

**IKINASIO TAUTAKITAKI**

**LLM RESEARCH PAPER**

**LAWS 525: INTERNATIONAL COMMERCIAL CONTRACTS LAW**

**TOPIC:**

**“ THE THREE PILLARS OF THE UNITED NATIONS GUIDING  
PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: A ‘NON-  
BINDING’ INTERNATIONAL CONTRACT ON THE STATE DUTY  
TO PROTECT HUMAN RIGHTS, THE CORPORATE  
RESPONSIBILITY TO RESPECT HUMAN RIGHTS AND THE  
ACCESS TO REMEDY FOR VICTIMS OF ABUSE”**

**FACULTY OF LAW**

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



**VICTORIA**  
UNIVERSITY OF WELLINGTON

**2016**

## **Word length**

14988 words (excluding references and bibliography)

## **Table of Contents**

### **Topic**

- A. Introduction**
- B. Prelude**
- C. The Bhopal case**
- D. Obstacles in providing remedy for business and human rights violations**
  - i. Option to bring legal action against parent company(s)**
  - ii. Extraterritorial human rights obligation and the corporate veil**
  - iii. Forum non conveniens**
  - iv. The UK Legal Aid, Sentencing and Punishing of Offender Act**
  - v. Alien Tort Claim Act**
- D. United Nations Guiding Principles on Business and Human Rights**
- F. United Nations Guiding Principles on Business and Human Rights and their application in the United Kingdom**
  - i. Pillar one: The State Duty to protect human rights**
    - a. United Kingdom**
    - b. Actions taken by the United Kingdom to conform with Pillar one: the State Duty to Protect**
  - ii. Pillar two: The Corporate Responsibility to Respect Human Rights**
    - a. Actions taken by the UK to conform with Pillar two: Corporate Responsibility to Respect Human Rights**
  - iii. Pillar three: Access to Remedy for victims of business-related abuse.**
    - a. Actions taken by the UK to conform with pillar three: Access to Remedy for victims of business related abuse**
- G. Suggestions in areas to improve for the UK**
- H. The Prospect of a Treaty on Trans-national Companies Liability in Human Rights abuses**
- I. Conclusion**
- J. Reference**

**Topic:** “the three pillars of the United Nations Guiding Principles on Business and Human Rights: A non-binding international contract on the State duty to protect human rights, the corporate responsibility to respect human rights and access to remedy for victims of abuse.”

## **A. Introduction**

This paper will discuss the importance of the *United Nations Guiding Principles on Business and Human Rights*<sup>1</sup> (UN Guiding Principles) violations and access to remedy for victims. Communities and individuals across the globe are adversely affected by activities of multinational corporations, this is due to a multitude of obstacles that are hindering the process of bringing multinational companies before judicial mechanisms. The major obstacles will be discussed in the following writing along with how they can be overcome.

In order to bring to light some of these obstacles, our discussion will cover on one of the world's biggest chemical disasters. This chemical disaster is now referred to as the *Bhopal disaster* which took place in India. This case was chosen amongst thousand available worldwide because it highlights the extent and efforts that victims of business and human rights related abuse go through to obtain an effective remedy. The *Bhopal case*<sup>2</sup> in particular shows the atrocities that occur when there are no stringent measures in place to curb multinational companies from causing such harms. The *Bhopal case* further highlights the key issues of *forum non conveniens*<sup>3</sup> and the *Alien Tort Claim Act*<sup>4</sup> (ATCA) of the United States.

Discussion will also include the need for a binding international treaty to deal with business and human rights related abuses. Consideration will be focussed on the *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*<sup>5</sup> (OEIWG). This working group is tasked with the burden of bringing such a treaty to light.

The simple idea of human rights is that everyone should be treated with dignity, that is the core idea of the modern version of human rights that grew out of the declaration of human rights after the second world war. Human rights are enshrined in international treaties and customary law that are binding on States. In this sense, states are the ones who sign treaties which deal with human rights, companies on the other hand do not. The human rights legal system are legal obligations that States undertake and are directed at states, as what is known as duty bearers.

However, companies throughout history continue to have huge impacts on human rights whether positive or negative. It has been well regarded on how states have an impact on human rights, but so too can business; that is why the *UN Guiding Principles* is important as a recognition that states are not the only ones that focus should be on, in regards to human rights. The *UN Guiding Principles* is about avoiding negative effects of business on human

---

<sup>1</sup> United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011) HR/PUB/11/04 New York.

<sup>2</sup> *Union Carbide Corporation v Union of India*, Supreme Court of India (1989) 1 SCC 674.

<sup>3</sup> A discretionary power that allows courts to dismiss a case where another court, or forum, is much better suited to hear the case.

<sup>4</sup> *The Alien Tort Claims Act 1789*, United States.

<sup>5</sup> Human Rights Council, *Resolution A/HRC/RES/26/9 (2014)* the establishment of a working group on working on a legally binding instrument on trans-national corporations and other enterprises with respect to human rights.

rights, managing risks in regards to the *UN Guiding Principles*. The focus of the *UN Guiding Principles* is on how we can avoid doing harm when business go about doing their business...

## **B. Prelude**

Imagine a fictional scenario in which you are twelve-year-old boy or girl living in an up-market densely populated city, a city which is situated near a multinational plant/factory. The plant could be manufacturing anything from textiles for a high-end clothing company to silicon microchips for computers. Nevertheless, For the sake of our scenario, this particular plant deals with pesticides; the plant is manufacturing pesticides by the name of as Sevin along with methyl isocyanate and other chemicals.<sup>6</sup>

It is midnight when you are awoken to the sounds of a blaring siren coming from the chemical plant. You step out your front door and hear screaming and shouting out on the streets, people are running in every direction and in the distance you hear your neighbours voice screaming from down the road, “run or you will die!”. Instinct kicks in and you run, not really paying attention to where you are running, as long as you are running. After some distance, the crowd come to the realisation that you have all been running towards a chemical gas cloud. Instead of running towards safety your are running towards calamity.

You notice that your vision is starting blur and there is so much discomfort in your lungs that it literally feels like its on fire<sup>7</sup>. You notice that those around you are suffering the same predicament of swollen eyes and sever coughing; you are able to witness a few individuals around you collapse to their death before you lose consciousness.

You regain consciousness in the hospital with doctors frantically trying their best to fight the poison that has ravaged your body. In the following weeks there is ongoing negotiations between the doctors and the chemical plant for the specific chemicals that is causing the illness.

Only with the knowledge of what chemicals are causing the harm, can doctors treat the illness with the specific antidote. If this knowledge is not released by the owners of the chemical plant, your treatment will be based on trial and error, until the right antidote is discovered.

The chemical plant (knowing that thousands of lives are at stake) do not release the name of the chemicals because of the fear that their ‘trade secrets’ would be compromised. It is further revealed that the company in charge of the chemical plant knew that there was a likely hood of the chemical plant leaking but did not take the necessary precautions to prepare the city in case of disaster, nor did it take to the necessary steps to fix the leak. In the following following aftermath of the gas leak more than 570,000 people are exposed to damaging levels of toxic gas and an estimated 7,000 to 10,000 people died within three days of the leak<sup>8</sup>.

Now the question you are asking yourself is who should be held responsible for your medical conditions? Who by law should foot the bill? Should the government be liable? If not,

---

<sup>6</sup> Themistocles D’ Silva, *The Black Box of Bhopal: A closer look at the world’s deadliest industrial disaster*, Victoria BC 2006, Trafford, pp181-182.

<sup>7</sup> Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy* (2014), London, Peter Benenson House.

<sup>8</sup> Amnesty International, *Clouds of Injustice*, 29 November 2004, AI Index: ASA 20/015/2004, cited above n<sup>2</sup> on page 35.

should government be supporting you in your claims? Could you receive some form of compensation for the harm that you and your family have suffered? Could you bring a claim against the parent company who owns the chemical plant? what if the parent company is in another country, could you still bring a claim against them for infringing your human rights?

These questions and similar ones to these are what victims of human rights abuse battle with in their everyday life; and even though the facts of this scenario are horrific it is one that is true; it is notoriously know as the *Bhopal Disaster*.

In the following writing this particular case will be discussed in detail as it sets out the what, how and why business enterprises across the board should respect human rights, and why there is an urgent need for stronger international mechanisms to fulfil such a goal.

### **C. The Bhopal case**

The fictional scenario just described actually took place thirty-one years ago in 1984 in Bhopal, India. The chemical plant was owned and operated by the Union Carbide India Limited (UCIL), the majority of the shares (59.9%) belonged to a United States based company called Union Carbide Corporation (UCC).<sup>9</sup> UCIL itself was directly managed by another company called Union Carbide Eastern (UCE) which was a subsidiary of UCC.

On December 2, 1984 the pesticide plant began to leak 27 tons of the poisonous gas methyl isocyanate, six security measures that had been in place to prevent such a disaster failed because of lack of maintenance.<sup>10</sup> The gas spread quickly through the city and exposed half a million people to the toxic chemicals, within minutes thousands were killed immediately. And to this date, as a result of direct inhalation of the toxic fumes, 24,000 people have died.<sup>11</sup>

Alongside the gas leak, laid a further threat, a danger that would eventually cause further damage to the residential area of Bhopal. For the past 15 years leading up to the disaster, the chemical plant had been dumping toxic chemicals in the soil beside the factory; resulting in the villagers drinking contaminated water for decades. The end result was the poisoning of 40,000 people from 18 townships.<sup>12</sup> Though officials from the chemical company were aware of the contaminated water, they did nothing to warn local communities of the risk.

As mentioned above, despite the fact that thousands of children, women, and men were dying from the exposure to the gas leaks while others suffered from excruciating wounds. UCC failed to disclose critical information on the substance that had leaked and to this day have not named any of the chemicals and reaction products that leaked along with 54,000 pounds of methyl isocyanate (MIC).<sup>13</sup>

Within 24 hours the State authorities launched criminal proceedings and nine individuals and three corporations were charged with criminal offences including culpable homicide. Among those charged was a United States national and the chairman of UCC<sup>14</sup>

---

<sup>9</sup> Above n<sup>2</sup>, at 33.

<sup>10</sup> Sally Hayden *Thirty Years After Bhopal's Union Carbide Disaster, Gas Leak Survivors Are Still Suffering* Vice News, 1 December 2014. <news.vice.com>

<sup>11</sup> above n<sup>5</sup>.

<sup>12</sup> Above n<sup>5</sup>.

<sup>13</sup> Above n<sup>2</sup>, at 34.

<sup>14</sup> Amongst those that were accused were Kishore Kamdar, Vice President and in charge of the Agricultural Products Division of Union Carbide India Limited (UCIL); Jagannath Mukund, Works Manager of the Bhopal

Warren Anderson. After some diplomatic negotiations by the US embassy in India, Anderson was released on bail the same day. As a requirement of his bond, Anderson signed and promised to return when summoned. In November 1988, the Chief Judicial Magistrate issued a warrant of arrest for Anderson.

However, while criminal proceedings were underway, negotiations between the government of India and the chemical companies resulted in an out-of-court settlement, which was ratified by India's Supreme Court in February 1989.<sup>15</sup> Within this agreement which was settled out of court, the Government of India agreed to quash all other proceedings (civil and criminal) that were then pending, even the criminal proceedings before the Bhopal Chief Judicial Magistrate. It was not until there was public outrage that the Supreme Court of India decided to review the decision to quash criminal prosecutions. In October of 1991 the Supreme Court upheld the 1989 settlement but revoked the decision to quash criminal prosecutions.<sup>16</sup>

On the 11<sup>th</sup> of November 1991 the criminal proceedings against the accused were again brought before the Bhopal Chief Judicial Magistrate's Court. UCC, UCE and Anderson were ordered to appear in court to face the charges laid before them in 1992. By this time UCE had ceased to exist and the plaintiffs did not show. The learned Judge adjourned the hearing till April 1992 and in the meantime made an order for the properties of the plaintiffs to be seized. The Supreme Court in 1994 modified the terms of the order and allowed the sale of the shares held by UCC in UCIL<sup>17</sup>, at the time UCC's properties in India were 59.9% held in UCIL stock.

Advocates working on behalf of the survivors filed applications to halt all forms of sales of UCIL stock but the hearing was adjourned on five occasions. When the applications were finally heard on the 20<sup>th</sup> of October 1994, the shares had already been sold.

Anderson during this whole procedure was living the life of a free man in his home country of the United States. On the 27<sup>th</sup> March of 1992 the Bhopal Chief Judicial Magistrate issued an arrest warrant for Anderson and requested the Government of India to start proceedings for Anderson's extradition. It was not until 2003 that the Government of India officially made a request to the United States for the extradition of Anderson.

In 2004 the United States Government rejected this request on the grounds that it did not meet the requirements of the Extradition Treaty:<sup>18</sup>

*Article 2(1): An offense shall be an extraditable offense if it is punishable under the laws in both Contracting States by Deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty. And;*

*Articles 9(3): a request for extradition of a person who is sought for prosecution shall also be supported by:*

*(a) A copy of the warrant or order of arrest, issued by a judge or other competent authority;*

*(b) A copy of the charging document, if any; and*

---

Plant; Dr. R B Roy Choudry, Assistant Works Manager of the Bhopal Plant; Shakeel Ibrahim Qureshi, Plant Superintendent and K V Shetty, Production Assistant at the Bhopal plant. all of whom are Indian nationals.

<sup>15</sup> Union Carbide Corporation v Union of India, Supreme Court of India (1989) 1 SCC 674.

<sup>16</sup> Union Carbide Corporation v Union of India, Supreme Court of India (1991) 4 SCC 584; AIR 1992 SC 248.

<sup>17</sup> S Muralidhar, *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims 'Twenty Years' of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre, at 33 and 36. [www.ielrc.org](http://www.ielrc.org).

<sup>18</sup> *Extradition Treaty Between the United States of America and India* (signed 25 June 1997, entered into force 21 July 1999).

(c) *Such information as would justify the committal for trial of the person if the offense had been committed in the Requested State.*

Despite being in control of a company that was responsible (directly or indirectly) for taking the lives of more than 25,000 women and children, Anderson passed away in his nursing home in Florida at the ripe old age of 92. The Chief Judicial Magistrate of India ordered the Indian Government to press on with extradition of Anderson. By January 2012, the US Department of Justice informed the Indian Embassy in Washington that the matter was still being examined.

#### ***D. Obstacles in providing remedy for business and human rights violations***

##### ***i. Option to bring legal action against parent company(s)***

Any form of litigation against an enterprise for any alleged involvement in business and human rights violations will be a difficult task to take; many of the multinational companies today have unlimited legal and non-legal resources at their disposal. However, discussion will be on what are the major obstacles or legal hurdles that are preventing or delaying victims from access to remedy in regards to business related human rights violations.

Holding a parent company liable for human rights violation in its home-state is difficult enough for most lawyers but it becomes even more of a challenge when legal proceedings are brought against a parent company who is a subsidiary to a company in another state accused of human rights violation. One the most common reason a parent company is included in lawsuits of human rights violations is that they are, at times, actively involved in how operations are run by a subsidiary in a different country.

For example, by failing to exercise reasonable oversight, failing to implement proper safety procedures in obvious hazardous environments or failing to act on safety and health issues when it was in their power to do so. There are also cases where the parent company directly gains a benefit from the human rights violations that have been caused by a subsidiary. In such cases it would be advisable that parent companies be considered when bringing a claim against human rights abuses by their subsidiary whose base of operations may well be in a different country; a defendant in such a situation would bring a claim against the parent company and the subsidiary as both may be joint liable for the human rights abuse.

Another reason why a parent company may be included in a law suite is that there is the likely hood that all documents pertaining to the case are kept in files in the home-state rather than the host-state. The offices in the home-state are more likely to have a long term presence in the home-state due to investments and prior engagements that are not as easy to dissipate as their branches in the host-state. As we saw in the Bhopal case, not only did UCIL not have sufficient funds to pay for the human rights abuses, but was quickly sold off by UCC to the US based Dow Chemical Company.

In theory, plaintiffs can bring a claim against a parent company in the host-state where the human rights violation occurred but the prospect of securing reparation against a foreign enterprise is slim. On the of the obstacles of obtaining reparations is that the parent company may not be subject to the local courts jurisdiction; this was the scenario in *Lubbe v Cape*<sup>19</sup>.

---

<sup>19</sup> *Lubbe v Cape Plc* [2000] UKHL 41.

This was a case of significance as it dealt with issues of conflict of laws, lifting the corporate veil including the argument of forum non conveniens.

In *Lubbe v Cape*, a Mr Lubbe had been injured in his work place while manufacturing asbestos for South African subsidiary company of a UK parent company by the name of Cape Plc. Cape had been requested to give its express consent to be sued in South Africa as the company was not subject to South African jurisdiction. The South African subsidiary of Cape Plc had no money left and Cape Plc had no assets in South Africa. To be subject to the jurisdiction of South Africa, the defendant (Cape Plc) had to be either present or have assets in South Africa, neither of which could be proven.

A similar situation was well documented in the *Bhopal case* as the US based UCC was able to evade Indian Jurisdiction by remaining outside Indian territory and by selling off all its shares and assets to the US Dow Chemical Company.

An option to bring legal claims against a parent company should be a fundamental right of a victim of human rights violation, this right can be bolstered further by implementing the foundational principles of the State duty to protect human rights and business related abuses in their legislations.

In regards to developing countries where the majority of the abuses occur, the legal systems may be lacking the expertise to hear complex cases of abuse by multinational companies and a victim of such abuse may more likely achieve justice and reparation in a home-state rather than a host-state. There is also the likely hood that the judicial system where the abuse occurred suffers from corruption and lacks independence from government influence that may undermine justice for the victims.

As shown in the *Bhopal case*, there was numerous delays in the judicial system when advocates of the victims were trying to halt the selling off of shares and assets in the UCIL company by its parent company UCC. Delays of which could only be attributed to the States close relationship with the company.

It is also worthy to have the option to bring a claim against a parent company for the purpose of multinationals corporations accountability. As demonstrated by the *Bhopal case* discussed above; a parent company can reap the benefits of controlling the economics of a subsidiary but can evade accountability when human rights are infringed. In the *Bhopal case* this was done by the parent company securing agreements with the Government of India and securing deals to sell off all remaining assets to avoid prosecution in the host-state.

## **ii. Extraterritorial human rights obligation and the corporate veil**

“Extraterritorial human rights obligations is what is referred to as the responsibility of a State for acts or omissions within or beyond its border, that have effects on the enjoyment of human rights outside of that states territory as well as obligations to engage in international co-operation and assistance for the realisation of human rights, as set out in the Charter of the United Nations and a number of human rights treaties and standards...the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights were articulated and adopted by a group of experts on international law in 2012. They are drawn from



international law and aim to clarify the content of extraterritorial State Obligations to realise economic, social and cultural rights.”<sup>20</sup>

There are clear reasons and purposes as to why it is necessary to pursue legal actions against a parent company and as technologies advance, more and more companies are merging into multinational companies for greater profit. Small local tech companies like YouTube, ITA Software, are being pursued by larger well established companies like Google; these mergers are not limited to tech companies but have included mining companies from Australia to Indonesia and toxic waste enterprises from Japan to China. The challenges of pursuing legal action against a parent company is becoming more difficult with how multinational enterprises are structured and the complex legal structures of a corporation.

Many corporations today act through a network of entities that are separate and often located in different countries with different national jurisdictions. When dealing with multinational companies with such complex structures, victims of human rights abuse face additional difficulties in obtaining a remedy or justice.

Multinational companies hide behind ‘the corporate veil’ or what is better known as the doctrine of separate legal personality. The corporate veil is the legal concept that separates the personality of a corporation from the personalities of its shareholders, and protects the shareholders from being personally liable for the company’s debts and other obligations.<sup>21</sup> However, this protection is not impenetrable. In the Bhopal Disaster in 1988, a decision by the High Court of India, cited equitable consideration’s in favour of a lifting of the corporate veil to increase the victim’s chances of being able to recover the sums needed to meet their claims.<sup>22</sup>

It is practical to point out that there are national legislations that are in place in which the corporate veil and limited liability is bypassed. For example, the New Zealand Companies Act s 271<sup>23</sup> is an exception to the general principle that a company is a separate legal entity from its shareholders. Section 271 gives the courts discretion to order a related company or parent company of a company that is in liquidation to pay the liquidator the any claims made in liquidation. This principle is also stated in UK law under the Insolvency Act s 214(1) subject to subsection (3) below, if in the course of the winding up of a company it appears that subsection (2) of this section applies in relation to a person who is or has been a director of the company, the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the company’s assets as the court thinks proper<sup>24</sup>. Though it is legislation that gives the court discretion to make orders requiring companies to be held responsible for debts or actions of a company that they are involved with and thus piercing the corporate veil, it has never been used in cases of business related human rights abuses.

### iii. *Forum non conveniens*

*Forum non conveniens* is a major obstacle in regards to the right to remedy in regards to business and human rights. The doctrine of *forum non conveniens* allows courts to prevent

---

<sup>20</sup> Above n<sup>2</sup>, at 128.

<sup>21</sup> <[www.businessdictionary.com/definition/corporate-veil.html](http://www.businessdictionary.com/definition/corporate-veil.html)>

<sup>22</sup> *Union Carbide v Union of India*, (1988) AIR Supreme Court 373.

<sup>23</sup> *Companies Act 1993*, s271(1)(a)(b)(c)(d) New Zealand.

<sup>24</sup> *Insolvency Act 1986*, s214(1) United Kingdom.

a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue.<sup>25</sup> The reasoning may be due to the location of evidence, witnesses, parties or that the court which is favoured is more familiar with the applicable local law.

This doctrine is only used in common law jurisdictions and has not been used in civil law countries with the exception of Quebec.<sup>26</sup> Article 3135 of the Québec Civil Code sets out a codified provision on *forum non conveniens* that 'Even though a Quebec court has jurisdiction to hear a dispute, it may decline jurisdiction if it considers that another court in another country is in a better position to decide'. However, the mere fact that a high proportion of multinational enterprises are based in common law countries, makes it a significant hurdle for victims of business related abuse. When a claim is dismissed on the grounds of *forum non conveniens*, the theory is that the victim can put forth his/her claim in the 'more suitable' court.

In the Bhopal case, legal claims for personal injury and death were filed against UCC in the US courts, all legal claims were handled in the US district court for the Southern District of New York. UCC moved that the case be dismissed on the grounds of *forum non conveniens*. The argument was that the Indian legal system had the capacity and capability to deal with claims relating to Bhopal, more so than the US legal system. Indian Government, however, argued that their courts and laws could not handle or rather were incapable of handling a case of this magnitude.<sup>27</sup> The learned Judge in this case accepted UCC's claim of *forum non conveniens* and dismissed the case.

However, as discussed in the Bhopal case, victims felt that relaunching a claim in their own corrupt jurisdiction as a waste of time and a majority eventually do not refile their claims. The jurisdictions of third world countries where the abuses occur are inadequate and incapable of handling complex cases of business human rights related abuse as can be seen of how the Bhopal disaster was handled by the courts in India and the Indian Government.

The bottom line in *forum non conveniens* cases involving business related human rights abuse, is that the doctrine is having a damaging impact on the ability of victims to access capable courts in seeking justice. It is apparent that *forum non conveniens* is used by business as a device to evade their responsibility rather than seeking the best jurisdiction to resolve a case of human rights abuse; for this reason, home-state courts should exercise jurisdiction unconditionally in cases involving gross human rights abuses by multinational enterprises.

#### **iv. The UK Legal Aid, Sentencing and Punishing of Offender Act**

In the UK the *Legal Aid, Sentencing and Punishing of Offender Act*<sup>28</sup> has been criticised by human rights groups who believe that the new law is a barrier to justice in regards to human rights lawsuits in the UK against companies who cause harm abroad. The new law which received Royal Assent in 2012, removes what is known as the 'success fee' and the 'insurance premium'. In general, cases brought by a foreign plaintiff against UK companies for

---

<sup>25</sup> Prog. Gwynne Skinner, Prof. Robert McCorquodale, Prof. Oliver De Schutter; *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (December 2013) The International Corporate Accountability Roundtable. [www.corporatejustice.org](http://www.corporatejustice.org).

<sup>26</sup> Article 3135 & 3137 Civ. Code (2001) Quebec.

<sup>27</sup> *Re Union Carbide Gas Plant Disaster at Bhopal*, India in December 1984, MDL Docket N.626,85 Civ 2696 (JFK) US Southern District Court of New York.

<sup>28</sup> *Legal Aid, Sentencing and Punishment of Offenders Act 2012* United Kingdom.

business and human rights abuses abroad have been eagerly accepted by UK lawyers on a no win, no fee basis. That means if the the plaintiff does not win the case, the UK lawyer does not get paid. However, if the case is successful the lawyer has the ability to charge a ‘success fee’. This success fee is paid on top of the lawyer costs and a UK lawyer could charge as much as the wanted. UK lawyers working on a no-win, no-fee basis were therefor able to obtain further funds for costs and expenses.

The after the event insurance or insurance premium is an insurance which covers the legal costs and expenses involved in litigation. It can be used by a claimant or a defendant, although it is mainly used by claimants. The insurance cover is normally purchased by solicitors on behalf of their clients which will cover legal costs if the claim is unsuccessful, abandoned or settled out of court.

The result of these changes, have been argued, will only be beneficial to multinational enterprises, which will be shielded from paying both the success fee and the after the event insurance premium. A further downfall of the reforms is that UK law firms are undermined in their capacity to take on business and human rights related abuses abroad as the burden to cover cost would be too great to bear.

#### **v. Alien Tort Claim Act**

In recent years there is a new avenue in the fight for access to remedy (a ray of dim light in a tunnel of darkness) currently there are cases pending in the US in regards to business and human rights related abuses. The avenue that is being used in bringing claims against transnational corporations in the US is *the Alien Tort Claims Act*<sup>29</sup> (ATCA). ATCA was originally created for for the use against pirates<sup>30</sup> but was left inactive and forgotten until 1980.

ATCA has been used to bring civil claims against companies for human rights abuses abroad, ATCA provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or a treaty of the United States.<sup>31</sup> ACTA promotes US goals in protecting human rights, however, defendants of business and human rights related abuse must be in the United States or have ties to the US and ACTA does not provide universal jurisdiction over human rights abusers.

Nonetheless, ACTA has been used to give survivors of egregious human rights abuse the right to sue the perpetrators within the US. The first human rights case that involved ACTA was in *Filartiga v Pena-Irala*.<sup>32</sup> This case involved a former police officer from Paraguay who was accused of torture and murder of a young man while he was in the police force in Paraguay. While on a visit to the US, the police officer was spotted by the father of the young man and called immigration services and had the former police officer arrested. The father of the young then brought an ACTA case against the officer and in 1980 the federal court of New York upheld their claims opening the door for future claims under the Alien Tort Claims Act.

In 2004, the federal courts held in *Sosa v Alvarez-Machain* that ACTA grants federal courts jurisdiction over claims based on specifically defined, ‘universally accepted and

---

<sup>29</sup> *The Alien Tort Claims Act 1789*, United States.

<sup>30</sup> Muyafer Eroglu; *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* Edward Elgar Publishing Limited, Cheltenham (2008). (book)

<sup>31</sup> Business and Human Rights Resource Centre, *Corporate Legal Accountability: Annual Briefing 2012*. <business-humanrights.org>

<sup>32</sup> *Filartiga v Pena-Irala*, Court of Appeals, Second Circuit, 30 June 1980.

obligatory norms of international law'.<sup>33</sup> The court effectively gave the all clear to the use of ACTA as a means of redress for severe human rights abuses.<sup>34</sup> In 2011, for the first time in history, the US Supreme court announced that it would hear an appeal in the ACTA lawsuit of *Kiobel v Royal Dutch Petroleum*<sup>35</sup> for allegations of human rights abuse by a corporation. The Supreme Court decided that there would be limits on lawsuits under ACTA in regards to foreign multinational corporation with a presence in the US. The court held that the case did not sufficiently 'touch and concern' the US.<sup>36</sup>

Europe seems to have taken the opposite view, in their recent decision of the Dutch Courts of Appeals ruled that *Royal Dutch Shell* can be held liable for oil spills caused by one of its subsidiary companies in Nigeria.

In 2009 when the case was in its preliminary stages Shell submitted a motion to the court arguing that the Dutch Courts lacked jurisdiction. Shell challenged that the courts in Nigeria were the correct courts to hear the claims as the alleged negligence occurred there, where all the evidence, victims and alleged damaged properties lay. The courts however, ruled that they do have jurisdiction and that they would hear the claims.

In 2013 Shell was acquitted in a Dutch court of all but one charge of causing pollution in Nigeria. The allegations were brought forth by five farmers who had their farms and livelihood destroyed by the oil spills. Only one of the farmers was successful in their claims. The case had put in the spotlight on how much power Shell wields in Nigeria, amidst allegations that the Authorities in Nigeria would not have enforce the judgement and that corruption in Nigeria would have been too prevalent for the victims to receive a fair trial. The parties that were unsuccessful appealed.

In 2015, the Dutch Court of Appeals ruled that Royal Dutch Shell can be held liable for oil spills at its subsidiary in Nigeria. This ruling overturns a 2013 finding by a lower court that Shell's Dutch-based parent company could not be held liable for oils spills caused by its Nigerian subsidiary. The 2015 ruling, potentially opens the way for other compensations claims against multinational enterprises. Judges in The Hague ordered Shell to make available to the court documents that might shed light on the cause of the oil spills and whether the company itself was aware of the dangers.<sup>37</sup>

### ***E. United Nations Guiding Principles on Business and Human Rights***

On the 16<sup>th</sup> of June 2011 the UN Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (Guiding Principles).<sup>38</sup> This act alone showed that there was and still is, an international consensus that there is a need for companies to respect all human rights. This need did not rest with companies alone but the Guiding Principles further stipulated that the State, not only plays a vital but just as crucial role, in bringing this

---

<sup>33</sup> *Sosa v Alvarez-Machain*, United States Supreme Court 542 U.S 692 (2004).

<sup>34</sup> The Centre for Justice and Accountability, *The Alien Tort Statute: A means of redress for survivors of human rights abuses*. <[www.cja.org](http://www.cja.org)>

<sup>35</sup> *Kiobel v Royal Dutch Petroleum* 133 S.Ct 1659 (2013) United States Supreme Court.

<sup>36</sup> Earthrights, *The Alien Tort Statute*. <[www.earthrights.org](http://www.earthrights.org)>

<sup>37</sup> theguardian *Dutch appeals court says Shell may be held liable for oil spills in Nigeria* (18 December 2015).

<sup>38</sup> Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011.

idea to fruition. The States role will be discussed further below in the discussion of the UK Action Plan.

In 2011 the forty-two governments that endorsed the Economic Co-operation and Development (OECD) unanimously endorsed the UN Guiding Principles, these principles states that companies should respect all internationally recognised human rights wherever they operate irrespective if it is on its national territory or abroad. They also confirmed that there is an expectation of companies whether, national or multinational, should address adverse human rights impacts that is directly or indirectly linked to such companies. Before proceeding it would be prudent to clarify the difference between home-state, host-state and territorial-state.

For the sake of this paper, the home-state is the State where a company is domiciled or registered, the country in which its legal address or main office is registered. In law this place is considered the centre of a corporation's affairs. Under European Union(EU) legislation, art. 60 of Regulation No, 44/2001, a company is domiciled in the place where it has its statutory seat, its central administration or principal place of business. In regards to a company that is multinational, the home-state is the State in which the parent company is domiciled or according to the applicable legislation, where it has its central headquarter or administration.

The host-state is any state, other than the home-state, in which multinational enterprises operate. This is usually done through subsidiaries, a company that is partly or completely owned by another company that holds a controlling in the subsidiary company. The easiest example would be the McDonald's fast food chain; the main office is domiciled in the United States(US) but has many outlets globally in which the parent company holds shares in. In foreign direct investment terms, it is the State 'receiving' the investment.<sup>39</sup> In regards to human rights abuses associated with businesses, it is often referred to as the territorial-state; referring to the State in whose territory the abuse occurs.

The scenario given above gives a clear indication of how multinational companies can undermine human rights across different territories and states; the decision made by a parent company in the home-state can lead to human rights abuses in the territorial-state or host-state. The actions of a subsidiary may be influenced by its parent company abroad, or the parent company may benefit financially from a subsidiary whose operations are responsible for human right abuses.

In the Bhopal case the chemical plant was owned and operated by Union Carbide India Limited (UCIL), a chemical company established in 1934 which was majority-owned (50.9%) by a Unites States based company Union Carbide Corporation (UCC); 49.1% was owned by Indian investors including the Government of India and government-controlled banks.<sup>40</sup>

The legal responsibility of the home-state does not diminish just by mere fact the abuses occurred in one of its subsidiary companies or in a host-state. Companies that are headquartered in developed countries but operate in developing countries, directly or through subsidiaries, have shown to operate to standards that would not be acceptable in

---

<sup>39</sup> Amnesty International Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy, London ,at 22. (2014).

<sup>40</sup> S.Tamer Cavusgil; Knight; Riesenberger; Rammal; Rose, *International Business: The new realities*. Pearson Australia, Australia (2014) at 141.

their home-state.<sup>41</sup> The reason for this is that in most developing countries the regulatory framework is weak and there are not sufficient resources to enforce laws and regulations.

In some cases the company, as relatively powerful economic actor, has undue influence in the country, whether over the executive or legislative arms of government.<sup>42</sup> This has meant that people living in poverty are prone to experience and suffer human rights abuses at the hands of businesses and multinational enterprises. Because of the multi-jurisdictional nature of corporate networks, and the phenomenon of powerful multinational companies, human rights advocates have argued for laws with extraterritorial effect. They have also argued that victims of abuse should have 'increased options'<sup>43</sup> in seeking redress in States other than the one in which the violation has occurred. When national or international laws that have extraterritorial effect are absent, victims of human rights abuses can be denied an effective remedy which is in itself a human rights violation.

Though extraterritorial dimension of a State duty to protect human rights is controversial, some states and companies have argued that action to prevent and address human rights abuses by companies should be based on territorial jurisdiction alone. However, there is a growing body of authoritative legal opinion and jurisprudence that has accepted and elaborated the States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.<sup>44</sup> In regards to regional and international levels the International Court of Justice (ICJ) suggested in its Advisory Opinion on Legality of the the threat or Use of Nuclear Weapons, the:

*Existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.*<sup>45</sup>

Although the Guiding Principles do not create in themselves new international law obligations, they do apply to all States and all enterprises and consist of no-legally binding guidelines. The Guiding Principles is a relatively new concept in contrast to other international agreements that have been around for decades; but it is a detailed and influential tool that can be used by a State in the protecting its citizens.

As of date, there has only been four annual forums on Business and Human Rights, and there is very little information available in regards to New Zealand and their efforts to conform with the Guiding Principles on Business and Human Rights. As such, focus of the how the Guiding Principles have been implemented will be discussed and analysed in detail in regards to the United Kingdom.

---

<sup>41</sup> R Steiner, *Double Standard: Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill* (November 2010) Friends of the Earth, 2010.

<sup>42</sup> Above n<sup>2</sup>, at 23.

<sup>43</sup> Above n<sup>2</sup>, at 23.

<sup>44</sup> Above n<sup>5</sup>, *Principle 1*, at 3.

<sup>45</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, para 29.

## ***F. United Nations Guiding Principles on Business and Human Rights and their application in the United Kingdom***

*The Guiding Principles on Business and Human Rights* was presented to the United Nations Human Rights Council by the Special Representative of the United Nations Secretary-General, Professor John Ruggie in June 2011. The Guiding Principles were officially endorsed by the United Human Rights Council in June 2011.<sup>46</sup> This move documented the Guiding Principles as the global standard of practice that is now expected of all states and business with regard to business and human rights. The guiding principles point out the implications of existing standards and practices for States and business, and include points covered in various international laws.<sup>47</sup>

The Guiding Principles are based on six years of work by the former Special Representative, including in-depth research and consultations with Governments, businesses, and civil society;<sup>48</sup> and were further developed to put into operation the “Protect, Respect and Remedy” framework presented by the Special Representative to the United Nations in 2008 now known as the three-pillars: The State Duty to protect human rights, the Corporate responsibility to respect human rights and Remedy for victims of business-related abuse.

### ***i. Pillar one: The State Duty to protect human rights***

“States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.”<sup>49</sup>

This is one of the foundational principles of the Guiding Principles that lays out a States duty protect against human rights abuses within its territory. In accordance with established

---

<sup>46</sup> Human Rights Council (A/HRC/17/31).

<sup>47</sup> The Right to remedy under Article 8 of the UN Universal Declaration of Human Rights.

The UN international Covenant on Civil and Political Rights, Article 2(3).

International Covenant on Economic, Social and Cultural rights, Article 2.

International Convention on the Elimination of all Forms of Racial Discrimination, Article 6.

Convention on the Elimination of all Forms of Discrimination against Women, Article 2.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14.

International Convention for the Protection of All Persons from Enforced Disappearance Article 3-8.

Convention on the Rights of a Child, Article 12,19(2),37 and 39.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 83.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 13.

American Convention on Human Rights, Article 25.

African Charter on Human and Peoples Rights, Article 7(1)(a)

Charter of Fundamental Rights of the European Union, Article 47.

Arab Charter on Human Rights, Article 12 and 23.

<sup>48</sup> United Nations Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights*, New York, HR/PUB/12/02, (2012).

<sup>49</sup> United Nations Human Rights Office of the High Commissioner, *Guiding Principle on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, HR/PUB/11/04, United Nations, New York,(2011).

international human rights law obligations, a State has to respect, protect and fulfil the human rights of individuals within their territory. This includes the duty to protect against human rights abuse by third parties, including business enterprises. States are not responsible for human rights abuses by private actors; but may be in breach of their international human rights law obligations where such abuse can be attributed to them or where they have failed to take appropriate steps to prevent, investigate, punish and redress private actors abuse.<sup>50</sup>

#### **a. United Kingdom**

In accordance with international human rights obligations under customary international law and other legal instruments that the United Kingdom(UK) have signed and ratified, the UK's obligation for the protection of human rights apply only within UK territory. Generally, there is no international requirement for the UK to protect human rights abuses that happen outside its borders. In accordance with customary international law such abuses in another territory, is and should be protected by the powers of that country.

However, the Guiding Principles, have pointed out that, States may be implicated in human rights abuses by companies where such abuses can be directly linked to them. Guiding Principle one asserts that must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

There are a number of international treaties and agreements that the UK are a party of, which deal with human rights in one form or another;<sup>51</sup> and there are also relevant national legislations in place which supports the UK's duty to protect human rights. The UK examples of legislation protecting human rights in the business context include the Health and Safety at Work Act of 1974, the Data Protection Act of 1998<sup>52</sup>, there are also employment regulations that require companies not to discriminate against employees on grounds of sex, race, sexual orientation and religious belief, and environmental regulations. The UK Gangmasters (Licensing) Act 2004, created an agency that prevents the exploitation of workers in agricultural work, shellfish-gathering and related processing or packaging<sup>53</sup>.

Other instruments that the UK have in place which encourages good business practice is the Declaration on Fundamental Principles and Rights at Work which was adopted in 1998 and the 8 core International Labour Organisation Conventions<sup>54</sup> which have all been ratified. The UK have also adopted the Organisation for Economic Co-operation and Development (OECD) guidelines for Multinational Enterprises in which the UK is recognised as having one of the most effective National Contact Point which is under the Department for Business, Innovation & Skills. Under the UK National Contact Point, any interested party can make a complaint where OECD guidelines have not been met. The OECD guidelines encourage governments to observe wherever they operate: due diligence in the supply chain, disclosure,

---

<sup>50</sup> Above N<sup>8</sup>, page 3.

<sup>51</sup> The International Labour Organisation's eight core conventions, Freedom of Association and Protection of the Right to Organise Convention of 1948, Right to Organise and Collective Bargaining Convention of 1949, Forced Labour Convention of 1930, Abolition of Forced Labour Convention of 1957, Minimum Age Convention of 1973, Worst Forms of Child Labour Convention of 1999, Equal Remuneration Convention of 1951 and the Discrimination (Employment and Occupation) Convention of 1958.

<sup>52</sup> which ensures the respect for the privacy of individuals.

<sup>53</sup> Gangmasters Licensing Authority under the Department for Environment, Food & Rural Affairs.

<sup>54</sup> Above n<sup>10</sup>.



human rights, employment and industrial relations, environment, working to stop bribery, consumer interests and taxation laws.<sup>55</sup>

The *UK Bribery Act* is another instrument available that is used to encourage good corporate behaviour and respect human rights. The *UK Bribery Act* has near world wide jurisdiction, which would enable the UK to prosecute individuals or companies with links to the UK, irrespective of where the crime occurred. Under s.7 of the *Bribery Act*<sup>56</sup> company may be held liable of an offence if the company had failed to prevent bribery on the companies behalf; which applies to all UK companies domestic or abroad.

***b. Actions taken by the United Kingdom to conform with Pillar one: the State Duty to Protect***

According to the UK action plan<sup>57</sup>, the UK Government have actioned seven pointers which they listed.

First, the UK have gained support from the G8 for responsible business investments in Myanmar in line with the UN Guiding Principles,<sup>58</sup> and have created a resource centre in Rangoon in which incoming investors from the UK are informed of the importance of human rights complaints in Myanmar in accordance with the Guiding Principles.

The UK Trade & Investment department(UKTI) is a non-ministerial department that works with businesses based in the UK to assist their success in international markets, and with overseas investors looking to the UK as an investment destination. The UKTI encourages British businesses in Myanmar to conduct trade and investment responsibly. UK business are encouraged to ensure that companies doing business in the oil and gas sector publish robust reports on how risks are managed and assess the impact of their investments and operations.<sup>59</sup>

UKTI further encourages UK companies to take local complications and legacies into account, when accessing the impacts operations may have, integrate issues relating to ethnic conflict into all phases of operations and to communicate with stakeholders, worker and communities to build understanding and demonstrate transparency and accountability.

The UK has also been heavily involved in supporting Myanmar's accession to the Extractive Industries Transparency Initiative (EITI) by providing funding to strengthen civil society's rule in ensuring transparency. The UK have also provided funding to the World Bank to carry out technical projects to ensure that current legal frameworks are compatible with EITI requirements.<sup>60</sup>

The UK has also funded the creation of a resource centre in Rangoon to inform investors the importance of human rights complaint business in Myanmar, based on the UN Guiding Principles. According to the UK action plan<sup>61</sup> the funding which was provided by the

---

<sup>55</sup> <[www.gov.uk](http://www.gov.uk)>.

<sup>56</sup> UK Bribery Act of 2010, Section 7 (1)(a)(b).

<sup>57</sup> United Kingdom *Good Business Implementing the UN Guiding Principles on Business and Human Rights* (Department for business, Innovation and Skills, September 2013) at 6.

<sup>58</sup> United Kingdom *Good Business Implementing the UN Guiding Principles on Business and Human Rights* (Department for business, Innovation and Skills, September 2013) at 6.

<sup>59</sup> UK Trade and Investment "Opportunities for British companies in Burma's oil and gas sector" (January 2015) [www.gov.uk/government/world/organisations/ukti-burma](http://www.gov.uk/government/world/organisations/ukti-burma).

<sup>60</sup> Above n<sup>17</sup>, at 13.

<sup>61</sup> Above n<sup>16</sup>, at 6.

Foreign & Commonwealth Office has now been aided with support from the UK's Department of International Development.

Second, the UK have sought and are committed to ensuring that in UK Government procurement, human rights related matters are reflected appropriately when purchasing goods, works and services. Under the public procurement rules public bodies may exclude tenderers from bidding for a contract opportunity in certain circumstances, including where there is information showing grave misconduct by a company in the course of its business or profession.

Such misconduct might arise in cases where there are breaches of human rights. This is stated in the UK Public Contracts Regulations 2015 which lay out the the grounds for mandatory exclusion of suppliers where there is evidence of convictions relating to organised crime, corruption, fraud money laundering; where the supplier(s) have been subject of a binding legal decision which found a breach of legal obligation to pay tax or social security obligations; and where the supplier has failed to provide sufficient evidence of remedial action having taken place subsequently (also known as 'self-cleaning'). Self cleaning is where the supplier 'self cleans', by paying necessary compensation, collaborating with investigations, and taking concrete technical, organisational and personnel steps to prevent recurrence of the offence or misdeeds.<sup>62</sup>

Third, the UK is a member of the Organisation for Economic Co-operation and Development(OECD) whose is to promote policies that will improve the economic and social well-being of people around the world. The UK have also agreed to the OECD 2012 Common Approaches<sup>63</sup> which takes into account not potential environmental impacts and social impacts which is defined to include relevant adverse project related human rights impacts. The UK have also brought to point in their national action plan of 2013 their Export Finance will consider any negative final NCP statements a company has received in respect of its human rights record when considering a project for export credit. This is inline with the OECD 2012 Common Approaches that requires ECA's to 'consider any statements or reports made publicly available by their National Contact Points at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises.'<sup>64</sup>

Fourth, the UK have highlighted that they play a leading role in developing the International Code of Conduct for Private Security Service Providers (ICoC). A set of principles for private security providers convened by the Government of Switzerland. The ICoC code reinforces and articulates the obligation of private security providers particularly with regard to international humanitarian law and human rights law. Under art. 12 of the Articles of Association<sup>65</sup>, the stakeholders have agreed to form an independent oversight mechanism that provide meaningful and independent oversight and accountability of members of the ICoC principles.

---

<sup>62</sup> Crown Commercial Service *Public Contracts Regulations 2015: New requirements relating to Pre Qualification Questionnaires to help businesses access Public Sector Contracts* (2015). <[www.gov.uk/government/uploads](http://www.gov.uk/government/uploads)>.

<sup>63</sup> Organisation for Economic Co-operation and Development *RECOMMENDATION OF THE COUNCIL ON COMMON APPROACHES FOR OFFICIALLY SUPPORTED EXPORT CREDITS AND ENVIRONMENTAL AND SOCIAL DUE DILIGENCE (THE "COMMON APPROACHES")* Trade Committee (TAD/ECG(2012)5, 28 June 2012). <[www.oecd.org](http://www.oecd.org)>.

<sup>64</sup> above n<sup>16</sup>, at 7.

<sup>65</sup> International Code of Conduct Association, *Article 12: Reporting, Monitoring and Assessing Performance* Articles of Association (February 2013). <[icoca.ch](http://icoca.ch)>.

Fifth, the UK have also taken into account the business activity in conflict and fragile states or countries with high levels of criminal violence and have implemented the Building Stability Overseas Strategy<sup>66</sup> (BSOS) on July 2011. The BSOS outlines how the UK will promote stability and prosperity in countries and regions where its interests are at stake. The Strategy has been developed jointly by the Foreign and Commonwealth Office (FCO) the Department for international Development (DFID) and the Ministry of Defence (MOD).

In accordance with the UK national plan of 2013 the UK will also implement the OECD Risk Awareness Tool for multinational enterprises in Weak Governance Zones<sup>67</sup> and will continue to implement the OECD Due Diligence for Responsible Supply Chains of Minerals from conflict Affected and High Risk Areas<sup>68</sup>.

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas provides detailed recommendations to help companies respect human rights and avoid contributing to conflict their mineral purchasing decisions and practices. The Due Diligence Guidance is one of the only international frameworks available to help companies meet their due diligence reporting requirements.<sup>69</sup> The UK has further noted that its government will continue to encourage higher standards in the diamond supply chain.

Sixth, the UK is an annual contributor to the United Nations Global Compact; an international mechanism that encourages and enables companies to align their operations and strategies with their accepted principles in the arena of human rights, labour, environment and anti-corruption.

Seventh, the UK have invested £750,000 from their Foreign and Commonwealth Office to the Human Rights and Democracy Programme in projects promoting the United Nations Guiding Principles. The UK anticipates that this will an annual investment on behalf of their efforts in promoting the Guiding Principles on Business and Human Rights.

I would like to highlight that in the UK Companies Act of 2006, require that company directors have regard to the impact of the company's operation on the community.<sup>70</sup> Though this has not been brought up against a company director to date; it is an avenue to which a company director may be held liable for a companies impact on the human rights of individuals within a given community. Under the UK Companies Act the UK Government has the option of bringing forth infringement notices to company directors whose companies do not gauge human risks or who do not assess actual or potential adverse human rights impacts within a community. The purpose of such assessments is to understand the specific impacts on specific people and community that are at most risk to an enterprises operation.

## **ii. Pillar two: The Corporate Responsibility to Respect Human Rights**

---

<sup>66</sup> Ministry of Defence *the Building Stability Overseas Strategy* United Kingdom (July 2011). <[www.gov.uk/government/publications/building-stability-overseas-strategy](http://www.gov.uk/government/publications/building-stability-overseas-strategy)>

<sup>67</sup> Organization for Economic Cooperation and Development *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (8 June 2006). [www.oecd.org](http://www.oecd.org).

<sup>68</sup> Organization for Economic Cooperation and Development *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2 ed. (November 2012). <[www.oecd.org](http://www.oecd.org)>

<sup>69</sup> the only other international frameworks are the *Foreign Corrupt Practices of 1997* (FCPA) of the United States and the *United Nations Guiding Principles on Business and Human Rights* of 2011.

<sup>70</sup> UK Companies Act 2006, s 172(1)(d).

In Accordance with the Guiding Principles 11 “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impact with which they are involved.”<sup>71</sup>

As seen in cases discussed earlier, enterprises can and should have the freedom to run their day to day business activities; as long as it does not infringe on an individuals’ human rights. The Guiding Principles set out the baseline responsibility of all enterprises to respect human rights wherever they operate. Beyond that, enterprises may voluntarily undertake additional human rights commitments as they fit. It is crucial that enterprises respect human rights as enterprises can have a direct or indirect impact on an individual’s human rights.

The right to fair trial for example, which is the responsibility of the State, can be adversely affected when enterprises obstructs evidence or interferes with witnesses. Other situations where an enterprise may have infringed an individuals’ human rights is when they are providing data about internet service users to a Government that uses the data to trace and prosecute political dissidents contrary to human rights; or when a company is the sole or main source of pollution in a community’s drinking water supply due to chemical seepage from the production process.

Infringement can also range from ‘better known’ infringements like routine racial discrimination in its treatment of its customers, to not so obvious infringements like performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment. Infringements of an individuals’ human rights is not restricted to physical infringements but can be linked to an enterprises operation, products or services for example, where a clothing companies’ products are subcontracted by a supplier that uses child labourers in appalling conditions.

**a. *Actions taken by the UK to conform with Pillar two: Corporate Responsibility to Respect Human Rights***

According to the UK National Action Plan of 2013, companies in the UK have made the link between their business activity and respect for human rights; many have human rights policies woven into their objectives and operations. However, they are not known as human rights mechanisms but are known as labour standards, health and safety, or non-discrimination policies. The UK Governments expectation of companies is that they take and respect human rights wherever they operate. UK companies should seek ways to honour the principles of internationally recognised human rights; adopt appropriate due diligence policies to identify, prevent and mitigate human rights risks, and commit to monitoring and evaluating implementations.<sup>72</sup>

The UK Government in supporting Corporate responsibility to respect human rights have put forth areas in which are inline with the UN Guiding Principles.

The UK Government have published the National Action Plan of 2013 which highlights the Governments actions and expectations on Business and human rights; emphasis on enterprises respecting human rights in light of the UN Guiding Principles. A fundamental principle in this regard is the requirement for businesses to conduct due diligence to avoid infringing human rights. The National Action Plan is distributed to UK businesses ambassadors and officials who engage with business, including embassies and high commissions. The UK

---

<sup>71</sup> Above n<sup>8</sup>, at 13.

<sup>72</sup> Above n<sup>16</sup>, at 8.

Government has posted their National Action Plan on Government websites and social media pages.

From the 1<sup>st</sup> of October the Companies Act 2006 (The Companies Act) has been amended to include annual reports by company directors on human rights issues.<sup>73</sup> The Strategic Report Regulation require that all companies other than small companies<sup>74</sup> publish a strategic report for each financial year. The strategic report must contain a fair review of the company's business and a description of the principal risks and uncertainties facing the company.

The Companies Act Strategic Report<sup>75</sup> has taken into account environmental and employee matters in accordance with Guiding Principle 21(b) which states "in order for companies to account for how they address their human rights impacts, enterprises should be prepared to communicate this externally... communications should (b) provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved...".

Section 385 of the Companies Act further stipulates that 'quoted companies must now include in their strategic reports, to the extent necessary for an understanding of the development, performance or position of the company's business information about, social, community and human rights issues; and any policies of the company in relation to social, community and human rights issue and the effectiveness of those policies,<sup>76</sup> this is inline with the principles set out in the UN Guiding Principles. An example of how s385 could be utilised would be when a company that operates in the mining sector may be expected to include information of how its operations directly or indirectly may have detrimental environmental and social effects on its surroundings.

Furthermore, the UK have in place the Financial Reporting Council(FRC) which promotes high standards of corporate governance through the UK Corporate Governance Code<sup>77</sup>. This Code is a set of principles of good corporate governance aimed at companies listed on the London Stock Exchange. Section 456 of the Companies Act (as amended by the Strategic Report Regulations) points out that the Financial Reporting Council is responsible for monitoring compliance of the Strategic Reports and may investigate cases were the Financial Reporting Council feels that information has not been provided.

The Financial Reporting Council has the enforcement power to apply to the courts if they feel that reports are not inline with requirements set out in the Companies Act.<sup>78</sup> Of significance is that any director of a company may be charged if that director approves a strategic report that they knew did not comply with FRC guidelines; and failed to take

---

<sup>73</sup> The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013. [www.legislation.gov.uk](http://www.legislation.gov.uk) and [www.frc.org.uk](http://www.frc.org.uk).

<sup>74</sup> The Companies Act 2006 of the United Kingdom, s 414A (1), (2) which states "The directors of a company must prepare a Strategic Report for each financial year unless the company is entitled to the small company exemption...".

<sup>75</sup> The Companies Act 2006, s414(4)&(6). "To the extent necessary for an understanding of the development, performance or position of the company's business, the review must include analysis using financial and, where appropriate, non-financial key performance indicators including information relating to environmental and employee matters."

<sup>76</sup> The Companies Act 2006, s414C(7) as amended by the Strategic Report Regulations.

<sup>77</sup> The UK Corporate Governance Code, [www.frc.org.uk](http://www.frc.org.uk).

<sup>78</sup> Above n<sup>35</sup>, s456.

reasonable steps to secure compliance with those requirements or to prevent the report from being approved.<sup>79</sup>

**iii. Pillar three: Access to Remedy for victims of business-related abuse.**

Under art.8 of the Universal Declaration of Human Rights<sup>80</sup> (UDHR) Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. This brings forth the third pillar of the UN Guiding Principles which academics and specialist in the field of business and human rights agree that it is the weakest of the three pillars of the UN Guiding Principles. Unless States take the necessary precautions or appropriate steps to redress business-related human rights abuses, the States duty to protect will be constantly challenged.

International law prescribes that states must provide and effective remedy for all persons who alleges a violation of his or her human rights; and as far as the United Nations treaties, the European Convention on Human Rights and even the UN Guiding Principles agree that the remedy need not necessarily consist of access to courts. Remedy may even be in the form of apologies, restitution, financial or non-financial compensation and punitive sanctions as well as injunctions or guarantees of non-repetition.<sup>81</sup>

The Guiding Principles affirm that the State duty to protect includes ensuring that a robust and appropriate remedy be available to those whose human rights have been infringed by businesses. This may be done through judicial, non-judicial, administrative, legislative or by any other appropriate means when such infringements occur within their jurisdiction. In accordance with the UN Guiding Principles judicial remedies are the core of ensuring access to remedy; states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to denial of access to remedy.<sup>82</sup> This implies taking steps to remove legal, practical or other barriers such as administrative fees or language barriers that may prevent victims from presenting their cases.

However, a states obligation should not lie only in their duty to provide effective judicial remedies, in accordance with Principle 26 of the Guiding Principles, but should also ensure that effective non-judicial remedies are available. This can be in the form of labour and employment mechanisms, national human rights institutions, ombudspersons or any other appropriate arbitrary mechanisms available to hear and adjudicate business-related human rights complaints. The principles regarding access to remedy under the Guiding Principles do not only apply to states but stipulates that companies should collaborate with judicial mechanisms in fielding and addressing grievances from individuals and communities that may be adversely affected by their operations.

**a. Actions taken by the UK to conform with pillar three: Access to Remedy for victims of business related abuse**

---

<sup>79</sup> The Companies Act 2006, s. 414(2)(3), as amended by the Strategic Report Regulations.

<sup>80</sup> Universal Declaration of Human Rights (created 1948, ratified 16 December 1948).

<sup>81</sup> Above n<sup>8</sup>, at 27.

<sup>82</sup> Above n<sup>8</sup>, at 28.

The UK has a culture of human rights awareness and it is fair to say that it is one of the leading countries in the world in awareness and protection; much of which results from their foundations set forth through various legislation enacted, some which have been discussed earlier in the paper. The UK sees its own provision of judicial remedy options as an important element in access to remedy. Most companies operating in the UK have internal company grievance procedures such as negotiation, arbitration, mediation, adjudication which support and facilitate the need for access to remedy for human rights abuses.

The most significant mechanism found within the UK that have made the most progress in regards to access of remedy is the complaint mechanism under the OECD Guidelines for Multinational Enterprises discussed above under pillar one. The OECD Guidelines require each signatory State to establish a National Contact Point(NCP) to receive complaints of human rights violations by businesses. The OECD Guidelines are distinctive, government supported corporate accountability mechanism designed to incite responsible business behaviour. In the UK their NCP is the Department of Business, Innovation & Skills (BIS), victims of human rights abuse or Non-Government Organisations acting on their behalf can lodge complaints to the BIS of such infringements.<sup>83</sup> Once complaints are received, the BIS issues their findings to the public on which companies have failed to comply with OECD Guidelines and which companies need to bring their practices in line with OECD Guidelines.

In 2015 the BIS in their capacity as the UK NCP issued a statement on a company that had not complied with the OECD Guidelines. The case involved a complaint by the Lawyers for Palestinian Human Rights (LPHR) against a company called G4S PLC. The company G4S PLC is an international security group that merged a UK security company Securicor and a security business of a Danish company Group 4 Falck. G4S is listed on the London Stock Exchange(FTSE 100) and was incorporated as a UK public limited company. The company G4S purchased 91 percent of Hashmira Technologies which was Israel's largest security company but have now changed their name to G4S Secure Solutions (Israel) Limited and G4S Security Technologies (Israel) Limited. By 2014, G4S owned 92% of G4S Secure Solutions (Israel) Limited and 100% of G4S Security Technologies (Israel) limited.<sup>84</sup> Within Israel, G4S confirmed that they are contracted to service and maintain baggage scanning equipment and metal detectors used at checkpoints, including a small number of checkpoints along the separation barriers. G4S also provide support in running prison facilities and detention centres.<sup>85</sup>

LPHR complaints allege breaches of international human rights law and humanitarian law. LPHR alleges that some of G4S's operation in Israel and occupied Palestinian territory are in violation of human rights provisions of the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (OECD Guidelines). In Particular in relation to G4S provision of equipment and services at Israel prisons, detention centres, and military checkpoints. In 2004 the International Court of Justice(ICJ) issued an Advisory Opinion in regards to the construction of the separation barrier in Israel.<sup>86</sup> The ICJ held that the construction of the wall being built by Israel, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to

---

<sup>83</sup> The Department of Business, Innovation & Skills website which has details about the UK National Contact Point at [www.bis.gov.uk/nationalcontactpoint](http://www.bis.gov.uk/nationalcontactpoint).

<sup>84</sup> G4S Annual Report and Accounts 2014, at 155. [www.g4s.com](http://www.g4s.com).

<sup>85</sup> Above n<sup>43</sup>, at 155.

<sup>86</sup> International Court of Justice *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion*, Hague (9 July 2004). <[www.icj-cij.org](http://www.icj-cij.org)>.

international law and that Israel is under an obligation to cease construction and dismantle all parts of the wall that have been constructed.

LPHR complained that the security forces provided by G4S restricted the freedom of movement of the Palestinians. The restrictions impeded on the Palestinians basic human rights to the right to health, right to work, right to education and the right to an adequate standard of living.

The UK NCP found that there was evidence of human rights violations at checkpoints and Israel Prison Service facilities which included restrictions on Palestinians freedom of movement, with associated adverse impacts on the right to health education work and standard of living, caused by military checkpoints in the occupied West Bank and along the unlawful barrier wall. The UK NCP also held that there is evidence of human rights violations against Palestinian detainees and prisoners in Israeli Prison Service facilities in Israel and the Occupied Palestinian territories.<sup>87</sup> One of the recommendations of the UK NCP was for G4S to implement a contract approvals process that includes assessment of human rights risks and to consider how to work with business partners in Israel to address the human rights violations referred to in LPHR's complaint.

### ***G. Suggestions in areas to improve for the UK***

In relation to state-based non-judicial mechanisms available within the UK for business and human rights violations, the UK NCP is the most pertinent in providing access to remedy for victims of human rights abuse. Although the UK NCP has the authority to undertake investigation into human rights abuses by businesses within the UK or abroad, it does not provide any enforceable remedy against the business enterprise or any remedy directly to the victim. Because of the voluntary nature of the reports put forth by companies in the UK, there is no guarantee that companies in breach of gross human rights violations will be willing to engage with government or claimants.

Though it is improvement, Companies Act 2006 s414C(14) could be used as a loop hole in as it gives directors the powers not to divulge information about impending developments or matters in the course of negotiation if it would seriously be prejudicial to the interest of the company.

The same could be said about Companies Act 2006 s414D(1) in which the Strategic Report must be approved by the board of directors and signed by a director or the secretary of the company. There is no guarantee that the board of directors would submit any information that may be damaging to the company. The onus is on the company itself to self-check and regulate, whether the information received in the Strategic Report is accurate or not, would be at the discretion of the board.

Within the UK legal system there is still much that can be improved, particularly in the arena of barriers to accessing remedy for victims of business and human rights related abuses. Although there have been cases in which victims have been compensated by multinational enterprises for human rights related abuse, there still remains procedural and financial barriers which inhibit the ability to bring claims before a UK court. As discussed earlier, the 'success fee' and the 'insurance premium' is an example that was repealed by the *Legal Aid, Sentencing and Punishing of Offender Act*.

---

<sup>87</sup> Lawyers for Palestinian Human Rights *Public Statement: UK watchdog finds G4S is violating human rights obligations towards Palestinians* (9 June 2015). <lphr.org.uk>.



Lawyers in the UK representing a client that is not a UK citizen, now come with high risks, law firms are no longer insured and since the success fee is capped; lawyers are hesitant in taking up multinational cases of human rights abuse for the fear that the financial burden of an alien client may be too much of a bear.

Improvement in the arena of criminal liability for business related human rights abuses would be a positive for the UK, the *Bribery Act* and the *Modern Slavery Act* are only two examples that are relevant to abuses of human rights. Be as it may, there have been few prosecutions to date. The UK law as it stands, gives the UK government the right to prosecute a UK national for murder, manslaughter committed overseas. However, a UK company cannot be prosecuted in the UK for corporate manslaughter committed abroad.<sup>88</sup> While the UK Action Plan dealt with how the UN Guiding Principles were to be implemented, it did not take into account criminal offence or criminal liability for multinational corporations.

In relation to State-based non-judicial mechanism the UK has in place the National Contact Point under the BIS. The UK National Contact Point implements the OECD Guidelines on Multinational Enterprises but does not possess enforceable powers. All that the National Contact Point can do is identify and give recommendations, whether such recommendations are headed is entirely at the discretion of the enterprises.

A further downfall of the UK National Contact Point is that it does not provide any remedy to victims of business related abuses, in short the UK National Contact Point has no power to enforce any of its recommendations. The *Gangmasters Licensing Authority* and the government Ombudsmen are in the same predicament; they lack the legislative power to provide remedies for victims of abuse nor do they have the power to oblige a multinational company to comply with its recommendations. Even the UN Guiding Principles is voluntary in nature and the international community can not oblige a State or company to head to the Guiding Principles.

Two suggestions that may provide a solution. One, that States like the UK use it strengthens its domestic legislations to cover business and human rights related abuses. Even taking into consideration multinational companies who cause harm in host-state territories. Two, that the international community be given the task of formulating a binding international treaty in which Multinational companies would be held accountable for human rights violations.

Moreover, I must admit that I was not aware of the vast array of knowledge available and the intricacies of business and human rights. What was known of any gross human rights violations, was that which is publicised on media outlets; and only then, the viewer is only shown what the network feels is newsworthy. A great hindrance in business and human rights, not only in the UK, but applies to most countries who have signed on to the UN Guiding Principles is that there is not enough being done in regards to bringing awareness. The UK is scattered with multinational companies, according to European Union Tripartite<sup>89</sup>, in the mid 1990's, UK based multinational companies accounted for 45% of manufacturing employment whilst overseas owned multinational companies accounted for only 16%. The number of UK based multinational companies to this date has only increased. However, we are only aware of a handful of companies that make it across the media when they are alleged of human rights abuses, like the *Shell* company or *British Petroleum*. The challenge of trying to bring

---

<sup>88</sup> Andrew Smith and Danielle Reece, *The Changing Face of Corporate Criminal Liability*. Traidcraft: Fighting poverty through trade (25 January 2016). <[www.traidcraft.org](http://www.traidcraft.org)>

<sup>89</sup> Paul Marginson *UK: Multinational companies and collective bargaining* (1 July 2009). <[www.eurofound.europa.eu](http://www.eurofound.europa.eu)>

about change in the area of business and human rights related abuse is that only a small percentage of the abuse is even heard of.

The vast majority of economic activity is carried out by small, relatively unknown companies. These companies ship goods across borders to developing countries and communities and atrocities occur, it is overlooked as the products that they are shipping are recognisable goods or brand names; and the individuals who are impacted are not from first world countries who are aware of complaint systems. But they are victims from third world countries who are difficult to track and the public have little interest in reading about.

UK NGO's could play a stronger role on bringing to light human rights abuses by companies. The UK non-judicial mechanisms could be tailored more to handle cases involving human rights abuses by companies not only within the UK borders but also human rights abuse outside UK borders. This can only be done by passing stronger national legislations that can accommodate for the victims seeking redress for business and human rights related abuses.

Furthermore, when piling through UK case law, legislations, judicial and non-judicial mechanisms, one can be overwhelmed with the amount of irrelevant information that is available. An area that could be improved is in the collection of data in the areas of business and human rights abuses, as discussed above, the *UK National Contact Point* is run by the Department of Business Innovation & Skills, the *Gangmasters Licensing Authority* (under the Department of Environment, Food, Regions and Agriculture, the Equality and Human Rights Commission, Ombudsman office and others. All working towards similar goals but are not aware of each others short fallings or barriers. For mechanisms and people that deal with human rights violations information is vital and the UK Government could implement legislation that would combine statistics on who what is being done by each agencies, state and non-state. The collections of such data would prove valuable in obtaining which multinational business are likely to infringe on human rights of others, which companies would be a greater risk of environmental calamities. Without the hard figures to show what is being done we are powerless in containing business and human rights related abuse.

This brings forth the last point, there are a number of suggestions by the UK Government of what is being done and what will be done in regards to their implementation of the UN Guiding Principles.

The UK lack mechanisms that ensure what is promised is actually being done. Multinational companies have statements on their websites with the promise to abide by and respect human rights in their daily operation, what is absent is the information on whether these promises are adhered to. Unfortunately, the UK Government could be accused of same. The only concrete and viable solutions is to give a state or not state mechanisms the legislative power to check on what is being done by business to curb human rights violations. This implementation could be taken further by empowering such a body the ability to penalise companies who are found wanting. This could prove an advantage in keeping companies honest in their day to day dealings, with the knowledge that they will be under scrutiny in regards to human rights violations.

As John Ruggie remarked:<sup>90</sup>

---

<sup>90</sup> Ruggie, John G.; Remarks at UK government launch: action plan for implementing the UN Guiding Principles, London, 4 September 2013. Cited in OECD Observer, Corporate Social Responsibility; Emerging good practice for a new era by Jame Nelson. <oecdobserver.org>

“...the era of declaratory corporate social responsibility is over. It is no longer enough for governments to act as though promoting corporate social responsibility initiatives somehow absolved them of their obligation to govern, and to do so in the public interest. It is no longer enough for companies to claim they respect human rights; they must know and show that they do. And it is no longer enough for rights-holders to merely to harbour the hope that governments and companies will fulfil their respective obligations; they are entitled to demand remedy for harm done.”

## ***H. The Prospect of a Treaty on Trans-national Companies Liability in Human Rights abuses***

There was much talk during the 2015 Forum on Business and Human Rights held in Geneva, on the possibility of a Treaty regulating the activities of transnational companies with regards to human rights related abuses. It is a significant step in seeking redress for business and human rights related abuses. As discussed in this paper there have been many adverse human rights effects due to activities of trans-national companies not only in their home-state but also in their host-state. The effects of human rights violations are more prevalent in third world, developing countries committed by trans-national companies based in a first-world country.

As pointed out throughout this writing the domestic systems of law and enforcement have proven difficult and inadequate in bringing human rights claims against trans-national companies. At present there are no reliable domestic or international laws that hinders a company or its executives from returning to their home country where they are out of reach of the host-state's laws. As in the Bhopal case discussed above, more than three decades after the tragedy, victims still have no reparation from the American company UCC. The same could be said of the victims in Nigeria who are currently battling for redress for the contaminated water and polluted farm lands that have been affected by the oil spills caused by a Shell subsidiary. There are at present thousands of cases in which local communities all over the world who have been directly or indirectly affected by the actions trans-national companies.

In 2014, the Human Rights Council adopted a resolution<sup>91</sup> with the aim of creating a legally binding instrument on transnational corporations with respect to human rights referred to as the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG).

In July of 2015, the OEIWG had its first meeting in Geneva in which the working group collected inputs including written inputs, from States and relevant stake holders on possible principles, scope and elements of such an international legally binding instrument.<sup>92</sup> It was acknowledged that an international legally binding instrument on business and human rights could contribute to redressing the gaps and imbalances in the current international framework, areas in which the UN Guiding Principles do not cover. It was further stated that the search for a new international legally binding instrument and the implementation of the

---

<sup>91</sup> Human Rights Council, *Resolution A/HRC/RES/26/9 (2014)* the establishment of a working group on working on a legally binding instrument on trans-national corporations and other enterprises with respect to human rights.

<sup>92</sup> Kinda Mohamadieh and Daniel Uribe; *Business and Human Rights: Commencing historic discussions on a legally binding instrument*, South Centre: South Bulletin Issues 87-88, 23 November 2015.

Guiding Principles should not be seen as contradictory, but rather complementary objectives.<sup>93</sup> It was agreed that the current systems of remedies for victims of corporate human rights abuses are patchy and inconsistent, complicated by jurisdictional challenges such as forum non convenience, asserting the liability of parent company and availability of funding for legal representation, all of which were discussed in this writing. The role of national mechanisms was discussed as well as the value of non-judicial mechanisms and preventive remedies, like injunctions to be included in the terms of the treaty.

Different obstacles were identified which undermine the possibility of holding corporations accountable, leading to significant deficiencies in access to remedies. One of the suggestions was the abolishing of the *forum non convenience* doctrine in human rights cases and accepting the principle of parent company 'duty of care'. In this sense, any company whether multinational or not, fails in its duty of care, they may be brought to account for such breaches.

With the need for a binding mechanism to hold multinational companies accountable for human rights abuses, some states have argued that binding treaty on business and human rights would not bring us any closer to solving the problem of human rights abuses by multinational corporations. In theory its binding but in practice, the international legal instruments available for enforcements of international agreements is lacking. A treaty would only be binding if the States ratify, and no state can be coerced into signing a treaty that may hinder their business aptitude in a capitalist based world.

## ***I. Conclusion***

We can gather from this writing the importance and impacts companies and multinational companies play in dealing with human rights violations in relation to business. The phenomenon of multinational corporations is growing world wide and along with it comes both positive and negative effects. This paper has touched on some vital area in regards to the negative effects multinational companies are impacting human rights across the globe, from the Bhopal disaster in India to oil spills in Nigeria. What is of great concern is how multinational companies could be brought to account for such violations; particularly in vulnerable communities in third world nation whose judicial and non-judicial mechanisms are not as stringent as those of first world countries.

The implantation of the UN Guiding Principles does not establish any new human rights binding laws, but they do bring awareness to the duties of the State and corporations in how human rights should be respected in their operations. Though talks are currently on the way to formulate a binding treaty, there is scepticism of how much of a positive impact it will have in regards to improving the right to remedy for human rights abuses by multinational companies. A treaty is only as good as its policing mechanism, and at the moment, there is no clear way of how to enforce a binding treaty in such a way that multinational companies would adhere to. At best, the only true concrete mechanism available is through a countries national legislation. By implementing national legislation that will cover human rights abuses by multinational corporations at home and abroad, can we truly tackle the issue of human rights violations by companies.

---

<sup>93</sup> Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples.

## **J. Reference**

<sup>1</sup> <[www.businessdictionary.com/definition/corporate-veil.html](http://www.businessdictionary.com/definition/corporate-veil.html)>

### **books**

James J. Fawcett ed. *Declining Jurisdiction in Private International Law* (August 1994) Oxford University Press, England.

Jena Maritn, Karen E. Bravo, ed. *The Business and Human Rights Landscape: Moving Forward Looking Back*, Cambridge University Press , London (2015).

Surya Deva, David Bilchitz. *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013) Cambridge University Press, United Kingdom.

David Kinley; International Library of Essays on Rights: Human Rights and Corporations, (2009) Ashgate Publishing Ltd, England.

S.Tamer Cavusgil; Knight; Riesenberger; Rammal; Rose, *International Business: The new realities*. Pearson Australia, Australia (2014).

Muyaffer Eroglu; *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* Edward Elgar Publishing Limited, Cheltenham (2008).

Themistocles D' Silva, *The Black Box of Bhopal: A closer look at the world's deadliest industrial disaster*, Victoria BC 2006, Trafford, pp181-2. (book)

### **International material**

International Court of Justice *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion*, Hague (9 July 2004). <[www.icj-cij.org](http://www.icj-cij.org)>.

G4S Annual Report and Accounts 2014, at 155. [www.g4s.com](http://www.g4s.com).

Organisation for Economic Co-operation and Development *RECOMMENDATION OF THE COUNCIL ON COMMON APPROACHES FOR OFFICIALLY SUPPORTED EXPORT CREDITS AND ENVIRONMENTAL AND SOCIAL DUE DILIGENCE (THE "COMMON APPROACHES")* Trade Committee (TAD/ECG(2012)5, 28 June 2012). <[www.oecd.org](http://www.oecd.org)>.

UK Trade and Investment "Opportunities for British companies in Burma's oil and gas sector" (January 2015) [www.gov.uk/government/world/organisations/ukti-burma](http://www.gov.uk/government/world/organisations/ukti-burma).

International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, para 29.

R Steiner, *Double Standard: Shell practices in Nigeria compared with international standards to prevent and control pipeline oil spills and the Deepwater Horizon oil spill* (November 2010) Friends of the Earth, 2010.

Amnesty International Injustice Incorporated: *Corporate Abuses and the Human Rights to Remedy*, London, at 22. (2014).

The Centre for Justice and Accountability, *The Alien Tort Statute: A means of redress for survivors of human rights abuses*. <[www.cja.org](http://www.cja.org)>

*Extradition Treaty Between the United States of America and India* (signed 25 June 1997, entered into force 21 July 1999).

S Muralidhar, *Unsettling Truths, Untold Tales: The Bhopal Gas Disaster Victims 'Twenty Years' of Courtroom Struggles for Justice*, 2004, International Environmental Law Research Centre, at 33 and 36. [www.ielrc.org](http://www.ielrc.org).

Amnesty International, Injustice Incorporated: *Corporate Abuses and the Human Right to Remedy* (2014), London, Peter Benenson House. (report)

## **JOURNALS**

The Yale Law Journal, *Corporations and Human Rights: A Theory of Legal Responsibility* by Steven R, Ratner compiled in *International Library of Essays on Rights: Human Rights and Corporations*, (2009) Ashgate Publishing Ltd, England.

Kinda Mohamadieh and Daniel Uribe; *Business and Human Rights: Commencing historic discussions on a legally binding instrument*, South Centre: South Bulletin Issues 87-88, 23 November 2015.

Ruggie, John G.; Remarks at UK government launch: action plan for implementing the UN Guiding Principles, London, 4 September 2013. Cited in OECD Observer, *Corporate Social Responsibility; Emerging good practice for a new era* by Jame Nelson. <[oecdobserver.org](http://oecdobserver.org)>

Paul Marginson *UK: Multinational companies and collective bargaining* (1 July 2009). <[www.eurofound.europa.eu](http://www.eurofound.europa.eu)>

## **Government Departments:**

Ministry of Defence *the Building Stability Overseas Strategy* United Kingdom (July 2011).

Department for Business, Innovation & Skills (UK)

Department for Environment, Food & Rural Affairs (UK)

The Department of Business, Innovation & Skills website which has details about the UK National Contact Point at [www.bis.gov.uk/nationalcontactpoint](http://www.bis.gov.uk/nationalcontactpoint).

### **International Conventions:**

Universal Declaration of Human Rights (created 1948, ratified 16 December 1948).

Organization for Economic Cooperation and Development *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2 ed. (November 2012). <[www.oecd.org](http://www.oecd.org)>

Organization for Economic Cooperation and Development *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (8 June 2006). [www.oecd.org](http://www.oecd.org).

International Code of Conduct Association, *Article 12: Reporting, Monitoring and Assessing Performance* Articles of Association (February 2013). <[icoca.ch](http://icoca.ch)>.

The International Labour Organisation's eight core conventions:

Freedom of Association and Protection of the Right to Organise Convention of 1948,  
Right to Organise and Collective Bargaining Convention of 1949,  
Forced Labour Convention of 1930,  
Abolition of Forced Labour Convention of 1957,  
Minimum Age Convention of 1973,  
Worst Forms of Child Labour Convention of 1999,  
Equal Remuneration Convention of 1951,  
and the Discrimination (Employment and Occupation) Convention of 1958.

### **United Nations Material**

Human Rights Council, *Resolution A/HRC/RES/26/9 (2014)* the establishment of a working group on working on a legally binding instrument on trans-national corporations and other enterprises with respect to human rights.

United Nations Human Rights Office of the High Commissioner, *Guiding Principle on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, HR/PUB/11/04, United Nations, New York,(2011).

Human Rights Council *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc A/HRC/17/31, 21 March 2011.

Prog. Gwynne Skinner, Prof. Robert McCorquodale, Prof. Oliver De Schutter; *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*

(December 2013) The International Corporate Accountability Roundtable. [www.corporatejustice.org](http://www.corporatejustice.org).

Victoria Tauli-Corpuz, United Nations Special Rapporteur on the Rights of Indigenous Peoples.

United Kingdom *Good Business Implementing the UN Guiding Principles on Business and Human Rights* (Department for business, Innovation and Skills, September 2013) at 6.

Human Rights Council, *Resolution A/HRC/RES/26/9 (2014)* the establishment of a working group on working on a legally binding instrument on trans-national corporations and other enterprises with respect to human rights.

### **UK Legislations**

*The Companies Act 2006* (Strategic Report and Directors' Report) Regulations 2013. [www.legislation.gov.uk](http://www.legislation.gov.uk) and [www.frc.org.uk](http://www.frc.org.uk).

*UK Companies Act 2006*, s. 414(2)(3), as amended by the Strategic Report Regulations.

*UK Corporate Governance Code*, [www.frc.org.uk](http://www.frc.org.uk).

*UK Companies Act 2006*, s414C(7) as amended by the Strategic Report Regulations.

*UK Companies Act 2006*, s414(4)&(6).

*UK Companies Act 2006*, s 414A (1)(2).

*UK Companies Act 2006*, s 172(1)(d).

*UK Bribery Act of 2010*, Section 7 (1)(a)(b).

*Gangmasters Licensing Authority* under the Department for Environment, Food & Rural Affairs(UK).

*Legal Aid, Sentencing and Punishment of Offenders Act 2012* United Kingdom.

*Insolvency Act 1986*, s214(1) United Kingdom.

### **Canadian Legislation**

Article 3135 & 3137 Civ. Code (2001) Quebec.

### **US Legislation**

-*The Alien Tort Claims Act 1789*, United States.



## **New Zealand Legislation**

*Companies Act 1993*, s271(1)(a)(b)(c)(d) New Zealand.

## **Newspaper and Magazine articles**

Andrew Smith and Danielle Reece, *The Changing Face of Corporate Criminal Liability*.  
Traidcraft: Fighting poverty through trade (25 January 2016). <[www.traidcraft.org](http://www.traidcraft.org)>

theguardian *Dutch appeals court says Shell may be held liable for oil spills in Nigeria* (18 December 2015).

Earthrights, *The Alien Tort Statute*. <[www.earthrights.org](http://www.earthrights.org)>

Sally Hayden *Thirty Years After Bhopal's Union Carbide Disaster, Gas Leak Survivors Are Still Suffering* Vice News, 1 December 2014. <[news.vice.com](http://news.vice.com)>

Crown Commercial Service *Public Contracts Regulations 2015: New requirements relating to Pre Qualification Questionnaires to help businesses access Public Sector Contracts* (2015). <[www.gov.uk/government/uploads](http://www.gov.uk/government/uploads)>.

## **Press Release**

Lawyers for Palestinian Human Rights *Public Statement: UK watchdog finds G4S is violating human rights obligations towards Palestinians* (press release, 9 June 2015). <[lphr.org.uk](http://lphr.org.uk)>.

## **cases**

*Kiobel v Royal Dutch Petroleum* 133 S.Ct 1659 (2013) United States Supreme Court.

*Filartiga v Pena-Irala*, Court of Appeals, Second Circuit, 30 June 1980.

*Sosa v Alvarez-Machain*, United States Supreme Court 542 U.S 692 (2004).

*Re Union Carbide Gas Plant Disaster at Bhopal*, India in December 1984, MDL Docket N.626,85 Civ 2696 (JFK) US Southern District Court of New York.

*Union Carbide v Union of India*, (1988) AIR Supreme Court 373.

*Lubbe v Cape Plc* [2000] UKHL 41.

*Union Carbide Corporation v Union of India*, Supreme Court of India (1989) 1 SCC 674.

*Union Carbide Corporation v Union of India*, Supreme Court of India (1991) 4 SCC 584; AIR 1992 SC 248.

*Union Carbide Corporation v Union of India*, Supreme Court of India (1989) 1 SCc 674.