the interests of stakeholders of a company, “including employees, the community, the environment, consumers” into consideration, subject to the interests of shareholders.³⁸⁶

Even though these new accountability mechanisms are a positive step, directors of companies in South Africa, are still nevertheless bound by the fiduciary duty to always act in the best interests of the company, accordingly if there is any conflict between the pursuit of social or environmental good, and the pursuit of profit, the latter will prevail.³⁸⁷ South Africa is nevertheless taking progressive moves towards creating a culture of corporate accountability, post-transition.

5.4 Concluding Remarks

As Wettstein observes “business has never been and will never be an amoral or value neutral affair”.³⁸⁸ Therefore to assume that corporations are neutral and accordingly not accountable for moral issues, such as human rights, is myopic and imprudent. Wettstein goes on to state that “human rights are the most promising starting point for elaborating on corporations’ moral obligations and that the young and dynamic debate on business and human rights is leading the way to new approaches to theorizing and thinking about business.”³⁸⁹ Therefore human rights, and correspondingly accountability for human rights violations, are important in terms of acknowledging the importance of corporations’ moral obligations, aside from their economic purpose; and consequently it is important to reconceptualise our understanding of corporations as

³⁸⁴ There are at present approximately 77 companies listed on the SRI Index, including BHP Billiton plc, Aspen Pharmacare Holdings Limited, Anglo American plc, and Telkom SA Limited, see <http://www.jse.co.za/About-Us/SRI/Constituents/SRIIndexConstituentsfor2010.aspx>.

³⁸⁵ Section 7(a) of the Companies Act.

³⁸⁶ See M. Katz, R. Mathabathe et al. “Global Business and Human Rights – South Africa” in *Global Business and Human Rights 2011: Jurisdictional Comparisons* (ed. James Featherby), European Lawyer Ltd: United Kingdom (2011); and International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations – South Africa*, International Commission of Jurists: Geneva 2010, p.9-10.

³⁸⁷ Cilliers Benade et al Cilliers & Benade *Corporate Law* 3 ed (2003) p.11-13.

³⁸⁸ Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution*, Stanford University Press: Stanford, California, 2009, at p.15.

³⁸⁹ *Ibid*, at 16.

morally benign. And a coherent way of making progress in this vein is by creating corporate accountability mechanisms. Nevertheless a cautious rather than precipitous approach must be adopted in relation to the realization of sound accountability mechanisms.

In the final analysis corporations in general, and TNCs in particular, should be held accountable for complicity in state-sponsored human rights violations and there are at present some accountability mechanisms. But such mechanisms are not as effective as they could or should be, as they are not stringent enough, and often leave the monitoring and implementation of these mechanisms to the corporation to determine and implement. Moreover, there is no universal standard to which corporate actors must adhere, and without uniformity it is difficult to establish a firm global corporate accountability culture. It is, however, clear that the tide is beginning to turn and there is a gradual awakening to the importance of the corporate actor and the need to have effective accountability mechanisms, but these mechanisms still remain within the realm of soft law; no significant hard law mechanisms have been created. However what may be gleaned from this trend is that although international law is uniquely placed to create an accountability mechanism which transcends territorial bounds and jurisdictions, international law may not be the complete answer, as states can choose whether to sign and/or ratify such treaties or not (and corporate accountability is not as yet a part of customary international law). In addition domestic forums have even been used for the implementation of international law, such as through the use of the ATCA. Therefore domestic law, as may be seen from the South African example, also represents a relevant area requiring accountability mechanisms.

Ultimately no one specific accountability mechanism represents a solution in itself, but such accountability mechanisms must and should rather work in conjunction. The use of international and domestic law, and voluntary corporate governance mechanisms are all important; the former to deal with past violations, and the latter to prescribe future behaviour. That being said, no easy answers are forthcoming; however, questions of accountability are becoming increasingly more pertinent as we shift from the post-Westphalian world to a globalized world with a multiplicity of important and powerful actors, aside from states and individuals. The form or type of accountability mechanisms aside, it is imperative that corporations be held accountable. Furthermore, complicity in human rights violations is an important issue and arguably augments and assists in the perpetuation and maintenance of such violations; therefore if any actor is involved (directly or indirectly) they should be held accountable. These are therefore important questions to answer, as political transitions of this nature, from authoritarian to democratic rule, are highly topical, as evidenced by recent uprisings sweeping parts of the Arabic-speaking world.³⁹⁰

The aim of this dissertation was to evidence the accountability gap between corporations and other global actors (such as states and individuals); and the complexity of the business-human rights interplay in periods of political transition, in the hope that the current drive towards corporate accountability will not gradually

³⁹⁰ For example Tunisia, Egypt, Yemen, Libya, Bahrain, and Syria.

evanesce in the wake of 'graver' or more direct human rights concerns or global political and economic issues.

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