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Crossing the Rubicon: Enforcing the international legal responsibility of transnational corporations for \textit{ius cogens} human rights violations

Master thesis
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Summary

The objective of this thesis is to comprehensively demonstrate the existing extent, and the nature of the *Ius Cogens* Human Rights Obligations of Transnational Companies and their enforcement in the international law. The existing international human rights law is mainly state-centric as it creates obligations primarily upon States to promote human rights. Apart from that one can outline an affluence of (non-state) actors who in various ways and to a varied extent participate in the international community. It is submitted that one of the most controversial non-state actors is transnational corporation. The top one hundred transnational corporations own nearly two trillion dollars of assets outside their home countries, a quarter of the world’s stock of all foreign direct investment (FDI). It is submitted that transnational companies (TNCs) nowadays freely exploit economic, natural and human resources of many states without respecting the basic human rights of their population. Many states are unwilling or unable to influence the behaviour of those companies effectively, or to protect their residents from abuses that may occur. Legal redress can therefore provide effective protection of the weak. It is often argued that national systems should have a primary role in enforcing the accountability of non-state actors. However, victims normally face numerous obstacles in enforcing the accountability of TNCs in the national courts. Hence, it is submitted that those obstacles could be addressed by recourse to certain international procedures. From that it follows that there are four questions of central importance. First, do transnational corporations have to comply with human rights obligations? Secondly, if a corporation bears a duty to respect human rights norms, can a TNC then incur international legal responsibility for violations of international human rights law, especially norms of an *ius cogens* nature? Thirdly, since international legal obligations of transnational companies would be of little importance in the absence of effective measures to enforce them, what should be the nature of an international mechanism that could effectively deal with *ius cogens* human rights violations by TNCs (extension of existing jurisdiction of international tribunals or establishment of new international forums). And fourthly, should TNCs be treated as participants in international law, and should they carry any special form of responsibility.
"Corporations have neither bodies to be punished, nor the soul to be condemned. They therefore do as they like."  

The transnational corporations are one of the most peculiar participants in international community. The search for TNC’s international legal accountability for *ius cogens* human rights abuses in many ways resembles the path ridden by Julius Caesar after in the first days of January 49 B.C., motions were put in place to strip him of his command over the all legions in Roman empire. At time, the majority of the Senate voted against Caesar's offer and ignored the vetoes of his two tribunes of the plebs, who were physically roughed up in the turmoil. The inviolable veto of the tribunes had been therefore infringed. When word reached him of the Senate's decree he harangued his soldiers with what was to become his standard version of events, telling them that "...They [the hostile senators] have seduced Pompey . . . and led him astray, through jealous belittling of my merits . . . I ask you to defend my reputation and standing against the assaults of my enemies." This may be compared with the on-going reluctance of international community to address the violation of human rights abuses. Throughout the course of the war, Caesar consistently claimed hat he acted merely defensively, to defend his own *dignitas*. The news reached Caesar at Ravenna on January 10, 49 BC. It must have been clear to him that the senatorial party was now placing the greatest legal authority of the Empire in the hands of his enemies. Julius Caesar immediately and secretly left Ravenna after sunset. The southern frontier of Caesar’s province was the small, northern Italian stream called Rubicon, which Caesar’s party reached at dawn. Caesar hesitated for a long time on the legal side of that small stream. When he crossed the bridge, Caesar became, not the national hero and revered general of many legions, but an enemy of the state. One of the most famous images in history is of Caesar pausing on the northern side of the river, telling his staff, "We may still draw back but once across that little bridge, we shall have to fight it out." It has been estimated that perhaps 100,000 Roman citizens had lost their lives since the opening of hostilities in 49. No one was left in the field for Caesar to fight. His leading opponents were dead. The Republic was dead too. He had become the state. Caesar and one legion began the Civil War of 49 BC by defying the Senate, crossing the Rubicon and marching on Rome. The ensuing Civil War would effectively complete the destruction of the Roman Republic and deliver the state to one-man rule for the next five centuries. The growing accountability of transnational corporations in many way represent the crossing of the Rubicon of impunity of TNC and other not state actor in international community and may bring the creation of special mechanism for enforcing the human rights abuses of transnational corporations especially when the transnational corporations continue to be major actors on the international scene.

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1 Edward, 1st Baron Thurlow, English Jurist and Lord Chancellor  
2 *The Civil War*, 1.8.  
3 *(that combination of integrity, reputation, and self-esteem no Roman could live without)*  
4 Id.  
5 *(see Everitt, Cicero, 235.)*
Abbreviations

ATCA Alien Tort Claims Act
BYIL British Yearbook of International Law
CSR Corporate Social Responsibility
DRC Democratic Republic of Congo
DSU Dispute Settlement Understanding
ECJ European Court of Justice
ETI Ethical Trading Initiative
EU European Union
FDI Foreign Direct Investment
GA General Assembly
GNPOC the Greater Nile Petroleum Operating Company
GRI Global Reporting Initiative
ICJ International Court of Justice
IACHR Inter-American Commission on Human Rights
IACHR Inter-American Court of Human Rights
ICRC International Committee of the Red Cross
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for Former Yugoslavia
IGO International Governmental Organization
ILO International Labour Organisation
ILC International Law Commission
IMF International Monetary Fund
NAFTA North Atlantic Free Trade Agreement
NCP National Contact Points
RWI Raoul Wallenberg Institute
TNC Transnational Corporation
WB World Bank
WTO World Trade Organisation
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Rara temporum felicitas, ubi sentire, quae velis,  
et quae sentias dicere licet.

Tacit, Historiae

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This work is dedicated to Jože Pučnik, the Slovene dissident, who fought against the wall of silence and won.

Strasbourg, March 2005
ON THE METHOD, MATERIAL AND OBJECTIVES

This study followed a non-complicated methodology which included a review of academic literature, reports of the international human rights and humanitarian agencies, articles from books, professional journals, international instruments in this field and Internet sources including databases of various organisations and interviews with practitioners and professors who are engaged in this work in the field of thesis. The materials used have been selected on the basis of the input and perspectives they were able to provide for the study. It has been the intention of the author to provide a critical analysis of the approaches, findings or conclusions of the material used. The literature review culminated in the development of a research proposal outlining the critical issues to be investigated, the methodology to be followed, and a schedule indicating time frame. The sources of information range from recognised treaty law to more ephemeral materials from non-governmental organisations.

The objective of the thesis is to explore the international legal responsibility of transnational corporations for *ius cogens* human rights obligations. By virtue of Article 56 of the Charter of United Nations Member States commit themselves to take joint and separate action to achieve higher standards of living, full employment, and conditions of economic and social progress and development, ... solutions of international economic, social, health and related problems and ... universal respect for human rights. It is suggested throughout the thesis that transnational corporations are also participants in international community and are bound by *ius cogens* human rights obligations, the respect of which is essential for international community. This thesis also argues that the international community so far has not properly addressed those kinds of obligations. The thesis is also the quest to bring the transnational corporations to some kind of international legal accountability.
1 ORIENTATION

It is submitted that traditional international human rights law and existing institutional arrangements are simply inadequate to deal effectively with the need to ensure the accountability of transnational corporations for *ius cogens* human rights violations. The existing inadequacies in international legal framework may be ascribed both to the lack of relevant international legal framework for transnational corporations and also to inefficiency in existing international legal framework. Therefore the time has come to move beyond the existing framework and to make effective use of already existing international structures and eventually to devise new approaches, which will be flexible enough, innovative and also reflect the sad realities of the twenty-first century. The realities are that the transnational corporations directly or indirectly commit the most heinous atrocities. DR of Congo, Sudan and Bhopal disaster in India plainly show involvement of transnational corporations in most blatant *ius cogens* human rights abuses. The genocide, torture, racial discrimination, slavery and forced labour, forced disappearances, war crimes and crimes against humanity all constitute *shock against the conscience of mankind*. Those norms are already clearly accepted and recognised as *ius cogens norms* or peremptory norms of international law. Violations of *ius cogens* norms are strictly prohibited in international law. Because of the importance of the values they protects, those principles (prohibitions) have throughout the decades evolved into a peremptory norms or *ius cogens norm* of international human rights law, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even normal/ordinary customary law. As the International Court of Justice held in the *Barcelona Traction case*, such obligations are "by their very nature the concern of all States and, in view of the importance of the rights involved, all States can be held to have a legal interest in their protection." The thesis suggests that the transnational corporations are often directly or through their contractors involved in violations of *ius cogens* obligations.

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8 Laid down by the 1969 Vienna Convention on the Law of The Treaties, Articles 53 and 64

9 See Furundzija, (Trial Chamber), December 10, 1998, para. 139

It is submitted that everyone has a duty to the community. Article 29 of Universal Declaration of Human Rights\textsuperscript{11} underlines that duty, which is reflected in both duties to the local community where corporation operates and to the nation society where it functions. It submitted that several transnational corporations grossly disregard that duty resulting in most heinous violations of international human rights law. Many states are unwilling or unable to effectively influence the behaviour of those companies, or to protect their residents from abuses that may occur.\textsuperscript{12} Legal redress can therefore provide effective protection of the weak. It is often argued that national systems should have a primary role in enforcing the accountability of non-state actors. However, victims normally face numerous obstacles in enforcing the accountability of TNCs in the national courts. Hence, it is submitted that those obstacles could be addressed by recourse to certain international procedures, both existing and yet to be established. From that it follows that there are four questions of central importance. First, do transnational corporations have to comply with \textit{ius cogens} human rights obligations? Secondly, if a corporation bears a duty to respect human rights norms, can then a TNC incur international legal responsibility liability for violation of international human rights law, especially norms of \textit{ius cogens} nature? Thirdly, since international legal obligations of transnational companies would be of little importance in the absence of effective measures to enforce them, what should be the nature of an international mechanism that could effectively deal with \textit{ius cogens} human rights violations by the TNCs (extension of existing jurisdiction of international tribunals or establishment of new international forums). And fourthly, should the TNCs be treated as the participants in international law, and should they carry any special form of responsibility.

The transnational corporations operate directly or through its subsidiaries across national boundaries in a context of nation states and are engaged in almost every economic activity, most notably in agriculture, foodstuffs, fishing, forestry, pharmaceuticals, mining, manufacturing, energy, tourism, transport, and financial and other services. All corporations have a direct responsibility to respect human rights in their own operations. They all need to ensure that their security arrangements do not lead to the human rights abuses. It is submitted that especially the corporations making the arms or other military equipment also need to help to ensure that their products are not used to violate human rights.

The shame of the commission of described crimes by transnational corporations is exacerbated by the fact that companies are supposed to be investing and doing business as service to the community protecting civilians, especially those most vulnerable, the children and the elderly. The transnational corporations have also wider responsibility, moral and legal, to use its influence to promote the respect for human rights in respective communities. Their reputation has been increasingly dependent on their response to violation of human rights, in particular the most fundamental human rights, and the defence of such rights.\textsuperscript{13} Transnational corporations have a responsibility to use their influence to try to stop human rights atrocities committed by the government or armed

\textsuperscript{11}Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948
\textsuperscript{12}Beyond Voluntarism, Human rights and developing international legal obligation of the companies; International Council on Human Rights, 2001,
\textsuperscript{13}Amnesty International, Human Rights Principles for Companies, January 1998, AI Index: Act 70/01/98
political groups in the countries in which they operate. However, the corporations are still mainly interested in making profits and are in the most case paying lip service to principles of corporate social responsibility. Their potential silence only aggravates the potential situation. The largest corporations have a deep influence on respective government's tax and trade policies, their labour law and other relevant legislation. The international human rights standards, both in form of customary norms and treaty law, should assist the corporations in identifying their role in situations of human rights violations or the potential for such violations. The accountability for such violation has to be explored both in treaty and customary law.

Business law and international human rights law have historically evolved in isolation from one another. In reality, transnational corporations have remained relatively immune from effective international regulation, let alone the obligations to protect human rights. It may seem that the distinction between corporate practice and international human rights law have become inevitable and proper. It is suggested that this distinction nowadays became dysfunctional.

This paper will discuss all these issues in order to determine whether prosecution of transnational corporations in international law is possible, and if it is, in reality, likely. Chapter 2 will detail the reality of the situation, and relate the stories of the real crimes committed by transnational corporations in Democratic Republic of Congo, Sudan and India. The lack of accountability will be demonstrated. Chapter 3 will address the inadequacies in international legal framework and human rights obligations of the non-state actors. Chapter 4 will address the application of *ius cogens* human rights obligations to the activities of transnational corporations. The following chapter will reflect on international legal responsibility of transnational corporations, whereas the chapter 6 will discuss the issues the mechanisms for TNC's accountability in international law. Chapter 7 will in detail present possible role of international financial institutions in enforcing *ius cogens* human rights obligations. The recommendations and proposals for international framework of responsibilities will be given in chapter 8. Finally, general conclusion in chapter 9 addresses whether the enforcement of *ius cogens* obligations of transnational corporation will be actually possible to achieve before the existing mechanisms and if it will be possible to achieve in the forthcoming years. It will be suggest that this would not be to hard task if the international community finds a political will, which would enable that.

### 1.1 A definition of transnational corporation

The UN Sub-Commission on the Promotion and Protection of Human Rights Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. It defines the term “transnational corporation” as an economic entity operating in more than one country or as cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively. In addition, the phrase “other business enterprise” includes

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any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. However, for the purposes of this thesis, TNC would be an economic entity, in whatever legal norm, that owns, controls, or manages operations, either alone or in conjunction with other entities, in two or more countries. The core element of this definition is a control exercised by a corporation over operations outside the country in which is established.

15 Ibid. p. 21.
This part will detail the reality of situation, and relate the stories of the real crimes committed by the transnational corporations. DR of Congo, Sudan and Bhopal disaster in India exemplify how the activities of transnational corporations may fuel the conflict, which would eventually result in the most horrific and systematic human rights abuses. Democratic Republic of Congo and Sudan are far from being the only examples, Burma, India, Thailand, China, Pakistan are only few areas where transnational corporations have taken advantage of lack of regulation and monitoring to their benefit and profits. The heinous human rights abuses should have opened the eyes of international community, however not change is so far apparent. National legal systems in countries of following examples are at this time not capable to address those abuse, therefore it is urgent that international community steps in and bring the perpetrators to justice.

2.1 Transnational corporations in DR of Congo

DR of Congo is probably the richest African country as regards the natural resources. There are many transnational corporations involved in diamonds, gold and cotton exploitation.\textsuperscript{16} However, DR of Congo has been throughout the history doomed by civil war and corruption, which eventually led to systematic abuse of its natural and human resources. Even though the country in 1960 broke its ties with French colonialist and declared independence, it immediately fell in disarray from which it has not been able to escape ever since. In 1965 Joseph Mobuto seized the power and in middle of seventies renamed country Zaire.\textsuperscript{17} In 1997 anti-Mobuto’s rebels under the auspices of its leader Laurent Kabila captured Kinshasa and renamed country Democratic Republic of Congo.\textsuperscript{18} According to International Rescue Committee, the ensuing Congo Civil war has hitherto claimed 3 million people. Merely in Uganda alone there is 1.2 million refugees from Congo.

In early April 2001 the UN Panel of Experts presented a Report on the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo.\textsuperscript{19} The penal was set up in June 2000 to explore presumed illegal exploitation of resources in DRC. This report was followed with an Addendum to the report in early November 2001. The report denounced the existence of criminal groups

\textsuperscript{16} UN Panel Report, document S/2001/357.
\textsuperscript{17} see J. Letnar; Illegal looting of natural resources of Democratic Republic of Congo, Utrikesperspektiv, Lund, 2002; Uganda’s role in the civil war in the DR of Congo, Utrikesperspektiv, Lund, 2002; Final withdrawal of foreign troops from the Democratic Republic of Kongo, Utrikesperspektiv, Lund, 2003
\textsuperscript{18} Id.
\textsuperscript{19} See UN Panel Report, S/2002/1146 and subsequent UN Security Council resolution 1457
liked to the armies of Rwanda, Uganda and Zimbabwe and elite networks of political, military and corporate structures that illegally exploit a bad humanitarian situation.

Looting of Congo’s natural resources (especially cotton, gold, copper, cobalt, diamonds and timber) by Uganda, Rwanda, Burundi is according to the Panel has taken place at an alarming rate. The panel tried to analyse to what degree the exploitation of natural resources and other forms of wealth constitute the motivation behind each party’s activities in the Democratic Republic of Congo. Furthermore it also analysed to what extent the exploitation provides the financial resources for sustaining the conflict. The UN panel of experts20 recommended 29 national and transnational companies should be placed under financial restrictions, whereas it identified eighty-five business enterprises to be in a violation of the OECD Guidelines for Multinational enterprises. 21

By way of comparison, the UN Experts Panel in its final report on DR of Congo named functionaries, companies, banks and individuals involved in the exploitation. 22 Failure to establish rigorous and transparent accountability procedures for manufacturers, brokers and dealers of diamonds, cobalt and arms allows money and subsequently weapons to reach governments and armed militias, helping them to commit egregious human rights abuses. Most of the 29 companies named by report have African origin, albeit the list includes four Belgian diamond firms and the Belgian Group Forrest mining group, which has a joint venture with US-based OM Group. Moreover, it suggests the resignation and investigation of DRC government institutions cited, and exclusion from the DRC transitional government of anyone named in the report. Furthermore, it identified a network of businessmen and politicians of transferring ownership of billions of dollars in assets from the DRC’s mining sector to private companies. The illegal revenues from these sales are being used to buy both small arms and sophisticated weapons used in the conflict. This unregulated, opaquely operated plunder of the country’s natural resources continues to fuel DRC’s tragedy. Human rights abuses committed by combatants have included mass killings of unarmed non-combatants, the use of large numbers of child soldiers, kidnapping and forced recruitment, the routine use of rape as a form of torture and a weapon of war, home demolition, and other acts of cruelty and inhumane treatment of civilians, prisoners of war, and child combatants. By itself that would require the establishment of special commission with all the necessary competences to address the crimes committed by transnational corporations.

It is not easy for a person from Democratic Republic of Congo to have his/her right not be tortured recognised before a tribunal. Firstly, allegations of genocide, torture, rape, slavery etc. are extremely difficult to substantiate because as people, who reside in DRC, has been in most of the cases isolated from the outside world, without any access to health care, family, attorney, or friends there is no one who could provide support and assemble the necessary evidence. Subsequently, the non-exhaustion of

20 The Panel of experts comprises: Mahmoud Kassem (Egypt), Chairman; Jim Freedman (Canada), Mel Holt (United States), Bruno Schiemsky (Belgium), Moustapha Tall (Senegal).
21 Id. Supra 67
domestic remedies may block the possibility of asking redress before the Human Rights Committee or other competent organs. Apart from that the DRC's national judicial system is not functioning at all lest to mention the implementation and execution of court judgements. The International Criminal Court may have an impact in investigating the situation of crimes allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002. However, it is not clear yet what this role will be in reality. It may be therefore that the existing mechanisms have to be modified in order to address crimes by transnational corporations.

2.2 Transnational corporations in Sudan

It is submitted that TNCs often participate in committing gross human rights violations either by direct involvement or by aiding and abetting other actors. The following case before US District Court plainly exemplifies how the activities of TNCs can result in the most blatant human rights violations. In 1999 Talisman Energy Inc., the Canadian oil company operating in Sudan, asked the government in Khartoum to remove villagers from the vicinity of its oil properties, according to what is claimed to be a Sudanese government document cited in a lawsuit filed against the company. The directive, which ordered the armed forces to conduct cleaning up operations in all villages in the area, is dated May 7, 1999, two days before the Khartoum regime launched one of the largest military offensives of the brutal 20-year civil war.

The complaint alleges that Talisman is engaged in an "unholy alliance" with the National Islamic Front Government of Sudan by knowingly participating in the Government's campaign of ethnic cleansing, to create a cordon sanitaire around Talisman's oil exploration, extraction and transportation infrastructure. Talisman Inc. continues to provide financial and logistical support for the Sudanese military knowing that the armed forces are engaged in a "jihad" against the non-Islamic civilians in the south. The roads and airfields built and maintained by Talisman serve as strategic military assets for the Sudanese armed forces who use them to launch bombing runs and ground attacks on civilian targets in violation of international law. Oil revenues not only earn Talisman significant profits, they also enable the Government to purchase weapons and build munitions factories for its "jihad" against the south, which has

23 Art 35 ECHR states: “The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”
25 The Presbyterian Church of Sudan, Rev. John Sudan Gaduel, Nuer Community Development services in U.S.A, Stephen Kuina, Fatuma Nyawang Garbang, and daniel Wour Choul, on behalf of all others similary situated (Plaintiffs) vs. Talisman Energy Inc., Republic of Sudan (defendants), US district Court for the Southern District of New York, Civil Action No. 01 CV 9882 (AGS)
28 Id.
resulted in 2 million civilian deaths, 4 million civilian refugees, and the enslavement of innocent men, women and children.  

Sudan’s oil production is carried out by the Greater Nile Petroleum Operating Company (GNPOC), which has four members - including Talisman Energy. Talisman Energy began its operations in Sudan in October of 1998 with the acquisition of Arakis, another Canadian oil company. Talisman operates several oil fields in its concession in the Heglig area. It also has a 25% interest in the GNPOC’s 1500km oil pipeline which extends from the southern oil fields to Port Sudan on the country’s eastern coast. 

Human rights groups, as well as investigations by the Canadian government and United Nations missions, have said oil drilling in Sudan by foreign companies is exacerbating a war that has already claimed about 2 million lives, mostly from war-related famine. Government troops and militia forces have destroyed villages and displaced about 200,000 people in the western upper Nile region of Sudan where the oilfields are located, witnesses and human rights groups claim. Rebel forces hostile to the Khartoum regime control most of the region near the oilfields. 

The victims eventually brought a lawsuit before a New York district court under ACTA charging that Talisman entered into a "joint strategy" with the regime in Khartoum whereby "government troops and allied militia engaged in an ethnic cleansing operation to execute, enslave or displace the non-Muslim, African Sudanese civilian population from areas that are near the pipeline or where Talisman wanted to drill". However, the Talisman Energy Inc. has consistently refused to release any details of its security agreements with the Khartoum government. The company has said, however, that it faces serious security threats from rebel forces in the area that consider the oil installations a legitimate target in their fight against the Khartoum regime. C. Greenwood in its Declaration on behalf of Talisman Energy Inc. submitted that there is no basis in existing international law for the liability of corporations and therefore no rules of international law regarding the questions, which necessarily arise when a corporation is accused of wrongdoing. 

2.2.1 Consequences

Approximately 204,500 people were internally displaced from Western Upper Nile/Unity State from mid-1998 until February 2001, conservatively estimated, with the usual caveat that numbers in the south of Sudan are often no more than educated guesses. As of March 2002, the total number of displaced persons who fled Western Upper Nile/Unity State to elsewhere in Upper Nile and to Lakes (part of Bahr El Ghazal) alone was estimated at 174,200. It is submitted that this displacement, accomplished through war as the means of control of the strategic and valuable oilfields, was illegal under international rules of war. The humanitarian law allows only for two permissible reasons for displacement of civilians, namely: imperative military reasons or the safety of the civilians. They were not allowed to go or

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29 Id.  
30 Id.  
32 Declaration of Christopher Greenwood in Talisman Energy Inc. Case, p. 9  
to remain at home after the danger of a military campaign was over. They were pushed off their land, in some cases many times, by government army or militia forces, for the purpose of emptying the oil areas of southern civilians whom the central government regarded as “security threats” to oil development.

The government tried to control this “security threat” by the most extreme means of removal, using military land and air invasions, killing, looting, burning, and destroying the local subsistence economy and killing and injuring civilians. It is alleged that the Canadian transnational corporation was directly or indirectly involved in committing genocide. At the same time it cut the area off from humanitarian assistance by imposing relief flight bans and denials of access, while only allowing food into garrison towns, where it could serve as a magnet to draw starving people to crowded areas under government control: a textbook case of a counterinsurgency operation.34 It is therefore submitted that forced displacement of this kind is a violation of international human rights and humanitarian law. None of described violation have been so far remedied or even addressed through Sudan’s legal system or through other state or international mechanisms of accountability. Impunity has become a rule in Sudan.

The most surprising fact is that the Talisman Inc. officials had not consulted relief agency documents nor relief personnel operating in southern Sudan when they conducted their review of the Sudan project prior to acquiring Arakis, nor even after they started doing business in Sudan.35 The relief documents, most of that were readily available on the internet, would have been useful to corroborate displacement and military activity affecting the civilian population, although the agencies rarely name those forcing the displacement.36 In addition, Talisman officials were made aware of serious concerns about the implications of their explorations on numerous occasions by various other sources, including representatives of Unity State (at that time from Riek Machar’s United Democratic Salvation Front/South Sudan Defence Forces (UDSF/SSDF)), statements by the Canadian government, and pressure from Canadian NGOs, among others.37 The described facts all display Talisman’s indirect or even direct involvement in human rights abuses in the Southern Sudan.

2.3 Bhopal disaster in India

On the night of Dec. 2nd and 3rd, 1984, a Union Carbide plant in Bhopal, India, began leaking 27 tons of the deadly gas methyl isocyanine. None of the six safety systems designed to contain such a leak were operational, allowing the gas to spread throughout the city of Bhopal.38 In the light of

34 Id. See also Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan, October 2001 and Sudan: Oil in Sudan: Deteriorating human rights, Amnesty International, AFR 54/001/2000
36 Id.
37 Id.
that, half a million people were exposed to the gas and 20,000 have died to date as a result of their exposure. More than 120,000 people still suffer from ailments caused by the accident and the subsequent pollution at the plant site. These ailments include blindness, extreme difficulty in breathing and gynaecological disorders.

Legal actions were brought in both the U.S. and India, but not on the international level due to lack of existing mechanisms. The courts in respective countries ultimately decided that the proper country for legal proceedings was India and matters were consolidated and preceded before the Supreme Court of India. In May 1989, Union Carbide and Union Carbide India Limited (UCIL) entered into a $470 million legal settlement with the Government of India, which represented all claimants in the case. The settlement was affirmed by the Supreme Court of India, which described it as “just, equitable and reasonable,” and settled all claims arising out of the incident. Ten days after the decision, Union Carbide and UCIL made full payment of the $470 million to the Indian government.

The settlement was reached after the Supreme Court of India reviewed all U.S. and Indian court filings, applicable law and relevant facts, and an assessment of the victims’ needs. In its opinion, the Court said that compensation levels under the settlement were far greater than would normally be payable under Indian law. In addition, the European Parliament also condemned on several occasions’ disaster occurred in India and addressed the role of transnational corporation in the conflict. In July 2004, fifteen years after reaching settlement, the Supreme Court of India ordered the Government of India to release all additional settlement funds to the victims.

In the United States Victims of the disaster filed a case under the Alien Tort Claims Act the in federal court alleging that Union Carbide committed multiple violations of international law both in the disaster itself as well as the events leading up to it, including racial discrimination, cruel, inhuman, and degrading treatment, and a consistent pattern of gross violations of human rights. The federal district court below extended the doctrine of comity to the Bhopal Act, under its interpretation of the Second Circuit case of Bi v. Union Carbide Chemicals and Plastics Co., finding that the government of India’s actions deprived the plaintiffs of standing to sue in federal court for the alleged international law violations. The district court also found that the “settlement,” by its own terms, extinguished all civil claims—including claims under international law—arising out of the disaster.

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40 Id.
42 00-9250 United States Court of Appeals for the Second Circuit Sajida Bano, Haseena Bi, Sunil Kumar, Dr. Stanley Norton, Asad Khan, Shiv Narayan Mathil, Devendra Kumar Yadav, Bhopal Gas Peedit Mahila Udyog Sanghthan, Gas Karmachari Sangh Bhopal Gas Peedit Sangharsh Sahayog Samiti, Bhopal Group for Information and Action, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, versus Union Carbide Corporation and Warren Anderson, Defendants-Appellees.
3 INADEQUACIES IN EXISTING INTERNATIONAL LEGAL FRAMEWORK

The case studies from the previous chapter show that there is urgent need to address *ius cogens* violations by transnational corporations at the international level. The alleged and proved crimes as introduced in the last chapter present a grave challenge to the values underlying the international community. Unfortunately no efficient legal remedies are at hand to address those violations by TNCs. The analysis below will show that there exists a gap regarding both lack of international legal framework for transnational corporations and also regarding the efficiency of the already existing international legal framework for TNC. It is submitted that there exists the five-fold inadequacy of the existing system. The accountability system for TNC may only work if the transnational corporations want it to work. The five-fold inadequacy may summarise as follows:

1. Inadequacy in approach since the international human rights standards continue to address TNC indirectly through states. TNC are participants in the international community and have to therefore comply with at least existing *ius cogens* human rights standards, as it will be explained below in this chapter.

2. Inadequacy in existing international human rights law standards. It is submitted that there is no agreement on standards to be applied by TNCs. The existing standards are vague and general and apply different standards at *home* and in *Rome*.

3. Inadequacy in general principles aiming at corporate accountability, which is nowadays based on profit/competitive strategy and voluntary approach by the transnational corporations. The corporate accountability is based on principles that the corporations need to comply with human rights standards only for the purpose of enhancing their profits by having competitive advantage towards other corporation. The whole framework of corporate social responsibility is based on that idea. It is submitted that one cannot fully comply with human rights law obligations just to raise its profits or to achieve better position on the market. Corporations need to comply with human rights as part of their position in society.

4. It is submitted that transnational corporations at many occasions do not comply with *ius cogens* human rights obligations.

5. Inadequacy in sanctions for *ius cogens* human rights abuses by transnational corporations/lack of strong international legal mechanism for corporate human rights responsibility. This issue will be examined in chapter 6 and 7. A strong international legal mechanism for corporate

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human rights responsibility should be established and the problem with lack of sanction should be overcome

3.1 Human rights obligations of transnational corporations and other non-state actors

This section will address first and fourth inadequacy, namely human rights obligations of non-state actors and possible solutions. The existing international human rights law is mainly state-centric as it creates obligations primarily upon states to promote human rights. Even where actors other than state bear the burden of human rights obligations, international law fails to provide an appropriate and efficient mechanism for enforcing those obligations. In the last decades complicated development has taken place. One can observe the creation of increasingly detailed human rights obligations of states, whereas the binding obligations for transnational corporations have been left out and TNCs rights or benefits remain disproportionate to their duties. It is submitted that transnational companies (TNCs) nowadays freely exploit economic, natural and human resources of many states without respecting the basic human rights of their population. The conflict in DR of Congo as introduced above has been its plainest example. The continued plunder of the DRC’s natural resources was one of the main elements fuelling conflict in the Democratic Republic of the Congo, which resulted in horrendous human rights abuses costing nearly four million lives. It has been said that we as human beings do good and we do evil because that is our nature, however that does not imply that the business enterprises which are led by people should not be held responsible in international law for the evil they produce to communities in respective countries.

In order to address these questions in the context of enforcing liability of transnational companies for violation of *ius cogens* human rights norms, the following issues are to be examined: the international legal personality of the transnational companies, violations of *ius cogens* human rights norms and the issue of the enforcement of those obligations in the international law. The aim of this study is therefore to critically examine the role of transnational companies and their *ius cogens* human rights obligations.

Some authors insist that the existing international mechanism for human rights protection was not designed to apply to TNCs, therefore its inadequacies are apparent and the continuous human rights violations also expose those inadequacies. By claiming that there are gap in international legal system, one accepts the premise that existing international human rights law was developed for state and not for often proclaimed protection of human dignity and liberty of a human being and humanity as a whole. Others claim that international law articulates

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45 I have used TNCs to indicate both transnational companies and multinational companies.
46 see the UN Security Council resolution 1457, see Annex 1 and Annex III of UN Panel Report, S/2002/1146
48 Dewa, Surya; Human Rights violations by multinational corporations and international law: where from there?, Connecticut Journal of Int’l law, Vol.19:1
political preferences into claims of legal right and obligation and pose a question if it does still maintain autonomy from the politics.\textsuperscript{49} That may not be true, but it is possible for me to agree with that paradigm since there has been an urgent need for reconceptualization of international law and especially with regard to the framework of accountability. The core question evolves around why, what and how should TNC, whose primary goal is profit, follow the human rights norms. My answer would be simple since they are participating in the international community they cannot assume role of free-raiders without any obligations whatsoever owned to international community as a whole, and have to hence bear the duty to protect the human rights as do the other actors among them the state being the primary actor. Transnational companies have to become liable to larger extent under international law for violations of \textit{ius cogens} human rights norms. It is submitted that it is dangerous to presuppose that international society at the local and global level will improve naturally, therefore one has to make every effort to benefit from the role which law plays or can play in the in the re-humanising of humanity.\textsuperscript{50} One way is certainly to ensure that all actors in the international community will comply with the most fundamental human rights obligations.

It has been argued that while under traditional human rights law the state is primary focus of accountability, globalisation has sharply brought to the forefront the issue of the lack of responsibility for human rights violations. Corporations possess rights and duties under international law, which implies that corporations are legally responsible for complying with international standards. Duties imposed on them are not legally binding and there exists no international forum to hold corporations accountable for its action. Individual seeking redress for violations of international law perpetrated by a corporation must turn to respective states for enforcement.\textsuperscript{51} Many human rights violation committed by the TNCs can be looked through the concept of state responsibility, however there are certainly gaps when issues of relative power and economic necessity are brought into picture. Where a TNC is directly involved with the host country in human rights violations, direct liability should be found.

International human rights law suffers in effectiveness and universal application and compliance due to diverging levels of human rights obligations of the participants in the international community. While the existing international human rights law is mainly state-centric as it creates obligations primarily upon states, there is an urgent need to challenge the traditional international framework for the protection of human rights. However, in recent years international community is gradually realising that in order to achieve fuller and wider realisation of human rights, the human rights obligations should be extended to the action of non-state actors. But since the international protection of human rights was mainly designed to cover dichotomy of individual-state dispute and was not designed to apply to non-state actors such as TNCs, there is

\textsuperscript{49} see Koskenniemi, Maarti: \textit{What is International law for?} In Malcom Evans (ed.), International Law (Oxford 2003), p. 89-114, and \textit{From Apology to Utopia. The structure of International Legal Argument} (Helsinki, 1989)

\textsuperscript{50} Allot, Philip, Eunomia New Order for a New World, Oxford University Press, 2003, and \texttt{www.loc.gov/bicentennial/abstracts_allott.html} visited at 20.7.2004

serious inadequacy at hand, which are even underlined by mostly non-binding character of obligations put on states. Therefore, it would be irony of ironies if human rights were by definition not to apply to horizontal relations between the private subjects, given that the relations between private individuals have no less of the potential to result in the violations of fundamental rights. The CERD Committee addressed latter issues extensively in its jurisprudence as will be discussed below.

By insisting that one of the parties to human rights dispute should always be a state, one would leave aside one of the most important characteristics of human rights law. Hence, it should be there to possible recourse even in the disputes where no state is directly or indirectly involved. Some of jurisdictions already provide for direct horizontal application of human rights obligations. The Bill of Rights of Constitution in South Africa provides for direct horizontal application of the Bill of Rights in private disputes.\textsuperscript{52} The Constitutional Court of South Africa reaffirmed that in several cases such as Fose v. Minister of Safety and Security\textsuperscript{53} Soobramoney v. Minister of Health\textsuperscript{54} and Minister of Health v. Treatment Action Campaign\textsuperscript{55}. By virtue of that jurisprudence it extended application of the South African Bill of Rights and confirmed that it not only bind the state, but also private legal subjects.

Inter-American Commission on Human Rights and Inter-American Court have on several occasions stated that human rights norms apply also to non-state actors. The IACHR for example stated in its 1981’s Report on the Situation of Human Rights in Guatemala that the “government must prevent and suppress acts of violence even forcefully, whether committed by public officials or private individuals, whether their motives are political or otherwise.”\textsuperscript{56} In Velásquez Rodríguez v. Honduras\textsuperscript{57} the Inter-American Court of Human Rights in context of forced disappearances held that private individuals can violate human rights and that this can be imputable to the state. It goes as follows: “An illegal act which violates human rights and which is initially not directly imputable to a state ... can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention... The violation can be established even if the identity of the perpetrator is unknown.”\textsuperscript{58}

One would dilute and distort the concept of human rights by applying human rights obligations horizontally between private subjects.\textsuperscript{59} This statement plainly describes one of the most common arguments against the horizontal effect of human rights obligations, namely between private actors. However, this presents very outdated approach and does not reflect the development in the last decade. The Committee established under International Convention on the Elimination of All Forms of Racial Discrimination has dealt extensively with the issue of horizontal application of human rights law. Article 2 \textit{inter alia} provides for horizontal application

\textsuperscript{52} Sections 8 (1), 8 (2), 8 (3) and 39 (2) of Constitution of South Africa
\textsuperscript{53} 1997 (3) SA 786 (CC)
\textsuperscript{54} Judgment in case CCT 32/97, Constitutional Court of South Africa, 27 November 1997
\textsuperscript{55} Judgment in case 8/02, Constitutional Court of South Africa, 5 July 2002
\textsuperscript{56} OAS document OEA/SER.L/V/ii.53, doc. 21, rev. 2, 13 Oct 1981, para. 10
\textsuperscript{57} Judgment 29 July 1988
\textsuperscript{58} Para. 166
\textsuperscript{59} Examination question at Academy of European Law, EUI, Florence, Italy, 2.7.2004
of prohibition of racial discrimination by any persons, group or organisation and puts positive obligation on each State Party.\textsuperscript{60}

In \textit{B.J. v. Denmark}\textsuperscript{61} the complainant was denied access to a discotheque in Odense with his brother and a group of friends. Two of them were of Danish origin and four were not. The doorman of the discotheque refused to let them in because they were “foreigners”. The Committee found violation of CERD and provided possibility for compensation as well since the violation cannot always be adequately repaired and satisfied by merely imposing criminal sanction in the perpetrator.\textsuperscript{62} Further, in \textit{L.K v. The Netherlands}\textsuperscript{63} the Committee found that threats and remarks made by private individuals constituted incitement to racial discrimination and to the acts of violence against the persons of another colour or ethnic origin contrary to article 4 (a) of CERD. Hence, it is obvious that the Convention makes certain requirements to the response by the authorities to racial discrimination committed by the private individuals against other private.\textsuperscript{64}

The International tribunal for former Yugoslavia also dealt with the question of human rights in private dimension. In case \textit{Kunarac, Kovac and Vokovic} before ICTY the Appeals chamber submitted that “The public official requirement {with regard do crime of torture} is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention.”\textsuperscript{65} Further, in ICTY Trial Chamber decision in \textit{Kvocka et al.}, it says “[T]he state actor requirement imposed by international human rights law is inconsistent with the application of individual criminal responsibility for international crimes found in international humanitarian law and international criminal law.”\textsuperscript{66} Because of the importance of the values it protects, this principle of prohibition of torture has evolved into a peremptory norm or \textit{ius cogens}. It is submitted that States cannot derogate from the principle at issue through international treaties or local or special customs or even general customary rules not endowed with the same normative force. If we continue with jurisprudence on the crime of torture there exist also cases which went in other direction, so it is not entirely clear what and to which extent horizontal human rights obligations apply.\textsuperscript{67}.

\begin{itemize}
\item \textsuperscript{60} Article 2 (1) (b) (d) of CERD
\item \textsuperscript{61} Communication No. 17/1999
\item \textsuperscript{62} Ibid. Section 6.3. Being refused access to a place of service intended for the use of the general public solely on the ground of a person’s national or ethnic background is a humiliating experience which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.
\item \textsuperscript{63} Communication No. 4/1991 (CERD/C/42/D/4/1991)
\item \textsuperscript{64} See opinions adopted by the Committee in Yilmaz-Dogan v. the Netherlands (CERD/C/36/D/1/1984) and Habassi v. Denmark (CERD/C/54/D/10/1997).
\item \textsuperscript{65} Kunarac, Kovac and Vokovic, (Appeals Chamber), June 12, 2002, para. 148
\item \textsuperscript{66} Kvocka et al., (Trial Chamber), November 2, 2001, para. 139, see also Krnojelac, (Trial Chamber), March 15, 2002, para. 188, where the Court submitted: “Under international humanitarian law in general, and under Articles 3 and 5 of the Statute in particular, the presence or involvement of a state official or of any other authority-wielding person in the process of torture is not necessary for the offence to be regarded as ‘torture.’”
\item \textsuperscript{67} Both in \textit{Furundzija}, (Appeals Chamber) and Prosecutor v. Mucic et al. the ICTY said that requirement of official capacity is still a valid one. See \textit{Furundzija}, (Appeals Chamber), July 21, 2000, para. 111: The fifth element of the crime of torture in a situation of armed conflict is “at least one of the persons involved in the torture process must be a
Various international instruments already nowadays indirectly regulate non-state actors. (for example criminal liability of individuals for war crimes under ICC Statute). To say that the system which focuses exclusively on the responsibility of governments is more effective, one would leave aside the progressive development of international law especially since the ICJ’s advisory opinion in Reparation for Injuries Case and Danzig Railway Official Case where Permanent Court of International Justice already in 1928 found that individuals can hold rights under international treaty if the intention of contracting states is to create such rights. States are generally required under international human rights law to respect, protect, ensure and fulfil human rights obligation to the benefit of persons within their jurisdiction. In order to properly comply with these duties, states also have to control private entities (non-state actors) within their jurisdiction. Namely, they have to apply human rights instruments horizontally as well. Human Rights Committee in its General Comment No. 31 on Article 2 of the Covenant (ICCPR) said that state parties have a positive obligations to ensure Covenant rights not only against state but also act committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or parties. Horizontal application of international human rights is of vast importance for full realisation of international human rights standards and has been confirmed in various cases at international (regional) tribunals. The above statement is in my opinion posed in wrong way and is it totally unacceptable as it accepts the subject/object dichotomy, which is nowadays very much present in international law. Even though the International Court of Justice in the Reparations for Injuries Case said that the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, one has to move beyond the subject/object dicta. By using the words of R. Higgins we have erected an intellectual prison of our own choosing and declared it to be an unalterable constraint. Rather is more useful to talk about participants at the international plane. By using the notion of participation is one able to argue that human rights obligations also apply horizontally between non-state actors. Human rights duties are already now imposed indirectly on the non-state actors through agency of state in which they operate. Therefore, one would no dilute and distort the concept of human rights by applying human rights obligations horizontally between private subjects since it would only recognise the obligations in international human rights law which have been drafted and developed by state, but which nowadays also apply to private parties. On the contrary,

public official or must at any rate act in a non-private capacity, e.g., as a de facto organ of a State or any other authority-wielding entity.”, and
Prosecutor v. Mucic et al., Case No. IT-96-21, (Trial Chamber), November 16, 1998, para. 494-496: Torture requires the act or omission to be “committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.”

68 see case The Economic and Social Rights Action Center for Economic and Social Rights/Nigeria, 155/96, African Commission on Human rights
70 Higgins, Rosalyn, Problems and Process: International Law and How We Use It, 1993, Oxford University Press. p. 94
one would dilute and distort the whole concept of human rights by denying their application in horizontal relationship - Drittwirkung.\footnote{The concept of Drittwirkung implies that certain provisions of the European Convention of Human Rights are understood to contemplate “horizontal effect,” meaning that they apply as between private parties.} This is also recognised in some case under ECHR and UN Human Rights Committee. Apart from that is should be said that various international instruments accord some non-state actors with some form of international personality. For example, companies have legal standing before Iran-US claims tribunal under some conditions. Further, companies have legal standing also before the Seabed Dispute Chamber established under the UNCLOS Convention.\footnote{Seabed Dispute Chamber – set up under Annex VI of the UN convention on the Law of the Seas, 10 December 1982.} United Nations Claims Commission is another example.\footnote{United Nations Claims Commission – established under Security Council Resolution 692 (1991) of 20 May 1991 \footnote{(see cases from the Constitutional Court in South Africa; Fred Khumalo v. Bantubonike Harrington Holomisa, p.29).} \footnote{See Maastricht Guidelines on violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, See also \footnote{A/C.6/56/N.20, in A/RES/56/83, adopted on 12 December 2001 without vote. ee Crawford, Peel and Olleson, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts, Completion for Second Reading’, 12 EJIL (2001) 963, and James Crawford, \textit{The International Law Commission’s Articles on the State Responsibility} (2002)}

It has to be said that development of international law is influenced by the requirements of international community. For human rights to be effectively protected, obligations on the part of non-state actors cannot be ignored. The compliance of non-state actors with international human rights standards is needed, to effectively ensure the universal respect for human rights. Some non-state actors could already now be held liable under international law for the most horrendous crimes before ad hoc and permanent international tribunals; however some progress is needed to bring also other non-state actors in the same position.\footnote{Not to recognise the human rights obligations of non-state actors would enable those entities to excuse themselves from responsibilities to society as regards human rights obligations and would have appalling effect at national and international communities.} To ensure that the TNCs activities are consistent with international human rights law and of how to ensure their accountability for \textit{ius cogens} human rights violations. The first answer would be that the governments are required to ensure that all actors operating within their territory or otherwise subject to its jurisdiction comply with national and international human rights standards. There is not doubt that state has positive obligations to secure the enjoyment of the rights contained in the human rights treaties and in customary international law whereas rules of responsibility are applicable to all areas of international law.\footnote{It is submitted that companies are required to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international human rights law and national law. At minimum this requires companies to refrain from activities that are legally unjustified.} It is submitted that companies are required to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international human rights law and national law. At minimum this requires companies to refrain from activities that

### 3.2 Challenging international legal framework

The question is how to ensure that the TNCs activities are consistent with international human rights law and of how to ensure their accountability for \textit{ius cogens} human rights violations. The first answer would be that the governments are required to ensure that all actors operating within their territory or otherwise subject to its jurisdiction comply with national and international human rights standards. There is no doubt that state has positive obligations to secure the enjoyment of the rights contained in the human rights treaties and in customary international law whereas rules of responsibility are applicable to all areas of international law.\footnote{It is submitted that companies are required to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international human rights law and national law. At minimum this requires companies to refrain from activities that are legally unjustified.} It is submitted that companies are required to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international human rights law and national law. At minimum this requires companies to refrain from activities that
directly or indirectly violate human rights, or benefit from human rights violations, and to use due diligence not to do harm.\textsuperscript{76}

The Universal Declaration of Human Rights is one of the fundamental stones of international human rights law and majority of its provisions have already acquired the status of norms of customary international law. The preamble of the Universal Declaration provides that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international to secure their universal recognition and observance. If one desires to move beyond prevailing subject/object dichotomy in international law, it can at least acknowledge the importance of the concept of international legal personality in existing international framework. Hence, it is necessary in the next paragraphs to examine the questions of international personality. A personality usually concerns the capacity of individual or entity to hold rights and be subject to obligations within certain legal system. A subject of law is an entity capable of possessing international rights and duties and having capacity to maintain its rights by bringing international claims. Usually there exist different levels of personality within particular legal system. An individual or entity with full legal personality is capable of holding as many rights and being subject to as many obligations as any other individual or entity within legal system.\textsuperscript{77}

While I agree that corporations may have a status of legal person at national level, I am reluctant to use that kind of terminology (international legal personality) on the international level, I would rather say that TNCs are participants in international legal order. It may be too philosophical and idealistic to build one’s argument on that premise, especially given the realities of international community, but I do argue that TNCs participate everyday life if the international community. It may be correct that they are not present when the treaties are negotiated or when the courts decision are delivered, but nevertheless they are there and must be held accountable in international law. Obviously this not possible through existing structures, especially when the most fundamental norms are concerned.

This section submitted that human rights have horizontal application and the evidence for that was also given. TNC are one of the various non-state actors who participate in international community and have therefore to comply with \textit{ius cogens} obligations, as the most fundamental human rights norms. There is a urgent need to complement existing mechanism for enforcing their accountability for at least \textit{ius cogens} violations of human rights law. TNC will through that start to be conscious of its role in respective communities and society as a whole.


\textsuperscript{77} Buyers, at p. 75
4 APPLICATION OF IUS COGENS HUMAN RIGHTS OBLIGATIONS TO THE ACTIVITIES OF TNCS

It has been submitted that transnational corporations have to comply with *ius cogens* human rights obligations, which are owned to the whole international community. The most important question in this respect is why the transnational corporations have to comply with *ius cogens* human rights norms? This is also the fundamental question of my thesis.

It is submitted that the concept of *ius cogens* reflecting the fundamental norms of the international community bind dissenters is instrumental for functioning of international legal order. In the *South West Africa Case* before ICJ, the applicants, Ethiopia and Liberia, contended that South Africa "may not claim exemption from a legal norm which has been created by the overwhelming consensus of the international community, a consensus verging on unanimity." It is submitted that TNCs may not therefore escape the *ius cogens* obligations by objecting their validity in international law. Those norms are therefore the most appropriate venue to show that TNCs must also respect human rights obligations in general. There exist common interests that rest upon a widely shared and deeply felt and often expressed humanitarian conviction. In this respect apartheid relates to genocide, and the nature of the law creating process in response to both has been remarkably similar: one in which the collective will of the international community has been shocked into virtual unanimity, and in which the moral basis of law is most visible. If the transnational corporation (or state) is allowed to avoid the legal condemnation of its action by stating a protest, then international law is rendered impotent in the face of a grave challenge to the values underlying the international social order.

By focusing on *ius cogens* norms rather than on general human rights norms, I try to argue that TNC's international legal responsibility must start with a respect and compliance with fundamental norms, many of which will be briefly described below. It is submitted that violations of *ius cogens* by TNCs norms need to be persecuted at the international level rather than by the national courts. Nowadays one can trace may voices calling for corporate social responsibility, while disregarding the observance of *ius cogens* norms, which are a platform from where one could ask for corporate social responsibility. The purpose in selecting them from other human rights obligations mainly lies in their higher value to the international community. It is true that most of TNCs do not violate *ius cogens* norms, however there are enough cases, which point on total disregard of basic norms by certain TNCs. There is the content of *ius cogens* - which gives rise to compliance by the international community

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78 38 ICJ Pleadings, *South West Africa Cases* 305 (Vol. 9) (statement by E.A. Gross, agent for the Governments of Ethiopia and Liberia), at p. 351.
80 Id.
of States and other participants as a whole. Other human rights norms may be modified freely as the international community so chooses, but the Vienna Convention on the Law of Treaties provides that a norm of *ius cogens* "can be modified only by a subsequent norm of general international law having the same character." 81 As higher law *ius cogens norms* clearly require the application of higher standards for the ascertainment of the existence of community consensus as regards both the content and the peremptory character of the relevant rules. Only an approach in that line may ensure the required universality in the formation and subsequent implementation of rules designed to reflect and to protect the fundamental interests of the international community.

The further difference to general human rights norms is that it is generally recognized that in order to acquire the quality of *ius cogens* a norm must first pass the normative tests for rules of general international human rights law. It is also established that, secondly, such a norm must be 'accepted and recognized' as a peremptory norm by 'the international community of states as a whole'. 82 Does concentration on ius cogens implies that there is opening for bringing TNCs to justice in international law as my professor asked? 83 The existing international legal order may provide such a opening especially under the framework of international trade law and bodies facilitating international commercial arbitration. It is submitted that concept of international *ius cogens* norms as a body of rules having vital importance for the international community as a whole requires the creation of certain basic universal principles binding all participants in international community. In this regard it reflects the deeply felt need of the increasingly interdependent global community for a public order for all mankind. This is one of the reasons why the thesis deals with above ius cogens norms. Also many legal systems are ill equipped to address the complicated issues of violations of *ius cogens* norms, which are then left hanging in the air of impunity. TNC's violations need to be addressed at international level, as is the case with the persecution of the individuals.

But what are norms of *ius cogens*? When and how can *ius cogens* be invoked? Who can identify a norm as having reached a *ius cogens* status? I am not able to provide answers to all of these questions, but I can only suggest some thoughts in this line. Genocide, torture, racial discrimination, slavery and forced labour, forced disappearances, war crimes, crimes against humanity and etc are among the most heinous abuses one can come up with. Because of the importance of the values it protects, those principles (prohibitions) have evolved into a peremptory norm or *ius cogens norm* 84 of international human rights law, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even normal/ordinary customary law. 85 The consequence of this higher rank is that the principles at issue cannot be derogated from by states through international treaties or local or special customs or even generally customary rules not endowed with the same normative force. The status of peremptory norm derives from the importance of the content of the norm to the international community. 86 A rule of *ius cogens* nature has

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81 Vienna Convention on the Law of Treaties, Art. 53
82 Id.
83 Comments by Ineta Ziemele, March 2005
84 Laid down by the 1969 Vienna Convention on the Law of The Treaties, Articles 53 and 64
85 See Furundzija, (Trial Chamber), December 10, 1998, para. 139
86 H. Thirlway in Evans (ed.): International law, OUP, 2003, pp. 141-142
its basis in international customary law. It has to have basis in a consistent practice of States and be backed by the *opinio iuris*. Reservations (derogations) to the *ius cogens* norms are not permitted. The Inter-American Court of Human Rights in Advisory Opinion on Restrictions to the Death Penalty said that "a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed incompatible with the object and the purpose of Convention and, consequently, not permitted by it."\(^{87}\) The customary nature of such peremptory norms is recognised by Article 26 of the Rules on the State Responsibility, which provides that *nothing in this chapter precludes the wrongfulness of any act of the state, which is not in conformity with an obligation arising under a peremptory norm of general international law*.\(^{88}\)

It is submitted that the transnational corporations are often directly or indirectly involved in violations of *ius cogens* obligations or *erga omnes* obligations. As the International Court of Justice indicated in the Barcelona Traction case, such obligations are "by their very nature the concern of all States and, in view of the importance of the rights involved, all States can be held to have a legal interest in their protection."\(^{89}\) As a consequence the right to respond to any violation of the norm is not confined to the State/States directly injured or affected by the violations that appertain to every State. Article 48 (b) provides that any other State other than an injured State is entitled to invoke responsibility of another State if the obligation breached is owned to the international community as a whole. The beneficiaries of such obligations can be any of the participants in the international community. In case of breach of *ius cogens* obligations, third states can bring case in a form of actio popularis before ICJ or demand cessation and assurances of non-repetition and reparation on behalf of the beneficiaries of the obligations breached. The concept of responsibility for violations *ius cogens* norms will be dealt with in following section. Transnational corporations have *ius cogens* human rights obligations insofar as non-state actors have international legal obligations. Corporations are legal creation allowed to exist by the State. Accordingly, a state should neither create nor tolerate international human rights norms to which the state has given its approval. Corporation is also a set of specialised agreements among persons. To the extent the corporations are comprised of individuals and those individuals inside corporations are also bound by human rights treaties, corporations themselves also bound by the same provisions.

In following paragraphs I briefly examine some of the most basic norms of *ius cogens* norms, which are most of the time brought in connection with the activities of transnational corporation but also other non-state actors. I therefore focus on the *ius cogens* crimes of slavery, forced labour, torture, racial discrimination and genocide with briefly mentioning crimes against humanity and war crimes.


Slavery and slave-like practices are crimes that were among the very first to be prohibited and form *ius cogens* and peremptory norms of customary international law. The prohibition began in the 19th Century, and had certainly obtained the status of *ius cogens* by the second half of the 20th Century. The transnational companies thus need comply with the prohibition of slavery and related international crimes. Their involvement in those crimes goes as far back as the origin of slave trade when the Portuguese and the Spanish companies were involved in hunting down the slaves and then transporting them to the Americas. The alleged violation of TNCs also includes the forced labour of local population, for example in building a pipeline of extracting the local mine on behalf of TNCs. The activities of UNOCAL Corp. in Burma are first example of rising accountability of transnational corporations for *ius cogens* human rights abuses. In all three lawsuits against UNOCAL the plaintiffs alleged that among other abuses governments soldiers forced them to work on construction jobs related to the pipeline and since such abuses were predictable, the pipeline consortium should bear responsibility for them.

On 13 December, Unocal, an American transnational company and the Parties to the lawsuits related to the construction of the Yadana gas pipeline in Myanmar (Burma), issued a joint statement in which they declared that they agreed in principle about the settlement of the claims. UNOCAL issued a statement that "it will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region".

Transnational corporations are likely to be involved in cases concerning racial discrimination violates both international customary law and the International Convention on the Elimination of All Forms of Racial Discrimination from 1966. Some acts resulting from racial discrimination have achieved the status of international crimes. The Genocide Convention covers clearly heinous forms of racial discrimination, and the persecution on racial ground constitutes a crime against humanity assuming it meets the other elements of that crime. In connection, apartheid as specific type of racial discrimination incurs individual responsibility and also corporate responsibility. But most of all groups and individuals may under CERD bring a claim against the State of their nationality. Article 2 (1) b states that

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91 *Doe v. Unocal*, (00-56603 / 00-56628 / 00-57195 / 00-57197), currently pending at the U.S. CA 9th Cir., Three-Judge Panel Opinion: 2002 WL 31063976 (9th Cir. Sept. 18. 2002), Order Taking Case En Banc: 2003 WL 359787 (9th Cir. Feb. 14, 2003). The plaintiffs, 15 Burmese villagers, filed a claim against Unocal in 1996 in Los Angeles under the 1789 Alien Torts Claim Act, 28 U.S.C. §1350. Assisted by the Center for Constitutional Rights and EarthRights International, the plaintiffs asserted that Unocal should be held liable for human rights abuses including murder, rape, torture, extortion, and forced labor, which allegedly occurred during the construction of the pipeline.
92 Unocal to Reach Settlement in Alien Tort Claims Act Case (December 13, 2004), *International Law In Brief* (ILIB) - Copyright 2005 - The American Society of International Law (ASIL), Editors: Elena Papangelopoulou, Ruth Teitelbaum, See also S. R. Ratner and J S. Abrams, Accountability for human rights violations in international law, OUP, 2001, p. 115
93 Mar. 7, 1966, 660 UNTS 195
94 Ratner and Abrams, p. 121
each state party undertakes not to sponsor defend or support racial
discrimination by any persons or organizations. Apartheid invoked
individual responsibility under the International Convention on the
Suppression and Punishment of the Crime of apartheid, which entered in
force in July 1976. International crime of apartheid incurs also corporate
responsibility. In case of certain victims of Apartheid v. Citicorp et al. a
class action suit is pending in New York. The plaintiffs in that case employ
the theory of an indirect harm by claiming that defendants’ loans to the
Apartheid-government of South Africa founded and stabilised the regime
and facilitated crimes against humanity.

It is submitted that transnational corporations by two
international treaties, which also prohibit torture in absolute terms: CAT
and ICCPR. The Torture Convention (CAT) forbids the use of physical or
mental coercion to obtain information and states “no exceptional
circumstances whatsoever, whether a state of war or a threat of war,
internal political instability or other public emergency may be invoked as a
justification for torture” . The ICCPR expressly specifies that torture, cruel,
inhuman or degrading treatment or punishment shall never be permitted,
even in times of “public emergency, which threatens the life of the nation”
and in addition it prohibits compulsion to extract a confession of guilty.
Since the binding legal instruments leave no space for interpretation; the
prohibition of torture is absolute. However, it submitted that transnational
corporations are directly or indirectly involved in torturing committed by
State or other organs. It is true that those victims can seek protection under
their national jurisdiction and in case they don’t take effective advantage of
those domestic remedies, they can bring a case before the UN Human
Rights Committee or lodge their claim before the ECtHR against the
respective state that failed to exercise control of TNCs.

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95 The Convention contains a broad definition of apartheid and after characterising the
practice as a crime against humanity it list a series of inhuman acts committed for the
purpose of establishing and maintaining domination by one racial group of persons over
any other racial group of persons and systematically oppressing them.
seq., at pp. 40 et seq.
97 See Torture Convention, Convention Against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment, Apr. 18, 1988, S. Treaty Doc. No. 100-20, 1465
U.N.T.S. 85 [hereinafter Torture Convention], art. 1. See also See generally, A. Cassesse,
“ Prohibition of Torture and Inhuman or degrading treatment or Punishment” in R.
Macdinald, F. Matscher, and H. Petzold, The European System for the Protection of
Human Rights (Dordrecht, (1993), at 225; and H. Danelius, “ Protection against Torture in
Europe and the World” in R. Macdonald, F. Matscher, and H. Petzold, “The European
system for the Protection of Human Rights (Dordrecht 1993) at 263, and Chahal v UK, 71:
Ireland v UK 163; Tomasi v France 115; Aksoy v Turkey’ para.62; Aylan v Turkey para 83
98 Art.7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or
punishment. In particular, no one shall be subjected without his free consent to medical or
scientific experimentation art 14 (g) Not to be compelled to testify against himself or to
confess guilt. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18
may be made under this provision.
99 The principle of subsidiarity is derived by the Art. 35 of the ECHR which estates that “
The court may only deal with the matter after all domestic remedies have been exhausted.
The principle of subsidiarity has been emphasized in Akdivar v. Turkey where the Court
stated : “ the machinery of protection established by the Convention is subsidiary to the
Crimes against humanity emerged primarily from international customary law. They cover a broad range of human rights atrocities. Transnational corporations may also be involved in those crimes, especially private military corporations that are likely to fuel the conflict in the third world countries like DR of Congo. The exposure of those corporations in the conflict in Iraq has helped to some extent to shed the light on their activities. It is suggested that private military corporations are involved in most of the conflicts and are on many occasions committing *ius cogens* atrocities. Mercenaries are usually, or have been, soldiers, combatants or, more frequently, members of special units and have experience with sophisticated weapons; this applies particularly to those recruited to take part in combat and to train those who are to make up battalions, columns or commando units. They are likely to be employed by private companies offering security services and military advice and assistance, in order to take part or even fight in internal or international armed conflicts. It is very difficult if not impossible to regulate activities of private military corporations. In 1999 United Nations Commission on Human rights submitted report on mercenaries.\(^{100}\)

Genocide is one of the most heinous crimes one can commit. Some of the reality of situations with linkage to transnational corporations was already discussed in the previous chapter. The transnational corporations often involved in genocide acts, but it is submitted that for the direct linkage to the crimes substantial evidence would be needed.

\(^{100}\) It reads as follows: "The Commission must also remember that mercenaries base their comparative advantage and greater efficiency on the fact that they do not regard themselves as being bound to respect human rights or the rules of international humanitarian law. Greater disdain for human dignity and greater cruelty are considered efficient instruments for winning the fight. The participation of mercenaries in armed conflicts and in any other situation in which their services are unlawful may jeopardise the self-determination of peoples and always hampers the enjoyment of the human rights of those on whom their presence is inflicted." Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by Mr. Enrique Bernales Ballesteros (Peru), Special Rapporteur pursuant to Commission resolution 1998/6, Commission on Human-Rights, Fifty-fifth session
5 TOWARDS INTERNATIONAL LEGAL RESPONSIBILITY OF TNCs

It is submitted that under present system, the primary responsibility for human rights continues to rest with the host governments. States are usually obliged to take steps to the maximum of their available resources. However, there is no doubt that a State as a bearer of *ius cogens* human rights obligation is answerable before the entire international community for its breach. In other words, breach of those obligations, is something that concerns the international community as a whole, primarily all the states. It is an absolute obligation. Governments should at all times abstain from the human rights abuses.

It is submitted that transnational corporations can violate and have violated, a wide range of human rights, including the most essential one - *ius cogens* norms - and they have remained unaccountable for their conduct in international law by exploiting the loopholes of existing regulatory regimes. One just have glance at the activities of Talisman Inc. in Sudan, Union Carbide Corporation and Enron Corporation in India, Unocal Corporation in Burma, Nike and Reebok across Asia, Shell Oil Company in Nigeria, Texaco in Ecuador, and Freeport-McMaron in Indonesia, to name a few. Having said that TNCs have violated wide variety of human rights, it is added that such violations may occur in different ways, as for example directly violating human rights, assisting in violations, failing to prevent violations, remaining silent about violations, or even operating in country which has a policy of grossly violating human rights. The respect for *ius cogens* norms is the first step in ensuring respect for basic human rights law. One cannot start talking about respect for example for transparent environment and or even right to fair trial when the basic *ius cogens* norms are not respect. For TNCs would be wise to afford more attention to those norms and then concentrate on other human rights and area of corporate social responsibility.

In the international community obligations of states have become increasingly detailed (through international human rights law, while surprisingly international standards relevant to transnational corporations have moved in the opposite direction; state provide benefits to TNCs but with no reciprocal duties. Recourse to effective remedies depends to a large extent on the information of the victims concerning knowledge and information about the availability of remedies, or their physical or economic security. The main question is whether the judiciary, the police and other law enforcement agencies - ombudsperson, human rights commissions and other bodies are impartial and able to take necessary remedial measures of affirmative action required to ensure equality in fact. The criminal and civil responsibility of TNCs for certain gross *ius cogens* violations of international human rights law and humanitarian law is now much in the dispute. But further to hold transnational corporations and individual within really accountable for their abuses in a meaningful sense, rather than a merely theoretical one, requires creations of specific international and national mechanism designed for this purpose. This and following chapter examine the most important of this fora-national judicial
systems, international tribunals (both ad hoc and permanent) and also briefly to principal non-prosecutorial processes, namely investigation commissions, civil lawsuits and other dispute settlement mechanisms. It turns to the WTO Dispute Settlement Mechanism and the Inspection Panel of the World Bank. The method used is to examine and scrutinise the legal structures and practical workings of these processes, with the goal of discovering their promise and limitations. The alternatives are not mutually exclusive, and it may be possible to pursue more than one successively or simultaneously. Treaties and custom usually confer obligations and rights to prosecute and punish certain acts that incur individual responsibility. It is recognised that transnational corporations and their officers and persons working for them are obliged to respect generally recognised *ius cogens* norms.

### 5.1 TNC'S RESPONSIBILITY/LIABILITY

#### 5.1.1 Corporate liability under Criminal law

One should begin by asking whether or not, and if yes how, corporations can be liable under criminal law. The ICC Statute does not concern corporations, but during the negotiation phase a draft article to this effect was on the table for some four weeks and no government held this option to be impossible in general. But which test would be appropriate for such cases? Would it be the ICTY test on aiding and abetting, the Unocal test, requiring practical assistance which has an effect on the actual crime or should some form of mens rea - test be employed which would focus on the thought that a contribution would be likely to help the abuse of human rights. Yet any such criminal law approach must have its shortcomings since the victims also want to be compensated for the damage done to them, furthermore requiring an element of tort. With a number of German industrialist put on trial in the Control council Law No.10 trials at Nuremberg, there are many indicators that companies could incur criminal liability, even though the trials were of the individual doctors and officers of the companies.

The Universal Declaration of Human Rights should be a minimum standard which is also to be respected by transnational corporations and that the 2009 Convention on the reform of the ICC Statute could lead to an amendment to the statute to this effect.

#### 5.1.2 Aiding and Abetting

It is submitted that the concept of direct individual criminal responsibility and personal culpability for assisting aiding and abetting, or participating in, has a basis in international customary law. Transnational corporation is most of the time not directly involved in committing heinous human rights abuses. They act behind as the main actors in silent or written agreements

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101 see United States v. Krupp (IX Trials of War Criminals 1327), United States v. Flick (VII Trials of War Criminals 1187) and United States v. Krauch (the IG Farben trial) (VII Trials of War Criminals 1081). The international Military tribunals and the modern International Criminal tribunals have all accepted that individuals may incur international liability.
with respective government by virtue of aiding and abetting them. They are aides and abettors. Aiding and abetting means rendering a substantial contribution to the commission of the crime. However, the aiding and abetting which at first glance appear to be synonymous are different. ICTY in Kvocka et al\textsuperscript{102}, held that aiding means giving assistance to someone, while abetting would involve facilitating the commission of an act by being sympathetic thereto. It may occur through omission provided this failure to act had a decisive effect on the commission of crime and that it was coupled with the requisite \textit{mens rea}.	extsuperscript{103} Exactly has been in occurring in the southern Sudan where Talisman Corp. stood silently when the Sudanese military forces were wiping out the territory. However, it is submitted that act of aiding and abetting has to have substantial effect on the commission of abuse.\textsuperscript{104} The aide and abettor will be responsible for all that naturally results from his/her/its act.

\subsection*{5.1.3 Joint Criminal Enterprise}

Transnational corporations are comprised of persons. In criminal law two or more persons have a common purpose where the criminal act is carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons, in an execution of criminal purposes, may be held to be criminally liable, subject to certain conditions. It is submitted that that transnational corporation can be held liable through their members (of executive board) for abuses committed on behalf of corporations. ICTY developed the doctrine of the common criminal enterprises in several cases and there is no reason why doctrine should not be extended to acts of (transnational) corporations.\textsuperscript{105} We follow the doctrine of joint criminal purpose/the common purpose doctrine as created in ICTY Trial Chamber decision in Tadić case. The mere notion of common purpose doctrine encompasses three distinctive categories of collective responsibility. The first category is presented in cases where all group of defendants possess the same criminal intention (this even more through for TNCs) and act accordingly to common plan or under the same framework.

The second category of cases was described in Tadić as embracing \textit{so called concentration camps} case. The doctrine of common purpose was applied to abuses charged were alleged to have been committed by a members of military or administrative units such as those running concerning camps. Analogy with the management of corporation is not far away from above as both (members of military/administrative units of concentration camps and members of executive boards of transnational corporations) are representing groups of persons acting pursuant to a concerted plan. The examples Shell in Nigeria or Unocal in Burma plainly exemplify this category.

\begin{flushright}
\textsuperscript{102} Kvocka et al. (Trial Chamber), November 2, 2001, p. 254, see also Tadic (Trial Chamber), May 7, 1997, p. 689
\textsuperscript{103} See Blaškić, (Trial Chamber), March 3, 2000, p. 284
\textsuperscript{104} See Vasiljević, (Trial Chamber), November 29, 2002, para. 70: »The act of assistance need not have caused the act of the principal offender, but it must have had substantial effect on the commission of the crime by the principal offender.«. See also Furundzija, (Trial Chamber), December 10, 1998, para. 234
\textsuperscript{105} See Tadic (Appeals Chamber), July 15, 1999, para. 1990, Krstic (Trial Chamber), August 2, 2001, para. 601
\end{flushright}
The act of that category also applies to some extent to conduct of transnational corporations. But it refers to cases involving the common design to pursue one course of conduct where one of the perpetrators commits an act, which outside the common design. This act could also be a natural and foreseeable consequence of the effecting of that common purpose. The elements of enforcing the liability of transnational corporations for *ius cogens* human rights abuses under common purpose doctrine are following:

I. A plurality of persons
II. The existence of common plan, design or purpose which amounts of a crime provided in a Statue of some International tribunal
III. Participation of company in common design

An individual member of the executive board may be hence held liable if she/he have carried out an acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his act or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise.\(^{107}\)

### 5.2.4 Command Responsibility

Transnational corporations often operate through its subsidiaries/daughter companies/subcontractors. The fact that the *ius cogens* human rights abuse was committed by subcontractor/etc. in respective country does not relieve the *mother company* of the criminal responsibility if the headquarters of TNC knew or had a reason to know that the subcontractor or similar entity was about to commit *ius cogens* violations or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.\(^{108}\) This line of legal reasoning could serve, as a source for analogies is therefore command or superior responsibility in international criminal law.

ICTY developed elements, which must be proved before a person may incur superior responsibility for crimes committed by the subordinates. This approach may be extended to behaviour of transnational corporations and its subcontractor since the nature and extent of criminal liability cannot different to large extent. Pursuant to the ICTY jurisprudence three elements must be proved\(^{109}\): the existence of a relationship of superiority and subordination between the accused and the perpetrator of offence, the accused knew and had a reason to know that the crime was about to be committed and that accused failed to take necessary and reasonable measures to prevent crime or punish the perpetrator thereof. The superior-subordinate relationship is based on the control within a hierarchy and that this control be exercised in a direct or indirect manner, with the result that superior-subordinate relationship may be both direct

\(^{106}\) Tadić (Appeals Chamber), part a. 220

\(^{107}\) See Kvocka et al., para 312

\(^{108}\) See Article 7 (3) ICTY Statue

\(^{109}\) See Kordić and Čerkez, (Trial Chamber), February 26, 2001, para. 401; Blaškič (Trial Chamber), March 3, 2000, para. 294; Aleskovski (Appeals Chamber), March 24, 2000, par. 76, Mučić et. Al. (Trial Chamber), November 16, 1998, para. 346
and indirect. The Additional Protocol I also defines superior-subordinate relationship in terms of a hierarchy encompassing the concept of control. ICTY Appeals Chamber held that persons (analogy to Tics) effectively in control of more informal structures, with a power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be responsible for their failure to do so. One has to add that a command responsibility is not a form of a strict liability. A superior may be held liable for the acts of his subordinates if it is shown that he knew or had a reason to know them. The Appeals Chamber in Mučić et al. found that the degree of de facto authority or powers of control required under the doctrine of superior responsibility is required under doctrine of superior responsibility is equivalent to that required based upon de iure authority.

A legal person can to exercise a similar authority and a parent company could possibly constitute a principal and a superior comparable to a commander and a business affiliate could equate an inferior person. A chain of command leading up to the crimes could be investigated and it could be established that the parent company de facto and/or de iure could direct the inferior’s conduct. A transnational corporation would consequently have to keep itself up-dated of inferior companies’ societal impact, as they do about associates’ financial situation. A practical example could be that a multinational is able to purchase merchandise for a price that is clearly below production costs and the price level is not temporary. The multinational would then have to ask itself how the seller was able to offer such a lucrative price and investigate further if no satisfactory answer is evident.

Where the transnational corporations was found to be the superior party, a legally binding duty to act upon human rights violations would emerge. In such a situation, a corporation has to demand that the violating party cease breaching human rights law and condemn the violations in order to escape charges of complicity. The result might be that the TNCs have to pay a greater price for the ordered products and services, or ultimately disengage from the commercial relationship. This line of argument is hypothetical and without acknowledged legal bearing. Nevertheless, corporations were already in the Nuremberg Charter held to possess the ability to constitute criminal ventures under international law and a membership in such a venture could amount to an international crime and agency law has been invoked in several CSR-related cases. On the other hand, establishing the casual linkage; the chain of command leading up to the violation will indeed be a difficult task. In the case a supplier has more than one customer; such a link might not exist or be problematic to prove to a sufficient degree. Further, the idea of expanding the scope of superior responsibility is constructed on the perception that TNCs are on the top of a hierarchy and thus, ignores business partners and network-connected multinationals.

110 See Mučić et al, (Appeals Chamber), February 20, 2001, para. 248-268
111 Id.
6 Mechanisms for the TNC's accountability in international law

This chapter and the following chapter examine the fifth inadequacy of international legal framework, namely inadequacy in sanctions for *ius cogens* human rights abuses by transnational corporations and lack of strong international legal mechanism for corporate human rights responsibility. The international crimes committed by transnational corporations must be addressed through an effective international legal mechanism. "A full-fledged right usually requires effective remedies when violated".\(^{112}\) The Universal Declaration of Human Rights provides in Article 8 that "everyone has a right to an effective remedy by the competent tribunal for acts violating fundamental rights granted him by constitution of law". International human rights law provides in various provisions for the right to effective remedy. ICCPR Article 2 (3), which ensures that the state parties to the Covenant have undertaken to ensure that any person whose rights are freedoms are violated shall have an effective remedy notwithstanding whether the violation has been committed by person acting in official capacity.\(^{113}\) Any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state. States are to develop the possibilities of judicial remedy at international and national level for *ius cogens* human rights violation by the transnational corporations and the competent authorities shall enforce such remedies when granted. For the time being, the mechanisms of various mixed international commercial arbitration remain the most appropriate option in dealing with *ius cogens* violations by transnational corporations.

6.1 International courts

For the time being no existing international legal mechanism may be appropriate to deal with *ius cogens* human rights violations by TNCs, given the fact that even persecution of the individuals for those crimes is mainly limited either geographically or in time. International Criminal Tribunal may be a new possibility to address those crimes but its real progress remains to be seen. There is also question where moral responsibility should be located in redefining international community. But further to hold transnational corporations and individuals within corporations really accountable for their abuses in a meaningful sense, rather than a merely theoretical one, requires creations of specific international and national mechanism designed for this purpose. This section briefly examines the most important of this fora-national judicial


system, international tribunals and briefly non-persecution options. Next chapter turns to the WTO Dispute Settlement Mechanism and the Inspection Panel of the World Bank. It is not my desire to provide comprehensive presentation of these mechanisms but merely to refer to that feature of the mechanism, which may be importance for enforcing the international legal responsibility of transnational corporations. The alternatives are not mutually exclusive, and it may be possible to pursue more than one successively or simultaneously. Corporations may be not only morally and socially responsible for respecting and protecting human rights, but also increasingly legally liable as *organ of society*. Treaties and custom usually confer obligations and rights to prosecute and punish certain acts that incur individual responsibility. It is recognised that transnational corporations and their officers and persons working for them are obliged to respect generally recognised *ius cogens* norms.

The question is whether or not the national courts are an appropriate forum for addressing corporate responsibility for human rights violations. It will be addressed very briefly. Examples for legal grounds allowing national courts to take up such cases include the Alien Torts Claims Act in United States and the Belgian International Crimes Law. In that respect one needs to focus on the relationship between nation law (for example ACTA) and doctrine of *forum non conveniens*.\(^\text{114}\) This doctrine was created to protect the defendant who can challenge the forum chosen by the plaintiff if there is another appropriate forum and certain other requirements are met. In most of the cases, the decision whether or not to apply forum non-conveniens doctrine is at discretion of the court. Prof. Gudmundur Alfredsson from RWI and Member of United Nations Commission on Human Rights working group on the working methods and activities of transnational corporations noted that while transnational corporations should respect human rights, that national laws protect human rights and so legislative action at the national level should be the vehicle for ensuring that companies respected human rights.\(^\text{115}\) The United Nations could then provide technical assistance to those States that were not easily able to achieve this alone.\(^\text{116}\)

In recent decades one can observe the multiplication of international tribunals, which were in many cases created in response to the most blatant atrocities. Yet, in most cases those tribunals have significant limitations, especially with regard to persecuting international crimes by transnational corporations. For an example, the ICTY Statute limits its jurisdiction to serious violations of international humanitarian law committed in the former Yugoslavia since January 1, 1991\(^\text{117}\), whereas ICTR's jurisdiction is limited to serious violations of international humanitarian law between 1 January 1994, and December 31, 1994\(^\text{118}\). And like ICTY, the ICTR's personal jurisdiction extends only to natural person. Transnational corporations are not covered neither in the

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\(^{114}\) The doctrine of forum non conveniens originates in Scotland and was accepted into English law by the House of Lords in the case of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 A.C.460.


\(^{116}\) Ibid.

\(^{117}\) ICTY Statute, Arts. 1:8

\(^{118}\) ICTR Statute, Arts. 5, 6,8,9.
Statue of Special Court for Sierra Leone. TNCs are not addressed even in the Rome Statute of the International Criminal Court. Therefore under existing international framework it seems not possible to bring the atrocities by transnational corporations into their jurisdictions in the light of jurisdiction limitation. Therefore, especially the Inter-American Court of Human Rights and the European Court of Human Rights have contributed immensely in evolving the human rights obligations of non-state actors by recognizing their obligation to respect the enjoyment of human rights by all persons.\(^\text{119}\)

In HLR v France\(^\text{120}\) the ECHR held that: “Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.” The International Court of Justice held in case of Diplomatic and Consular Staff in Tehran (U.S. v. Iran\(^\text{121}\)) that the endorsement of militant's conduct by Iranian authorities gave rise to international responsibility for what would otherwise have been private conduct. The international responsibility that resulted was put on Iran, not of the militants who perpetrated the seizure and detention.

The International Court of Justice (ICJ) is the main judicial organ of the United Nations and it deals with two types of issues: cases submitted by states and advisory opinions referred by approved international organs and agencies. It is submitted that the state could raise a claim against another State and commence the proceedings before the ICJ for the *ius cogens* violations committed by transnational corporation in that state for failure to prevent atrocities or to provide an appropriate redress for abuses sustained. Article 42 (b) (ii) of Draft Articles on State Responsibility provides that a State may consider itself to be an injured State within the meaning of the Articles if the obligation “is owed to a group of States including that State, or the international community as a whole”, and the breach of the obligation is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the future performance of the obligation.” Any State other than an injured State has a right to invoke the responsibility of another State (the so-called actio popularis) if the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or the obligation breached is owed to the international community as a whole.\(^\text{122}\) Given the ICJ’s case law on legal


\(^{120}\) ((1997) III Eur Ct HR 745; (1998) 26 EHRR 29)

\(^{121}\) United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran\(^\text{121}\)), 1980 I.C.J. 3 (May

\(^{122}\) Article 48 of Draft Articles on State Responsibility, See Reports on State Responsibility by Mr. James Crawford, Special Rapporteur, 1996-2001, and Resolution 56/83 Adopted by the General Assembly on 12th December 2001
dispute, it is highly unlikely that the Court would consider taking up such a case, at least so far those issues have not been put under consideration. In addition, Article 34 of ICJ's Statute explains that only states may be parties in cases before the Court and the Court is merely open to the states parties to the present Statute.\textsuperscript{123}

It may be considered that the International Criminal Court may the appropriate tribunal for addressing international criminal responsibility of transnational corporations for gross violations of international human rights law. However, ICC personal jurisdiction does not extend to crimes of transnational corporations, even though it was originally envisaged in Draft Statute of the ICC. ICC jurisdiction is based on the delegation of state sovereign jurisdiction. Jurisdiction is granted on the basis of one of the two reasons given in art.12\textsuperscript{124}: that the crime was committed by a national of a state party to the Rome Statute, or that the crime was committed on the territory of a state party. The ICC may gain jurisdiction delegated from a state through the concept of universal jurisdiction. Whereas the ICC does not obtain jurisdiction through universal jurisdiction, if a state has jurisdiction via universal jurisdiction, that state can delegate its jurisdiction to the ICC. This may be relevant for TNC framework if the judicial system of respective country is not up to the task in addressing the crimes by TNCs. But the ICC may obtain jurisdiction also in case of deferral by the Security Council of United Nations.

The regional human rights courts, notably European Court on Human Rights and Inter-American Court have already in their jurisprudence addressed the obligations of private actors and also those of transnational corporations, but at least ECHR did not explore the \textit{ius cogens} obligations of private actors. That has not been even possible so far in the light of limitation of its \textit{rationae materiae} jurisdiction. The Inter-American Commission and the Court touched upon those issues in \textit{Forced Disappearances Cases} and in already mentioned Advisory Opinion on Death Penalty. It may suggested that regional human rights court may be the appropriate transitional venue to deal with violations by transnational corporations, but reality remains that are not any clear indication that will happen in the near future. The Inter-American Court adopted in its jurisprudence a due diligence approach, which was taken from corporate law. The essence of this approach is that the human rights law imposes positive obligations on States to prevent and sanction private violations of human rights. The Court submitted that an act by a private individual, which is not directly imputable to a State, can generate international responsibility of the State, not in the light of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation. It is submitted that transnational corporations may there become indirectly responsible for human rights. A failure to exercise due diligence to prevent or remedy an attack on an alien, or failure to try the individuals committing such an act give rise to State responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts again nationals of the State. The Inter-American Court held in the Velásquez Rodríguez Case, that: “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or

\textsuperscript{123} Article 34 and Article 35 of ICJ's Statute

\textsuperscript{124} Provided that the crimes also fit within the temporal jurisdiction of art.11
because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.” Under due diligence test States are required to take reasonable or serious steps to prevent or respond to a violation by a private actor, including investigation and provision of remedies as compensation. International and regional human rights standards expressly require states to regulate the conduct of non-state actors containing explicit obligations for States to take effective measures to prevent private violations of human rights.

6.2 United Nations Framework

Under UN framework Firstly, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights have been drafted and are waiting for approval of UN Commission of Human Rights. However, norms are not binding, they are soft law norms, beginning as recommendations, and later building as the basis of a possible treaty; differing from a company code of conduct that might be changed or altered easily. The Norms also set forth basic implementation approaches. TNCs and business enterprises are to adopt, disseminate and implement internal rules of operation in compliance with the Norms. They must also perform self-evaluations, record claims of Norm violations, incorporate the principles into contracts with their business partners, and provide reparations to those negatively affected. The governments may implement the Norms by using them as a model for legislation or administrative provisions for enterprises acting in their country, perform monitoring including labour inspections, and utilise their national courts for determining responsibility for violations. The UN monitors implementation of the Norms by creating State reporting requirements and additional implementation techniques, by receiving complaints and giving businesses opportunities to reply, by possibly engaging a group of experts to take action for failure to comply, and by raising concerns about continued human rights abuse by TNCs and business enterprises. In addition, the UN may use the Norms to develop procurement standards.

NGOs are involved in monitoring and reporting on the efforts and potential violations of the Norms, whereas the Sub-Commission’s Working Group on the Working Methods and Activities of Transnational Corporations receives information concerning the possible negative impact of the activities of TNCs and other business enterprises on human rights, and particularly affecting the implementation of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Working Group will invite any TNCs or other business enterprises concerned, to provide whatever comments they may wish to provide within a reasonable time. In addition, the Working Group shall study submitted information and transmit comments and recommendations to the appropriate parties. Finally, the

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125 Id.
Working Group will also consider other methods to encourage full implementation of the Norms.\textsuperscript{127}

The International Labour Organisation in 1977 adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.\textsuperscript{128} The aim of the declaration is to stimulate the compliance of the fundamental labour standards by transnational corporations. These fundamental standards are the prohibition and abolishment of forced labour (ILO Conventions 29 and 105), prohibition of discrimination and unequal remuneration (ILO Conventions 100 and 111), outlaw of child labour (ILO Conventions 138 and 182), and the freedom of association and the right to collective bargaining (ILO Conventions 87 and 98). It provides principles regarding the social aspects of multinational enterprises, for the use of governments, employee organisations, and corporations themselves. Under Declaration there is a need for corporations to comply with national laws, respect international standards, honour voluntary commitments, and harmonise their operations with the social aims and structure of countries in which they operate. Implementation of these standards is on a voluntary basis. National labour laws outlaw such behaviour and provide for responsibility at national level. Within the European Union, there exists with the European Court of Justice a regional enforcement mechanism.\textsuperscript{129}

The weaknesses of this tool are that there are no international mechanisms for enforcement. The Declaration is not legally binding, and the Committee does not condemn governments or impose penalties. No international enforcement authority. While member states have an obligation to ensure compliance with Declaration, the Committee that review grievances does not have the authority to enforce compliance.\textsuperscript{130} The Committee must rely on the power of persuasion and the use of public disclosure and shaming to change business or government practices. The governments are signatories of the Declaration, and should incorporate the principles into national law. However, even governments that have formally ratified the conventions as part of their national law fail to implement and enforce many aspects of the document, leaving them with no-compliance mechanism.

Documents and instruments adopted by international organisations have recognised that the aim to be achieved is to maximise positive impacts of corporate activities and to minimise their negative impacts.\textsuperscript{131} UN Global Compact\textsuperscript{132} initiated the voluntary initiative to respect and support human rights within their sphere of influence. The Global

\textsuperscript{127} Id.
\textsuperscript{128} Declaration adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977))
\textsuperscript{129} See Art. 141 of Treaty Establishing European Community
\textsuperscript{130} Id. pp. 10-12
\textsuperscript{131} The effects of businesses are usually split into the components of economic, social and environmental.
\textsuperscript{132} First presented at the The World Economic Forum on 31 January 1999, United Nations by Secretary-General Kofi Annan. The Global Compact is a network. At its core are the Global Compact Office and six UN agencies. The Global Compact involves all the relevant social actors: governments, who defined the principles on which the initiative is based; companies, whose actions it seeks to influence; labour, in whose hands the concrete process of global production takes place; civil society organizations, representing the wider community of stakeholders; and The United Nations. http://www.unglobalcompact.org/Portal/Default.asp, last visited 20.12.2004
Compact is open-ended in scope, more diverse in implementation and overlaps with development. It is true that responsibilities and opportunities appear for TNC to respect and support human rights. By saying that corporate violations are pressing, but narrowing the relationship in this way, while needed and legitimate for certain purposes, will not lead to over reliance on state action and on the deterrent function of law. It is submitted that the enforcing corporate responsibility cannot artificially and detrimentally narrow the understanding of the broader context in which voluntary proposals may create positive pressures and change rules of the game.\textsuperscript{133}

United Nation’s Global Compact embraces the voluntary approach to the issue of corporate accountability. It is thought as instrument for the engagement of corporations that voluntarily decide to change their approach with regard to their social impact. There is no enforcement mechanism for its nice principles; the reporting requirements merely preserve the credibility of the whole initiative rather to ensure the accountability. It aims towards mobilising business initiatives for the benefit of developing countries. This one-sided approach may be seen as a contradictory to the basic principles of UN enshrined in UN Charter and Universal Declaration of Human Rights. Some international legal scholars argue that there is a reason for cautious approach and the point out on the problems concerning the legal personality of TNC and the political will of the international community\textsuperscript{134}. On the other hand, it emphasises the adoption of codes of conduct and in building partnerships. It is also designees as network to obtain the participation of other actors and complementarily with other initiatives, GC delegates the tasks of monitoring, verifying and reporting corporate impact to other initiatives.

Under the Framework of Organisation for Economic Cooperation and Development, experts drafted the guidelines for Multinational Enterprises. They contain non-binding recommendations by governments to multinational enterprises operating in or from the 33 adhering countries - the OECD members as well as Argentina, Brazil and Chile. They are complemented by implementation procedures whereby adhering governments agree to promote observance of the Guidelines.\textsuperscript{135} The Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises. The OECD Guidelines for Multinational Enterprises, which were revised in 2000, have been adopted by governments in all thirty OECD member countries and by eight non-members. The Guidelines represent a commitment by governments to make recommendations to multinational companies operating in or from their territories. As such, although they are addressed directly to companies, they are not binding on them. However, the Guidelines are endorsed by a corpus of multinational companies, represented through the OECD’s Business and Industry Advisory Committee (BIAC), as well as by the corresponding Trade Union Advisory Committee (TUAC). For our purposes the weakness of the guidelines are that they no relating to \textit{ius cogens} human rights norms, but they mainly address: information disclosure, employment and industrial relations, the environment, combating bribery, consumer interests, science and technology, competition and taxation.

\textsuperscript{133} Compare with Mares, R. (ed.), p. xxii
\textsuperscript{134} Comments made by professor Ineta Ziemele, February 2005
However, The Guidelines are implemented through a dual system of National Contact Points (NCPs) in each adhering country and the Investment Committee made up of NCPs from member countries, which oversees the process. The text of the Guidelines is weakened with caveats allowing too much discretion to companies in crucial areas such as disclosure and environmental protection. The implementation procedures however lack investigative powers and are subject to arbitrary decisions and interpretations by government officials, who lack any formal training in human rights and who are seen to be too closely allied to business interests. Additionally, the fact that implementation of the Guidelines is monitored by government officials in the countries where the companies are registered raises the concern that narrow national economic interests may unduly influence the way in which a company's behaviour is assessed. The monitoring provisions neither make provision for condemning non-compliant enterprises nor for the provision of incentives for compliance. It is also not possible under the Guidelines to obtain relief or reparations. The main question if they have had an impact on the national legislative framework? To give that answer more specific study must be undertaken. In Africa and particularly in the Democratic Republic of Congo, many businesses from Asian countries, which come to exploit natural resources, trample on the OECD Guidelines, because their countries of origin are not members of the OECD. Therefore, the real impact of the guidelines remains to be seen.

6.3 European Union Framework

This section examines two of EU mechanism, the European Ombudsman and the European Parliament, which may prove the most appropriate to address issues connected with *ius cogens* abuses by transnational corporations. The European Ombudsman investigates complaints about maladministration in the institutions and bodies of the European Union. Many of the complaints lodged with the Ombudsman concern administrative delay, lack of transparency or refusal of access to information. Any citizen of the Union or any natural or legal person residing or having its registered office in a EU Member State can lodge a complaint with the Ombudsman. The Ombudsman can investigate the case of breaches of human rights by transnational corporation, which directly or indirectly involved with European institution or the projects are financed by the European Union resources. If the case is not resolved satisfactorily during the course of the inquiries, the Ombudsman will try to find a friendly solution, which puts right the case of maladministration and satisfies the complainant. If the attempt at conciliation fails, the Ombudsman can make recommendations to solve the case. If the institution does not accept his recommendations, he can make a special report to the European Parliament. However, The European Ombudsman Office has not so far received any complaints concerning the activities of the TNCs and human

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136 Id.
137 The regulations and general conditions governing the performance of the Ombudsman's duties shall be as laid down by this Decision in accordance with Article 195(4) of the Treaty establishing the European Community, Article 20d(4) of the Treaty establishing the European Coal and Steel Community and Article 107d(4) of the Treaty establishing the European Atomic Energy Community. For the case law see http://www.euro-ombudsman.eu.int/glance/en/default.htm#html Last visited 3.1.2005
rights compliance. Therefore relevance of that mechanism may be questioned.

In 1999 the European Parliament adopted Resolution on the EU standards operating in developing countries: towards a European Code of Conduct\(^{138}\) on the proposal from the European Parliament Committee on development cooperation asking for request the creation of a model European code of conduct which would contribute to greater standardisation of voluntary codes of conducts and the establishment of a European monitoring platform including provisions on complaint procedures and remedial action. The report was prepared by Richard Howitt, MEP, in the European Parliament and reiterates its request to the Commission and the Council to make proposals, as a matter of urgency, to develop the right legal basis for establishing a European multilateral framework governing companies operations worldwide and to organise for this purpose consultations with companies representatives, the social partners and those groups in society which would be covered by the code. However, since the reports from 1999, 2001 and resolution from 1999 no progress seems to be achieved. No European Code of Conduct was adopted so far.\(^{139}\) In addition, the social partners in the European textile and clothing sector signed the Code of Conduct. It encourages European firms or sectors to adopt codes of conduct on a voluntary basis but considers that a monitoring system be an integral part of the package.

It is submitted that the European Union should act and take a more active role in standard setting for the conduct of its enterprises in developing countries. Forty-two of the top 100 MNEs are based in Europe, only 35 in North America.\(^{140}\) Yet in the United States, 85 per cent of large companies have codes, and NAFTA provides a first mechanism where trade unions and civil society can bring complaints against companies.\(^{141}\) The world’s first voluntary standard for the social impact of business, Social Accountability 8000, was first developed in America.

### 6.4 International Commercial Arbitration

It is submitted that international commercial arbitration is under existing international legal framework the most appropriate mechanism to address the violations of *ius cogens* human rights norms by transnational corporations. The arbitration is the oldest of the legal methods of dispute settlement. It is not my wish to explore this possibility in detail but merely to put forward a suggestion how international community may address the existing problem especially in absence of political will to create any international mechanism with regard to transnational corporations and their abuses. One may suggest that a distinctive feature of arbitration is that parties themselves set up tribunal to decide a dispute or a series of disputes, on the basis of international law and

\(^{138}\) Official Journal of the European Communities, C 104/180, 14.4.1999

\(^{139}\) The author tried to contact the European MEP, Richard Howitt, concerning the matter, but so far in vein. Mr Richard Howitt may be contacted at rhowitt@europarl.eu.int.

\(^{140}\) See REPORT on EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct, 17 December 1998 A4-0508/98, Committee on Development and Cooperation

Rapporteur: Richard Howitt

\(^{141}\) Id.
agree to treat its decision as binding. How the arbitration may be used to address the violation by transnational corporations can be disputed, since individual victims probably will not stand against a transnational corporation due to lack of resources and (legal) knowledge as well. The recourse to legal remedy might prove more likely in case of class actions. In most of the case the parties are free to choose arbitrators and law to be applied. Private claims are no foreigners to international arbitration. The Iran-US Tribunal, which was set in 1981 to handle a large number of disputes arising from the Islamic revolution in Iran, has jurisdiction over both inter-state and private claims. Arbitration also has very significant limitations with regard to transnational corporations. If even states are reluctant to commit themselves to judicial settlement and also therefore to arbitrations, one may expect that transnational corporations would not be so keen on undergoing any legal process as well. It is also true that the arbitral awards enjoy much greater international recognition than judgements of national courts. Over 134 countries have so far signed 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help enforcement.

6. 4. 1 Mixed international commercial arbitration

Mixed arbitration for the protection of foreign investors has actually existed for centuries, but until the 1960s it was normally pursued on an ad hoc basis through subrogation of a private actor’s claim by its “home” state, which the state of citizenship or incorporation. The United Nations Commission on the International Trade law has been also instrumental in addressing the corporate social responsibility. The disputes may already now be brought to the following venues.

6.4.1.1 The International Centre for the Settlement of Investment Disputes, of The World Bank

The International Centre for Settlement of Investment Disputes (ICSID) is one the venue for mixed international arbitration. ICSID is an autonomous international organization and it has close links with the World Bank. Article 25 of the Convention on the Settlement of Investment Disputes provides for mixed international commercial arbitration between States and National of Other States. It reads as follows: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.” The Convention is the basis of the jurisdiction of the Tribunal and of the International Centre for the Settlement of Investment Disputes. ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is

entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. The Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute provided it relates to a transaction, which has "features that distinguishes it from an ordinary commercial transaction." The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts." This may prove helpful in human rights matters.

In Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka\textsuperscript{144} before the Centre received a request for arbitration from Mihaly International Corporation (Mihaly USA or the Claimant), a company established under the laws of the United States of America, against the Democratic Socialist Republic of Sri Lanka. The request invoked the provisions of the 20 September 1991 Treaty between the United States of America and Sri Lanka concerning Encouragement and Reciprocal Protection of Investment. The dispute matter actually did not concern the human rights, however it shows that are not any hinders in addressing human rights issues of transnational corporations relating to investment before the ICSID. This is exemplified also the case Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica\textsuperscript{145} which concerned expropriation of property in Costa Rica. The ICSID has also dealt with several investment disputes regarding environment.\textsuperscript{146} In Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo\textsuperscript{147} concerned the alleged expropriation by the DRC of the assets of Banro American’s subsidiary established and existing under the laws of the DRC, the Société Aurifère et Industrielle du Kivu, in violation of a mining convention between the DRC, and Banro Resource and the Société Minière. However, it did not address the human rights issues. In Patrick Mitchell v. Democratic Republic of the Congo\textsuperscript{148} the ICRSD took account of devastating human rights situation in DRC as the reason for the stay of enforcement of the Award of February 9, 2004. The panel said as follows: "Given the sensitive political situation of the DRC, described in the UN Resolution 1565 of 1 October 2004 to which Respondent refers, significant efforts have to be made in order to ensure

\textsuperscript{144} ICSID Case No. ARB/00/2

\textsuperscript{145} ICSID Case No. ARB/96/1

\textsuperscript{146} See the following cases: Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), Société d'Investigation de Recherche et d'Exploitation Minière v. Burkina Faso (ICSID Case No. ARB/97/1), Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), and Robert Azimian and others v. United Mexican States (ICSID Case No. ARB(AF)/97/2)

\textsuperscript{147} ICSID Case No. ARB/98/7

\textsuperscript{148} ICSID Case No. ARB/99/7
peace and security in the region, which entails an important financial burden for the State."\textsuperscript{149}

\textbf{6.4.1.2 United Nations Compensation Commission}

The Commission has accepted for submitting claims of individuals, corporations and Governments, submitted by Governments, and also well as those submitted by international organizations for individuals who were not in a position to have their claims filed by a Government.\textsuperscript{150} This opens a possibility for transnational corporations.

\textbf{6.4.1.3 International Court of Arbitration}

The International Court of Arbitration of the International Chamber of Commerce (ICC) is the arbitration body attached to the ICC. The function of the Court is to provide for the settlement by arbitration of business disputes of an international character in accordance with the Rules of Arbitration of the International Chamber of Commerce \textsuperscript{151}

\textsuperscript{149} p. 27
\textsuperscript{151} See www.icc.org
International financial institutions and development agencies have a special role in promoting the respect and implementation of international human rights standards, taking into account the influence and the resources at their disposal. The institutions increasingly recognise the duty in acknowledgement of the contribution which human rights, democracy, good governance and accountability make to political stability and improved economies. In the light of their influence they may be the right venue in addressing *ius cogens* human rights violations committed by the transnational corporations. It is not suggested that existing international financial framework would suffice to relate to transnational corporations, I desire simply to put forward some arguments or speculations on how the *ius cogens* norms may be addressed under international trade law. I implicitly suggest that institutional reform of Bretton Wood institutions is needed in order to address those issues, and even also to preserve the credibility of those institutions.

### 7.1 World Bank and its Inspection Panel

One may read from the World Bank webpage that "The World Bank Group's mission is to fight poverty and improve the living standards of people in the developing world. It is a development Bank which provides loans, policy advice, technical assistance and knowledge sharing services to low and middle income countries to reduce poverty." It is not my wish to challenge that at this point of time, but merely to look into the World Bank monitoring mechanism, notably the Inspection Panel.

The World Bank Inspection Panel is a special, independent mechanism created by the World Bank's Executive Directors in September 1993. It is a permanent body, with its own secretariat, and it is composed of independent experts. Panel usually does not refer to companies in its formal statements but it co-operates quite closely with the companies that actually operate the projects. Especially indigenous peoples have often complained to the Panel on the basis of Bank's guidelines about the various impacts of big development projects and the role of private companies in operating them. Even though the Panel is not in position to provide specific
remedies, their report nevertheless can influence the direction of the projects or even to force the financing altogether.\footnote{See Beyond Voluntarism, pp. 108-109}

The private parties in the territory of a borrowing state who have been adversely affected by the Bank project may register such grievances with the Panel alleging that a project does not confirm with the Bank’s guidelines or operational procedures. The Panel has the competence to investigate every aspect of a particular project, can review Bank records, and can conduct onsite investigations. Local groups may lodge a complaint/claims if they can show they have suffered and actual or threatened harm as a direct result of an action or omission by the Bank, before 95% is complete. First, it has to be established whether the claimants have shown a prima facie violations by the Bank of its operational procedures. If so after all other remedies have been exhausted, the Panel recommends to the Executive Directors to authorise an investigation. However, this is in no way automatic. At minimum, requesters must show in writing that:

- They live in the project area (or represent people who do) and are likely to be affected adversely by project activities.
- They believe that actual or likely harm results from failure by the Bank to follow its policies and procedures., and that
- Their concerns have been discussed with Bank management and they are not satisfied with the outcome.

The Panel may serve as useful tool in monitoring the compliance of transnational corporations with human rights norms, especially when and where transnational corporations co-operate in the projects of the World Bank. This mechanism is certainly welcome mechanism of monitoring the performance of transnational corporation with respect to human rights.

\section*{7.2 World Trade Organisation (WTO)}

The World Trade Organisation (WTO) is the only global international organisation dealing with the rules of trade between nations.\footnote{See Agreement Establishing the World Trade Organization, signed in Marrakesh, April 15, 1994, and http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm, last visited 20.12.2004} The WTO may be the appropriate international mechanism for enforcing the accountability of TNCs for human rights violations. The Appellate Body rulings\footnote{United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, October 12, 1998; United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, October 22, 2001; for commentary, see R. Howse, “The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate”, 27 Columbia Journal of Environmental Law 2 (2002), 491-521.} in the Shrimp/Turtle case created a new venue for the trade and environment debate at the WTO. It is therefore submitted that analogy between environment and human rights may be adopted. The Appellate Body held that its observation concerning policy conditionality would apply to more than the environmental exceptions in Article XX WTO Agreement, but also include, significantly, XX(a) (inter alia), the “protection of public morals”\footnote{para. 121}—a
rubric often claimed to include fundamental labor rights. In this way would *ius cogens* norm would easily come to the picture.

However, the WTO so far does not offer any institutional structures for enforcing direct and indirect obligations on companies to respect human rights. The WTO is said to be working for well being of people all over the world and attach major concern to building a just society. It is submitted that international trade/economic law is basically fundamentally about justice as is human rights law. However, the enforcement through international tribunals or organisations can be only one part of the integrated framework of corporate accountability. What is needed for effective and efficient implementation, are common efforts at national, regional and international levels. My argument concerns the involvement of WTO in enforcing the accountability of TNCs for human rights violations, and leaves aside the question whether the WTO is appropriate venue for imposing and enforcing human rights obligations upon states. With enforcing human rights obligations on TNCs, states would not hesitate to large extent to enforcing human rights standards on TNCs, since this mechanism would not touch to larger extent upon states sovereignty and their jurisdiction over TNCs. In case of WTO enforcement human rights obligations towards states, states probably would not be prepared to invoke trade sanction against themselves. Whether, the WTO system of dispute settlement would be right venue to enforce *ius cogens* obligations upon TNCs remains open. The WTO dispute mechanism has been drafted so as to foster among its members a strong co-operation based primarily on the voluntary respect of the new international trade rules.

7.2.1 WTO and Human Rights

The Preamble of the WTO Agreement explicitly states a number of objectives of the WTO system that may at some point relate to certain human rights obligations; especially labour rights and elements of social and economic rights. In this respect may its framework concern also to activities of transnational corporations. Article 20 (a) of the original GATT allows members to take otherwise GATT-inconsistent measures necessary for the protection of "public morals". It is submitted that where trade restrictions may be a necessary mechanism for dealing with gross human rights abuses, there is a possibility of invoking the public moral exception. This provision has never been interpreted so far in dispute settlement. It is an open question how strictly such measures would have to be justified, given the use of the term "necessary" in the provision. This may especially true with regard to transnational corporation.

However, because of the new approach under the WTO Appellate Body, the meaning of the necessity test would have to be considered in light of relevant rules of international human rights law. It would also take into account whether that situation was considered as pressing under international human rights law or recognised as such by

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159 Robert Howse, Back to court after Shrimp/Turtle: India’s challenge to labour and environmental linkages in the EC generalized system of preferences,, (Draft), September 2004, pp. 1-2
160 Id.
162 Id.
international human rights institutions. Article 20(b) of the GATT also allows for trade measures that would otherwise be GATT-inconsistent where necessary for the protection of, among other things, human life or health.

The WTO preamble therefore does not explicitly mention human rights, although it talks about raising standards of living and the need for sustainable development. It is submitted that these values must be read as supervening free trade for its own sake. WTO members undertake a standard set of obligations whose purpose is non-discriminatory treatment of products in each other’s markets. To the extent that deviations are permitted from this general script, there are clear provisions governing permissible measures. In addition to the Most-Favoured-Nation Treatment and the National Treatment clauses, states are prohibited from imposing restrictions. The GATT does not explicitly list human rights as grounds for the exclusion of products. It does, however, contain provisions that permit states to protect and promote human rights through trade by taking certain measures against states that violate human rights. Article 20 provides a wide array of exceptions under which a WTO member can promote and protect human rights without being in violation of GATT. The exceptions that would not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade include measures to protect public morals, measures necessary to protect human, animal or plant life or health and measures relating to the products of prison labour.

7.2.2 WTO and ius cogens violations

It has been submitted that violations of ius cogens norms are strictly prohibited in the international community and ius cogens automatically annuls or modifies any inconsistent provisions. The prohibition is not limited to the state parties to the Vienna Convention. However, can a WTO panel or the Appellate Body identify a norm as having reached an ius cogens status? Can WTO bodies determine the consequences of ius cogens violations by WTO provision? Can the WTO adjudicating bodies act as an appropriate mechanism for violating ius cogens human rights by transnational corporation? In this section, I only suggest the ideas for addressing those heinous crimes.

The WTO Appellate Body may be said to be international judicial body. Its presence in the WTO dispute settlement mechanism makes it the most ambitious international mechanism for settling not only trade disputes. Even most advanced international trade treaties provide only for

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163 Id.
164 Id.
165 See General Agreement on Tariffs and Trade, 55 UNTS 194 (the original GATT Agreement) [GATT]. This was amended by the General Agreement on Tariffs and Trade 1994.
166 Id., Article III.
167 Id.
168 Id.
169 Id.
an arbitration system, the decisions of which very rarely may be reviewed.\textsuperscript{170} The most innovative aspect is that is expected to be completed within 60 days from the notice of appeal to circulation of report by the Appellate Body.\textsuperscript{171}

With regard to activities of TNCs one should pay special attention to Articles, which take special notice of the interest of developed countries. This approach should be taken when trying to bring TNCs or their violations of rights within jurisdiction of dispute settlement panel.\textsuperscript{172} The provision on consultations states the Member should give a special attention to the problems and interests of developing countries. If one party to a dispute is a developing country, that country is entitled to have at least one panellist from developing country. Attention is to be paid to interest of developing parties in the course of implementing recommendations and rulings of the panels. How the latter injunction would be carried out if a panel recommended elimination of a preference from which some developing countries were beneficiaries and others claimed injury.\textsuperscript{173}

It is true that so far the majority of complaints brought to WTO dispute settlement have been complaints falling under Article 23(1) a, which are complaints alleging the failure by the respondent state to carry out obligation in the GATT or one of the associated agreements. The bringing of TNC in a panels jurisdiction even through Member state would be a vital step in addressing violations of \textit{ius cogens} human rights. The development of an international legal framework to guide corporate behaviour is only natural step in development, construction and constitution of international society. Economic globalisation requires that also the WTO start to extend the application field of its major treaties and also human treaties to transnational corporations.\textsuperscript{174} The UN Committee on Economic, Social and Cultural Rights held that trade liberalisation "must be understood as a means, not an end. The end which trade liberalisation should serve is the objective of human well-being to which the international human rights instruments give legal expression".\textsuperscript{175} It is submitted that in the event of a conflict between a universally recognised human right and a commitment ensuing from international treaty law such as a trade agreement, the latter must be interpreted to be consistent with the former. When properly interpreted and applied, the trade regime recognises that human rights are fundamental and prior to free trade itself.

\subsection*{7.2.3 Labour rights violations by transnational corporations and the WTO}

It is submitted that human rights norms should always be taken into account when interpreting international trade and investment obligations of states and transnational corporations. It might be disturbing

\begin{itemize}
\item \textsuperscript{170} See Elisa Baroncini in Paolo Mengozzi (ed.); \textit{International Trade Law: On the 50th anniversary of the multilateral trade system}, Milano, Dott. A. Giuffr\`e Editore, 1999, pp. 153 - 302
\item \textsuperscript{171} Article 17 (5) DSU
\item \textsuperscript{172} see WTO Dispute Settlement and Human Rights, Gabrielle Marceau, EJIL Vol. 13 (2002) No. 4
\item \textsuperscript{173} See \textit{European Communities-Regime for the Importation, Sale and Distribution of Bananas}, WT/DS27/AB/R, 9 Sept. 1997, ps. 10 - 12
\item \textsuperscript{174} Id.
\item \textsuperscript{175} UN Doc. E/C.12/1999/9-26 November 1999
\end{itemize}
that UN Sub-Commission on the Promotion and Protection of Human Rights, which has been concerned with the intersection of trade and human rights, have not been included in the GATT/WTO processes. There is textual basis for involving NGOs and intergovernmental organisations in WTO deliberations. Article 18(2) of GATT allows the WTO to permit intergovernmental organisations into its processes.\(^ {176}\)

It is the deep-seated culture of secrecy, not the lack of textual authority that has kept "outsider" groups from participation in WTO structures.\(^ {177}\) Many of these organizations would provide much needed information and insight into the complex problems globalization raises. The manner in which WTO provisions are interpreted is of fundamental importance to human rights. Most domestic legal systems, and an increasing number of supranational adjudicative bodies, allow public scrutiny of judicial proceedings.\(^ {178}\) Written and oral pleadings in the WTO remain secret unless states party to the dispute consent to openness. This secrecy keeps NGOs, including those dealing with human rights issues, from participating in the dispute settlement process. Such secrecy is notably inconsistent with the norms of transparency required by the WTO itself in domestic legal trade-related proceedings.

The workers’ representation is particularly complex as governments in some countries sanction selected trade unions and suppress others. In a Declaration adopted by its membership, the ILO recently adopted a set of core labour rights.\(^ {179}\) It listed these rights as the "freedom of association and recognition of the right to collective bargaining," the "elimination of all forms of forced or compulsory labour," the "effective abolition of child labour," and the "elimination of discrimination in respect of employment and occupation."

It is submitted that the GATT itself does not create a general right of free access for imports. A member's basic obligation, subject to additional rules in the codes on food safety and on technical barriers, is to provide treatment as favourable to imports as that provided to domestic products.\(^ {180}\) It seems fair to assume that a country that has banned slave labour in domestic production, for instance, could equally ban imports of products from transnational corporations or countries that use slave labour.\(^ {181}\) This would amount to equal treatment of both domestic and imported products, with reference to the requirement that slave labour not be used. Requiring a country to accept imported products produced with slave labour, regardless of the treatment of like domestic products in its law, would in fact amount to demanding more favourable treatment to imports. GATT law does not mandate such a requirement and it is hard to imagine that many countries would agree to it.

Fundamental labour rights, enter into the definition of public morals.\(^ {182}\) Some, like the prohibition against enslavement, are human rights

\(^ {176}\) It provides, in part, that the "contracting parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where they consider such consultation necessary." Article 23(2), GATT,

\(^ {177}\) Id. Howse

\(^ {178}\) Id.


\(^ {180}\) Id.

\(^ {181}\) Id.

\(^ {182}\) Id. recognised by the WTO membership in the 1996 Singapore Declaration,
with the status of *ius cogens*. Human life and safety are clearly implicated in cases of slave labour and particularly extreme forms of child labour.\(^{183}\) Trade sanctions cannot provide a comprehensive solution to the complex issues that affect the labour rights performance of WTO members. Sanctions should be viewed only as a final strategy when others have been exhausted. Incentives in the form of preferences to developing countries, which enforce basic labour rights, would be a more effective means of encouraging progressive realisation of labour rights. WTO members should provide technical assistance where needed and adequate time to implement corrective measures should be given to those countries which have demonstrated a commitment towards the rights of their workers.

### 7.2.4 THE WTO DISPUTE SETTLEMENT

The Understanding on Dispute Settlement is set out in an elaborate treaty of 27 articles and four appendices to by all member states of the WTO and is applicable to virtually all of the WTO mechanisms.

The dispute settlement mechanism strictly focuses on compliance. The WTO Understanding on Dispute Settlement addresses the question of compliance and retaliation in a precedence strictness and thoroughness. Article 21 (1) goes as follows: *Prompt compliance with recommendation or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.* The new mechanisms presented by the WTO dispute settlement understanding are not maybe comparable to the full judicial systems within the member states, but they have so far radically changed both the legal culture concerning the adjudication and enforcement of obligations in international trade law.\(^ {184}\) The most apparent deficiency of international human rights law is its enforcement inefficiency and lack of appropriate mechanism to invoke the obligations. Hence, it would seem that the mechanism under the WTO DSU would appropriate instrument for addressing the most heinous human rights violations not only by non-state actors but also by states.

The establishment of the panel is since 1994 Marrakech agreement no longer hindered by the veto power. Article 6 (1) DSU states that *if the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB agenda, unless at that meeting the DSB decides by consensus not to establish a panel.*\(^ {185}\) The panels so formed is to "make an objective assessment of the matter before it, including the objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements in order to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements."\(^ {186}\) Where the parties to the dispute failed to develop a mutually satisfactory solution, the panel has to submit to DSU its final report from the date that the composition and terms of reference of the panel have been agreed upon.\(^ {187}\) The report will become binding almost automatically. It will adopted by the DSU unless a party to dispute formally notifies the DSU of its decision to appeal or the DSU decides by consensus

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\(^{183}\) Id.

\(^{184}\) See J.H.H Weiler (ed.), the EU, the WTO, and the NAFTA, OUP, 2000

\(^{185}\) Article 6 (1) DSU

\(^{186}\) Article 11 (1) DSU

\(^{187}\) Article 11 (1) DSU and Article 12 (7) DSU
not to adopt the report. The *ius cogens* violations of human rights can be matter of dispute between the parties through the various ways. The gross violations of enabling clause by one the member states is one possibility, the violations of international trade agreements by transnational corporations may be the other.

### 7.2.4.1 WTO and Dispute Settlement and its Prospects

The World Trade Organisation does not really offer possibilities for enforcing either direct or indirect obligations on companies to respect human rights. So far this may only feasible through state action. WTO free trade liberalisation measures may reduce some constraint on corporation concerning respect for human rights. Arguments are presents that *ius cogens* human rights over the rules of international trade law. However, transnational corporations are very much present in the WTO framework, although behind the curtain. They lobby governments to bring cases before the WTO panels in order to advance their own interest. It is suggested that WTO dispute settlement mechanism may serve to enforce the human rights obligation through the treat of sanctions. But the question remains how to bring the human rights within jurisdiction of the WTO adjudicating bodies. It appears necessary that existing mechanism will have to be changed. It is suggested bring private claims into the WTO jurisdiction through state action, namely that state take up cases, or to abandon the fragment approach to international law. A government may therefore take up the case if the corporation can also demonstrate that is complying with basic human rights standards. Another approach may be that the government would refuse to take up complaints in the WTO when the measures may affect human rights.

It has been suggested that the WTO procedures so far do no provide an appropriate venue for holding corporations accountable or for addressing the failure of states to hold corporations accountable. It is submitted that international human rights standards and accountability framework must be integrated in the WTO and its dispute settlement mechanism. It may be suggested that the WTO has to include human rights law in its policies and dispute settlement, which all members must comply with. All of the trade measures may have to comply with human rights law. The WTO adjudicating bodies need to accept submissions from non-governmental organisations and other actors of civil society. Opportunities are always there to challenge the existing procedure, weather within WTO or outside in some other mechanism. It may also be feasible to enforce international human rights law through WTO in the light of harmonisation of international adopted for example by ILO and WHO. The strive for harmonisation may be used for international human rights standards. In the sources and varieties of norms governing corporate responsibility, it is possible to observe the new emergence of medieval lex mercatoria, comprising a body of international trade law but also international human rights law.

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188 Article 12 (8) DSU
189 Beyond Voluntarism, p. 77
190 Id. See supra note 210
7.2.5 Government Procurement: The possible way to monitor transnational corporations?

It is submitted that the government procurement policies are important in ensuring respect for human rights. Many governments tie procurement to the respect of rights or other social objectives in a broad range of countries. The South African government currently uses a system of "targeted" procurement as part of its policy on social integration. One of the earliest International Labour Organisation conventions (No. 94) requires a linkage between certain fair labour standards and government contracts, and this has been widely ratified.\textsuperscript{192}

The WTO Agreement on Government Procurement (GPA) provides for National and MFN treatment when foreign suppliers bid for government procurement contracts. While on the face of it the MFN requirement prevents the exclusion of bidders on the grounds that the government of their country of origin violates human rights, Article VIII (b) of the GPA seems to allow the imposition of qualifications based on human rights performance.\textsuperscript{193} It appears, however, that the qualifications must be made a condition of the contract itself.\textsuperscript{194} It may provide opportunities to further develop the position that human rights-based procurement conditions are consistent with WTO law. It is anomalous and unjustifiable that WTO regulations should force a country to provide better treatment to foreign bidders than to domestic enterprises, prohibiting it from imposing on the former human rights-based requirements that it routinely imposes on the latter.\textsuperscript{195}

7.2.6 The Enabling Clause

The so-called Enabling Clause, limits the applicability of Article 1(1) to GSP preferences. Thus, paragraph 1 of the Enabling Clause states that: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." Paragraph 2(c) of the Enabling Clause states that developing countries may establish regional or global preferential arrangements for the mutual reduction or elimination of tariffs and, in accordance with criteria and conditions that may be prescribed by WTO Members, for the mutual reduction or elimination of non-tariff measures.

7.2.7 Concluding remarks

Transnational corporations are powerful enough to exert considerable influence on the agenda and rules of the World Trade Organisation. It is weird enough that while it is corporations rather than countries that trade, the WTO is made up of countries. However, the WTO decisions are usually in line with corporate expectations. Government ministers and their officials conduct business at WTO meetings under the gaze of representatives from major corporations who may even be part of

\textsuperscript{192} Id. see supra 220
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
the official delegation. The company people expect to be heard when they
lobby for decisions that help their business. The role that TNCs can play in a
nation’s economy can make their host government a very accommodating
and attentive audience; the corporations have much more access to WTO
decision-makers than citizens groups and NGOs.196 It is true that to improve
their image, TNCs now talk more about corporate responsibility. The phrase
is common in company reports. But especially when there are no changes in
company policy on the ground, “corporate responsibility” may be nothing
more than public relations. Therefore change in applying the existing WTO
structure is needed.

7.3 International Monetary Fond

The IMF is an organisation of 184 countries, working to foster
global monetary co-operation, secure financial stability, facilitate
international trade, promote high employment and sustainable economic
growth, and reduce poverty.197 It is submitted that International Monetary
Fond need to have more important role in addressing international legal
responsibility of transnational corporations for *ius cogens* human rights
violations especially if its project are operated by transnational
corporations. However, it may be suggested that the UN, the World Bank,
IMF and WTO should integrate their objectives, in order for economic and
financial negotiations to be in respect of social and human rights
conventions.
IMF aims at preventing crises in the system by encouraging countries to
adopt economic policies. It is supposed to work for global prosperity by
promoting balanced expansion of world trade, stability exchange rates,
avoidance of competitive devaluations, and orderly correction of balance of
payments problems. When dealing with country it usually draws up a
Poverty Reduction Strategy Paper (PRSP) in order to strengthen basic
principles of country ownership, comprehensive development, and broad
public participation.198 It this areas it refers to many activities of
transnational corporations, so it may appropriate to include more human
rights based policy in its policies.

196 Myriam Vander Stichele of the Transnational Institute
197 http://www.imf.org/, last visited 20.1.2.2004
198 id.
8 PROPOSED INTERNATIONAL FRAMEWORK OF RESPONSIBILITIES AND RECOMMENDATIONS

This thesis has tried to suggest that the existing mechanisms are not sufficient to address of *ius cogens* human rights violations by transnational corporations. In order to address five-fold inadequacy of international legal framework for transnational corporations presented in Chapter 3, the international community must to take into consideration each of these inadequacies. The answer to five-fold inadequacy of international legal framework may summarised as following:

1. TNC are participants in the international community and have to therefore comply with at least existing *ius cogens* human rights standards (see Chapter 3 and 5). The states may be left with the supervising role to over the compliance of TNC with these standards.

2. The inadequacy in existing international human rights law standards must be overcome by adopting strong international human rights law legal standards governing the conduct of transnational corporations. The question is if the U.N. Norms are the right tool for addressing the most heinous human rights violations since it also does not address most of the *ius cogens* norms.

3. Inadequacy in general principles aiming at corporate accountability. The corporate accountability should not be based only on principle that the corporations need to comply with human rights standards only for the purpose of enhancing their profits by having competitive advantage. One cannot promote human rights to raise its profits. Corporations need to comply with human rights as part of their position in society.

4. It was submitted in previous chapters that transnational corporations have to comply with human rights obligations

5. A strong international legal mechanism for corporate human rights responsibility should be established and the problem with lack of sanction should be overcome. Nowadays compliance is absolutely voluntary and lack compliance with *ius cogens* human rights norm is not followed by any consequences (civil and criminal) in international law. It is submitted that in the short term already existing mechanisms should be used. A strengthening of the co-ordination and legitimacy of these could take place by on the one hand integrating the international judicial bodies and on the other hand by ensuring that the international institutions, being primarily the Bretton Woods institutions and the WTO. In addition, the mechanism of international commercial arbitration may prove as the most appropriate approach in addressing human rights violation by transnational corporations.

In the long term, a Special Court for Transnational Corporations (For example International tribunal for transnational corporations) should be established, which among other things could supervise that the transnational corporations actually fulfil their international human rights obligations. The simplest way to establish that kind of Tribunal would be through the Security Council of United Nations.
under the chapter 7 of UN charter as a response to the threat to international peace and security posed by those serious violations. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established on this legal basis by Security Council resolution 827. There is no reasons why the Special court for addressing the violations committed by transnational corporation could not be established in a similar way. It is submitted that a Special Court needs to be established in the light of serious violation of *ius cogens* human rights norms. It would provide possibility to prosecute transnational corporations or individuals behind them for most terrible atrocities, which touch the core of mankind existence.

Furthermore, the International tribunal for transnational corporations should ensure that economical and developmental problems connected with activities of transnational corporations get the highest political priority. It is one of the largest problems of today. WTO adjudicating bodies cannot under existing institutional framework enforce the *ius cogens* obligation. The problem is both the lack of political will and also lack of international legal framework. It is submitted that the overhaul is needed to bring the violation of *ius cogens* human rights norms within the jurisdiction of the WTO bodies. So far the WTO adjudicating bodies are not courts of general jurisdiction and cannot interpret and apply treaties and customs provisions and resolve conflicts with human rights treaties as they considered the best.

### 8.1 Recommendations

- **To the international community overall**
  1. Work towards international legally enforceable International Standards, based on the UN norms or on some other document.
  2. Establish international mechanism ((International tribunal for transnational corporations or similar) for reporting reviewing, monitoring and reviewing human rights abuses committed by transnational corporations.
  3. Support the activities and effort to address *ius cogens* human rights violations by transnational corporations at the national level as well
  4. Promote to respect for *ius cogens* norms and other human rights norms and human rights education.

- **To transnational corporations and other business enterprises**
  1. Adopt, disseminate and implement international human rights law standards in your business policy policies and codes of conduct.
  2. Apply international human rights law in contracts and other dealing with contractors, subcontractors and any other associates.
  3. Publicly and privately condemn heinous human rights violations by all parties (including yourself) in respective country, and possibly the inappropriate use of facilities by government forces, and establish procedures to ensure that the activities of the consortia, their company members, and their subcontractors do no result in, benefit from, or contribute to human rights abuses.
  4. Cooperate in creating an environment where human rights are understood and respected. Do not operate or reconsider operating in countries where there is a high level of human rights violations or where legislation, governmental practice or other constraints make it imperative to
address specific abuses and devise ways of promoting respect for human rights.
5. Adopt internal guidelines for the public or private security forces for facilities in oil producing areas, emphasising the need to respect human rights, to institute effective monitoring to ensure the guidelines are being followed, and to initiate disciplinary proceedings when they are violated.
6. Since, the primary responsibility for monitoring company policies lies within the company itself; there should be periodic independent verification of these procedures and the report they generate.

- **To the States/respective governments**
  1. Prepare and implement operational guidelines for transnational corporations to apply international human rights law
  2. Organise training seminars and workshops for staff of transnational corporations and facilitate similar events with subcontractors and associates and within industry associates to raise awareness
  3. Welcome the initiatives for enforcement of *ius cogens* human rights obligations by transnational companies in international law before international tribunals.
  4. Use the international human rights law as a benchmark to ensure domestic legislation is adequate, and to inform the interpretation of the concept of due diligence by domestic courts.
  5. Establish the necessary legal and administrative framework for ensuring that transnational corporations and other business enterprises abide by the international human rights law and especially by peremptory norms of international law.

- **To the United Nations Security Council**
  1. Consider creating a tribunal for enforcement of *ius cogens* human rights obligations by transnational companies in international law
  2. Impose and enforce an embargo on trade or transfer of all arms and other war materiel between any person, company, or country and the respective government or any rebels operating inside that country until concrete and measurable progress in compliance with international human rights and international humanitarian law is made toward ending human rights abuses, as established by the U.N. High Commissioner for Human Rights.

- **To World Bank**
  1. Refrain from lending to or funding of the government of respective developing country, including funding for research, until government and transnational corporations operating in that state show the minimum respect for international human rights law.

- **To World Trade Organization, Inspection Panel**
  1. Evaluate companies in which you invest by using the UN Human Rights Norms for Business as a benchmark
  2. Use the UN Human Rights Norms for Business in development of criteria to assess the human rights impact of potential projects.

- **To European Union – to European Parliament**
  1. Initiate a consultation with the respective governments under Article 96 of the Cotton Agreement between the E.U. and the African-Caribbean-Pacific (ACP) states, and insist on measurable progress including remedies
for past human rights abuses, an immediate cessation of government bans on relief flights and denial of access to relief operations, and cessation of targeting civilians and civilian objects. In particular the consultation must stress abuses in the oil areas.

2. Authorise and fund an independent and professional human rights and environmental assessment of all oil concession areas/problems areas in respective country where E.U. companies have invested or provided good or services, supervised by the UN High Commissioner for Human Rights—where at least a full year is provided for field work—to determine whether or not oil development has contributed to human rights abuses, the spread of the conflict, loss of livelihood of original residents, or potential or actual environmental damage.

3. Authorise and fund an independent and professional investigation of possible breaches of the E.U. arms embargo on DRC and Sudan, including any arms sales or transfers by E.U. aspiring members.

4. Devise regulations for transnational companies incorporated or based in the E.U. regulating their conduct so that they do not become complicit, directly or indirectly, with human rights abuses in countries where they are doing business.

5. Seek from all companies incorporated or based in the E.U. which are engaged in oil-related business in Sudan or in diamonds exploitation detailed annual reports relating to their compliance with international business codes and international business human rights norms.

- To OECD, ILO
  1. The OECD should indicate that the UN Human Rights Norms for Business are to be used as a reference for understanding the scope of human rights clause in the OECD Guidelines for Multinational Enterprises.

- To United Nations
  1. The United Nations Commission on Human Rights should through resolution finally welcome the adoption of the UN Human Rights Norms for Business.
  2. The United Nations should more intensively link the UN Global Compact and UN Human Rights norms for businesses.
  3. The Office of the Global Compact should issue a strong statement of support for the UN Human Rights Norms for Business, and indicate that the UN norms are to be used as a reference for understanding Global Compact’s Principles 1 and 2 on human rights.
  4. The Office of Global Compact should disseminate the UN Human Rights Norms through its networks.

- To NGOs and advocates
  1. Use the international human rights law and the UN Human Rights Norms for Business in your monitoring, campaigning and lobbying activities and in your dialogues with companies, governments and other bodies.
  2. Support the further dissemination and development of international mechanism for invoking the accountability for human rights violations by transnational corporations.
  3. Support the further dissemination and development of the international human rights law and the UN Human rights norms for business.
9 Conclusion

In the orientation to this thesis four questions were put forward, namely, do transnational corporations have to comply with \textit{ius cogens} human rights obligations? Secondly, if a corporation bears a duty to respect human rights norms, can then a TNC incur international legal responsibility for violation of international human rights law, especially norms of \textit{ius cogens} nature? Thirdly, since international legal obligations of transnational companies would be of little importance in the absence of effective measures to enforce them, what should be the nature of an international mechanism that could effectively deal with \textit{ius cogens} human rights violations by the TNCs (extension of existing jurisdiction of international tribunals or establishment of new international forums). And fourthly, should the TNCs be treated as the participants in international law, and should they carry any special form of responsibility?

It has been submitted that transnational corporations as the participants in international community, must, in good faith, comply, with their \textit{ius cogens} human rights obligations and their other international legal obligations. TNCs may not claim exemption from a legal norm, which has been created by the overwhelming consensus of the international community. The development of international law is influenced by the requirements of international community. It has thus been suggested that corporations are required to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognised in international human rights law and national law. At minimum this requires companies to refrain from activities that directly or indirectly violate human rights, or benefit from human rights violations, and to use due diligence not to do harm (see Velasquez-Rodriguez test). Various international instruments already nowadays indirectly regulate non-state actors; whereas international and regional judicial bodies have now recognized the human rights obligations of non-state actors for several decades. The Inter-American Court of Human Rights and the European Court of Human Rights have contributed immensely in evolving the human rights obligations of non-state actors by recognizing their obligation to respect the enjoyment of human rights by all persons.\textsuperscript{199}

Secondly, transnational corporations may incur the international legal responsibility for violations of \textit{ius cogens} human rights norms. Over seventy years ago it was already argued that: Those who wield (state) power we have subjected to some sort of responsibility to a democratic electorate, and to various constitutional limitations. Yet much of this recognised political power is not different in kind or degree, from much of the power that some individuals and private groups can lawfully exercise.

against other individuals". However, the obligations of states have throughout the decades become very detailed, whereas obligations of non-state actors remain at stale point. States foremost in developing worlds provide benefits to transnational corporations, on the other side no duties reciprocate. Transnational corporations hence have two-fold duty, one to the local community in which they operate, and other to national society in which they function. It was submitted on the case-by-case basis that several transnational corporations grossly disregard that duty resulting in most heinous violations of international human rights law.

Thirdly, after extensive research I consider highly unlikely that existing arrangements will be sufficient enough in order to address *ius cogens* human rights obligations of transnational corporations. It may be then suggested that major overhaul of international institutional framework is needed. Whether that is likely to happen in forthcoming years or decades in the view of political will of international community, it is not for me to state. I have in this thesis desired merely to explore the possibilities in achieving full international legal responsibility of transnational corporations for *ius cogens* human rights abuses. It has not been my desire to preach on international community how to deal with these atrocities but I have merely summarised the existing situations in international legal fora and shed a light on few examples of the most heinous examples of abuses where international community remained silent. When I read the testimonies of people and children from DR of Congo and Sudan, it have not understand why corporations are paying merely lip-service to human rights obligations rather than to take them seriously. It has been also hard to grasp why the European diamonds companies are buying diamonds from the mines in Congo controlled by rebels. Through that transnational corporations fuel the conflict in already destroyed region. And there is the European Union, which has been since a decade preparing a Code of Conduct for European Enterprise operating in developing countries. The legislative process came to stop in 2001 probably in the light in heavy lobby of transnational corporations. In the light of all these fact, I have suggested that a special court for transnational Corporations should be established, which could supervise that the transnational corporations actually fulfil their international human rights obligations. The simplest way to establish that kind of tribunal would be through the Security Council of United Nations under the chapter 7 of UN charter as a response to the threat to international peace and security posed by those serious violations.

Hence, it would be reasonable to expect that existing international judicial bodies would interpret the TNC's obligations taking account the relevant international human rights standards, notably *ius cogens* obligations, international customary and international treaty law obligations. It may be high time for international financial institutions to determine whether human rights have been violated or respected by transnational corporation, but also to see if states act consistently with international law. The commercial arbitration may be useful tool in addressing those kind of violations.

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200 H.L.Hale (1935) 'Force and the State: a comparison of the political and compulsion' Columbia Law Reviews, p. 149. This extract is quoted by Professor Bercusson at the beginning of a paper on 'Economic Policy: State and Private Ordering' in the context of law as tool of economic policy, and more recently by Andrew Clapham in his doctoral dissertation on Human Rights in Private Sphere from 1991. The both thesis submit that the private organs have human rights obligations. Private/public distinction is nowadays outdated.
Fourthly, the debate on human rights obligations of transnational corporations concerns very much about private/public distinction. It has been submitted that this distinction is out dated. By using the words of Rosalyn Higgins *we have erected an intellectual prison of our own choosing and declared it to be an unalterable constraint*.²⁰¹ It is more useful to discuss about participants in international community. Therefore is one also easier argues that human rights obligations also apply horizontally between non-state actors.

Finally, my comments in the thesis are partially in form advocacy, but also simply in the form observation and speculation. I started to write this thesis with intention to strongly argue for case that transnational corporations have international legal responsibility for *ius cogens* human rights violations. In reflecting on development of enforcement of most appalling crimes, I have embraced embracing the growth of the international mechanism cumulating with the development of international criminal court. I would simply submit that the existing mechanisms, newly created international criminal courts are most likely to dominate the enforcement of international legal responsibility for international crimes of transnational corporations in years to come, possibly through the extension of their personal jurisdiction. As the things stand now, we should expect a continued growth in the reach of international and national courts for international crimes committed by transitional corporations. I have also suggested that the Special Court for Transnational Corporations should be established, which among other things could supervise how the transnational corporations are actually fulfilling their international human rights obligations. International financial institutions must contribute to building environments and societies in which people are better able to pursue a broader range of human rights. It has been also submitted that a reform of financial institutions is need that may address the atrocities committed by transnational corporations especially in the light of absence of any appropriate international binding mechanism for redress of such violations.

The respect for the most basic human rights norms goes to the heart of mankind and who ever refuses and denies that may not be given the full status in the international community. Corporations may be not only morally and socially responsible for respecting and protecting human rights, but also increasingly legally liable as *organ of society*. Treaties and custom usually confer obligations and rights to prosecute and punish certain acts that incur individual responsibility. Therefore it has to be recognised that transnational corporations and their officers and persons working for them are obliged to respect generally recognised *ius cogens* norms.

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