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Abstract

Business and human rights began to emerge on the globe due to the increase in transnational corporations and the impact of their activities on human rights. This heightened the awareness of the issue since businesses or TNCs have been found to either violate human rights directly or indirectly and existing international instruments are inadequate to hold businesses accountable. However, the attention of the organisations like the United Nations was drawn to this anomaly, and international standards began to evolve. These standards emphasize for the first time that apart from States, businesses can also be responsible and held accountable for human rights violations. Against this background, this paper identifies existing frameworks including regional frameworks relating to business and human rights. It examines emerging standards on the subject. The method adopted in this paper is doctrinal and it reveals that the standards for States and businesses are voluntary guidelines and are not legally binding on them. It recommends that States make efforts to develop policies reflecting these standards to prevent violation of human rights. It concludes that if states do not take necessary steps to ensure that businesses respect and fulfill human rights in the process of carrying out their activities, abuse of human rights will increase.

Keywords: Business, Human rights, United Nations, TNCs

1. Introduction

International human rights law recognizes the protection of human rights and imposes a duty to respect, protect and fulfill human rights on States. Thus, national governments are saddled with the primary obligation to secure universal enjoyment of human rights and this involves an obligation to protect all individuals from the harmful actions of others. They are equally required to ensure that individuals are protected against abuse by third parties, including businesses. Regional frameworks have also emerged to ensure that countries in the regions observe fundamental freedoms.

In recent years, there is an increase debate on the connection between business and human rights.¹ Discussions and writings focused on the impact of businesses on human rights consider how corporations can be held accountable for human rights violations and what mechanisms are or should be in place to prevent the violations from occurring.

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¹ 'Business and Human Rights: A Progress Report' <http://www.ohchr.org/Documents/Publications/BusinessHREn.pdf> (accessed 18 February 2017)

rights consider how corporations can be held accountable for human rights violations, and what mechanisms are or should be in place to prevent the violations from occurring in the first place. Such discussions also focus on reasons and whether the corporate sector can take part in respecting and safeguarding rights.² In recent decades, there is a growing body of evidence that the impact of corporate activities on poor communities in developing countries can result in violations of human rights.³ Businesses are associated with serious human rights abuses like the violence caused by Shell in Nigeria.⁴ Thus, the awareness of the concept continues to grow due to the rise in economic activities as a result of the expansion of the private sector and most particularly the impact of businesses on human rights. This concept within the context of business has also received attention from international NGOs like the Amnesty International, the academics and also the United Nations.⁵ Hence, it has become obvious that companies either local or multinational corporations, public or private could have major impact on human rights, whether positive and negative.

The international standards emerging in response to the violations by these third parties now emphasizes that businesses should also protect and fulfill human rights. Hence, international standards as voluntary initiatives like the United Nations Global Compact, the ILO Tripartite Declaration, the OECD Guidelines for Multinational Enterprises addressing business and human rights, United Nations Business Guiding Principles have begun to emerge and bring attention to the issue of business and human rights globally.

This paper seeks to identify and examine the framework on business and human rights under international law including regional frameworks.

2. The Concept of Business and Human Rights

The atrocities that occurred during the Second World War led to the serious need to secure protection, peace and order for humans. Hence, the Universal Declaration of Human Rights was adopted by the UN General Assembly (UNGA) in 1948.⁶ It was the first set of codification of human rights.⁷ The adoption of two covenants; the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on

² 'Business and Human Rights' <http://www.ahrcentre.org/topics/business-and-human-rights> (accessed 18 September 2017)

³ L. C. Jernej, 'Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises', 2008 International Law p. 74 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317263&download=yes (accessed 11 September 2016)

⁴ 'Business and Human Rights' <http://hrp.law.harvard.edu/areas-of-focus/business-human-rights/> (accessed 18 September 2017)

⁵ J. Ruggie, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', A.HRC.17.31 www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (accessed 6 February 2016).

⁶ P. Sieghart, *The International Law of Human Rights*, Oxford University Press, New York, 1983, p. 17, UDHR, G.A. Res. 217 A (III), Dec. 10, 1948

⁷ Ibid.

Economic and Social Rights (ICESR) by the UN General Assembly in 1966 followed the adoption of the UDHR.⁸ The former being on civil and political rights and the latter on economic, social and cultural rights were created to become legally binding on member States of the UN.⁹ The UDHR and the two covenants both comprises the International Bill of Rights. In addition to these instruments are other treaties adopted to protect human rights. These includes International Labour Organisation (ILO) which addresses the workers' rights including their employment conditions, Convention on the Rights of the Child 1989 which elaborates on the rights of the child and Convention Against Torture and Other Cruel Punishment of the Crime of Apartheid 1973. Apart from these agreements are also regional agreements like the European Convention on Human Rights and Fundamental Freedom, the American Declaration of the Rights and Duties of Man (ADR), The American Convention on Human Rights (AMR) and the African Charter on Human and People's Rights (AFR). States under International human rights law are under obligation to respect, protect and fulfill human rights. Thus, they are required to protect individuals against human rights abuses by third parties, including corporations.

In the 1970s, the negative impact of the activities of corporations on all facets of life began to be discussed and since then, the United Nations has taken steps to control these impacts.¹⁰ Hence, in 1974, the Transnational Corporations Commission which is part of the UN Economic and Social Council (ECOSOC), with 48 Member States was created and equally developed a code of conduct including the Centre for Transnational Corporations.¹¹ Due to opposition, the purpose for its existence was not achieved.¹² In recent years, there is also an increase in evidence of serious impact of the conducts of corporations particularly in developing countries on poor communities that can result in violations of human rights.¹³ Businesses can violate and they violate a wide range of human rights which includes civil, political, social, economic and cultural.¹⁴ The increased recognition of the link between business and human rights is one of the most significant changes in the human rights debate.¹⁵ Business is a key source of investment

⁸ ICCPR, G. A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999, U.N.T.S. 171, entered into force on March 23, 1976, ICESCR., Preamble, Dec. 19, 1966, Preamble, para. 5, entered into force Jan. 3 1976

⁹ T. Hillier, *Public International Law* Cavendish Publishing Limited, 1994, p. 311, P Sieghart, p. 25

¹⁰ A. J. de Regil, 'Business and Human Rights Towards a New Paradigm of True Democracy and the Sustainability of People and Planet or Rhetoric Rights in a Sea of Deception and Posturing the good old formula of changing so that everything remains the same' The Jus Semper Global Alliance 2008 p.17 <https://www.jussempir.org/Resources/BusinessandHRRVF.pdf> (accessed 27 September 2017).

¹¹ Ibid.

¹² Ibid.

¹³ L. C. Jernej, p.74.

¹⁴ B. L. Mangalady, 'Relationship Between Business Corporations' And Human Rights: A Legal Analysis' p. 2 <http://ssrn.com/abstract=1987032> (accessed 12 November 2016)

¹⁵ United Nations High Commissioner for Human Rights' Office, 'Business and Human Rights: A Progress Report' Geneva, January 2000 <http://www.ohchr.org/Documents/Publications/BusinessHRRen.pdf> (accessed 6 February 2017)

and creation of employment.¹⁶ Businesses like Transnational Corporations (TNCs) or Multinational Corporations (MNCs) are 'very powerful actors in the current world order'.¹⁷ A TNC is "a national company in two or more countries operating in association, with one controlling the other in whole or in part".¹⁸ They are vital tools in the process of globalization,¹⁹ and a major contributor to economic growth around the world.²⁰ They have the capability of decreasing poverty and increasing demand for the rule of law which contributes to the realization of a broad spectrum of human rights.²¹ TNCs promote the transfer of technology, the training of human resources, and create access to international markets.²² TNCs continue to expand their global networks and an increasing number of developing countries anticipate attracting their investments.²³ Foreign Direct Investment (FDI) may promote economic development in the host state but may also pose threats to the fulfillment of human rights, which can be through the activities of businesses or complicity with the government of the host state.²⁴ They have the ability to evade domestic laws and also exploit the loopholes in such laws.²⁵ Government, particularly in developing countries, is usually reluctant to restrain the activities or take firm actions against businesses that disregard their human rights responsibilities.²⁶ This unwillingness is primarily rooted in the anxiety that taking such actions against human rights abuses by MNCs might impair their competitiveness to

¹⁶ J. Ruggie, 'Protect, Respect and Remedy A Framework for Business and Human Rights Report of the Special Representative of the United Nations Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises' <http://www.mitpressjournals.org/doi/pdf/10.1162/itgg.2008.3.2.189> (accessed 12 November 2016)

¹⁷ A. Gatto, *Multinational Enterprises and Human Rights: Obligations Under EU law and International Law* Edward Elgar Cheltenham; Northampton 2011 3. Businesses, Transnational Corporations (TNCs) or Multinational Corporations (TNCs) can be used interchangeably.

¹⁸ T. Donaldson, 'The Ethics of International Business', 30 1992 cited in A. L. Shinsato, 'Increasing the Accountability of Transnational Corporations for Environmental Harms: The Petroleum Industry in Nigeria', *Northwestern University Journal of International Human Rights* 4 (1) (2005-2006) 186-209 189

¹⁹ F.G. Isa *Privatisation and Human Rights in the Age of Globalisation* Intersentia nv 2005 23, D Aguirre *The Human Right to Development in a Globalized World*, Aldershot, Ashgate, 2008 19

²⁰ Castan Centre for Human Rights Law Faculty of Law, Monash University, Clayton VIC 3800, Melbourne, Australia, 'Human Rights Translated :A Business Reference Guide' hrbdf.org/doc/human_rights_translated.pdf (accessed 20 August 2016).

²¹ J. Ruggie Protect, n 16 above.

²² J. E. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' *American University International Law Review* 23 (3) (2007): 451-558 p. 453.

²³ E Paus *Foreign Investment, Development, and Globalization Can Costa Rica Become Ireland?* Palgrave Macmillan US, 2005 1

²⁴ P. Redmond, 'Transnational Enterprise and Human Rights: Option for Standard Settings and Compliance' 37 (2003) *International Law* 62 cited in B. L. Mangalpaday, n 14 above p. 2.

²⁵ B. L. Mangalpaday, p. 2 n 14 above.

²⁶ A.L. Shinsato, p. 189 n 18 above.

attract foreign investment much desired for development.²⁷ Businesses have been accused of direct or complicit violations of human rights including murder, rape, torture, forcible dislocation of populations, forced labour, destruction of the environment and extrajudicial execution.²⁸

For instance, the exploration and production of oil by Royal Dutch Shell in the Ogoni land in Rivers State caused harmful effects to the environment, human right violations, violence including armed conflicts and disruption of oil production. The livelihood of members of the communities was also lost due to the pollution of the land and water in the communities. Victims also instituted cases in foreign courts due to the poor response of the government to the problems. Major MNCs, like Shell and Chevron were accused of complicity in crimes such as summary execution, extrajudicial killings, arbitrary detention, torture, cruel, inhumane or degrading treatment including other violations of international law, such as infringements on the right to life, liberty and security of the person, and the right to peaceful assembly and association.²⁹ Complicity charges were instituted against Royal Dutch Shell and its Nigerian subsidiary Shell Petroleum Development Company (SPDC) in U.S courts under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) in *Wiwa v Royal Dutch Petroleum*³⁰ and *Kiobel v Royal Dutch Petroleum*.³¹ In May 1998, the UN Committee on Economic, Social and Cultural Rights noted with alarm the extent of the devastation that oil exploration has done to the environment and quality of life in areas such as Ogoni land where oil has been discovered and extracted without due regard to the health and well-being of the people and their environment. It recommended that "the rights of minority and ethnic communities—including the Ogoni people – should be respected and full redress should be provided for the violations of the rights set forth in the Covenant that they have suffered".³² Another example is the case of Nike which was criticized by NGOs for poor

²⁷ S. Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' European Company Law 9 (2) (2012) *University of Oslo Faculty of Law Research Paper*. See also Mangalpadny n 14 above.

²⁸ S. Pillay, 'And Justice for All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections', 81 (2004) *University of Detroit Mercy Law Review* 489, cited in B. L. Mangalpadny n 14 above.

²⁹ C. Kaeb, 'Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks', *Northwestern Journal of International Human Rights* 6 (2) (2006) 327-353 at 331. Shell was accused of complicity with the Nigerian military in the trial and execution of the writer and activist Ken Saro Wiwa and nine others by the Nigerian Government.

³⁰ 226 F.3d 88, 93-94 (2d Cir. 2000); Eighth Amended Complaint for Damages and Equitable Relief at 26-42.

³¹ *Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457 (S.D.N.Y. Sep. 29, 2006), leave for interlocutory appeal granted, Nos. 06-4800 & -4876 (2d Cir. Dec. 27, 2006).

³² Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria, U.N. Doc. E/C. 12/1/Add.23 (June 16, 1998).

working conditions in its factories in Indonesia, Thailand and other countries. It was alleged of paying low wages, child labour and forcing workers to work overtime.³¹

Although some human rights treaties may be interpreted to apply to MNCs, however, there is an emergence of international standards on business and human rights to respond to these violations.³⁴ The emphasis of these initiatives is to the effect that businesses and not only states can respect, protect and fulfill human rights.

3. International Human Rights Standards on Business and Human Rights

Generally, international law and international human rights law does not establish duties on businesses directly but may have limited direct obligations in some circumstances.³⁵ This section will highlight existing treaties and conventions as regards the obligations of businesses.

In the preamble of the Universal Declaration of Human Rights, the UDHR focuses on the obligations of States, and also mentions the responsibilities of individuals and of every organ of society, which includes business corporations. It states that;

the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end 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 and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.³⁶

Both the ICCPR and the ICESCR recognize private obligations in their preambles, in the following terms:

Realizing that the individual, having duties to other individuals and to the Community of which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.³⁷

This implies that every individual, comprising legal persons such as MNCs, is saddled with the duty to promote the fulfillment of this covenant. The ICESCR also contains

³¹ C. Kaeb n 29 above p 345-355, Ruggie J.G, *Just Business- Multinational Corporations and Human Rights I* ed. W.W. Norton, London 2013 p. 3-6.

³⁴ B.L. Mangalpaday, n 14 above. See also D. Aguirre, 'Multinational Corporations and the Realization of Economic and Social Rights', <http://www.mangalpaday.institute-of-humanrights/seminars/ds0406cdaniel%20aguirre-eng.doc> (accessed 20 May 2017).

³⁵ C. M. O'Brien & S. Dhanarajan, 'The Corporate Responsibility to Respect Human Rights: A Status Review', p. 1 <http://ssrn.com/abstract=2607888> (accessed 15 November 2017).

³⁶ Preamble, UDHR

³⁷ ICESCR, Preamble, ICCPR Preamble

express recognition that it cannot be interpreted to imply for any "group or person" any right to destroy or limit the rights of others to a greater extent than is provided.³⁸ Under the ICCPR, each state party undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognised in the present Covenant.³⁹ Thus, where a corporation endangers the rights of a person, it is the duty of the State to ensure that human rights are respected. The Committee on Economic, Social and Cultural Rights has stated in its general comments that non-state actors such as those within the private business sector have responsibilities and obligations for the fulfilment of these rights.⁴⁰ This line of reasoning seems to indicate a duty of non-state actors to go beyond respect for the law and into the realm of positive obligations.⁴¹

Several international declarations support the concept of private-actor responsibility regarding the realisation of social and economic rights. For example, the UN Declaration on the Elimination of All Forms of Racial Discrimination,⁴² the Rio Declaration on Environment and Development⁴³ and the Copenhagen Declaration on Social Development and Programme of Action⁴⁴ all require active promotion of their mandate from non-state actors. There can be little or no doubt that this statement applies to corporations.⁴⁵ The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) demands that states take all proper measures to eliminate discrimination against women by any enterprise.⁴⁶ The African Charter on Human and Peoples Rights,⁴⁷ the African Charter on the Rights and Welfare of the Child⁴⁸ and the American Declaration of the Rights and Duties of Man impose duties directly on non-state actors.⁴⁹ These actors specifically include individuals and communities and some

³⁸ Article 5 (1) ICESCR,

³⁹ Article 2 of ICCPR

⁴⁰ For example, para 20 of the General Comment No. 12 "the Right to Adequate Food" (Art.11) 12 May 1999; Para 42 of General Comment No. 14 "The Right to the Highest Attainable Standard of Health" (Art. 12) 4 July 2000

⁴¹ D. Aguirre, 'Multinational Corporations and the Realisation of Economic and Social Rights', <http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0406c/daniel%20aguirre-eng.doc> (accessed 20 May 2017)

⁴² Adopted on 20 November 1963 by General Assembly Resolution 1904 (XVIII) Art. 2 states that "No State, institution, group or individual shall make any discrimination in matters of human rights..."

⁴³ Adopted by the UN Conference on Environment and Development, Rio de Janeiro, on June 13 1992 UN Doc: A/CONF.151.26 (Vol.1) (1992)

⁴⁴ Adopted by the World Summit for Sustainable Development, Copenhagen on 12 March 1995, UN doc A/CONF.166/9 (1995)

⁴⁵ D. Aguirre n 41 above.

⁴⁶ CEDAW

⁴⁷ Adopted by the OAU on 27 June 1981 and entered into force on 21 October 1986.

⁴⁸ Adopted by the OAU on July 11 1990 and entered into force on 29 November 1999

⁴⁹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 'adopted' by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

duties concern social economic and cultural rights.⁵⁰ All of the above mentioned charters and declarations demonstrate that private actors have duties and responsibilities within international law.

The international legal system appears to be inadequate to regulate powerful non-state actors, such as businesses or MNCs as they are powerful.⁵¹

4. Emerging Standards on Business and Human Rights

The evolving human rights standards in respect of corporate responsibility and accountability includes the OECD Guidelines, the Global Compact, the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises, the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration) and United Nations Framework on Business and Human Rights.

4.1 The Organization for Economic Cooperation and Development's Guidelines for Multinational Enterprises

The OECD was formed in 1961 involving countries united with the aim to ensure "democratic government and market economy".⁵² It has strived to establish strong economies in its member states, encourage development, make improvement on market systems as well as broaden free trade.⁵³ After unsuccessful trials to agree on a document to be binding legally as it concerns corporate responsibility, a formal document was adopted in 1976 by the Organization for Economic Cooperation and Development.⁵⁴ Since then, it has been revised in 1979, 1982, 1984, and 1991 and then in 2011.⁵⁵ "The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws."⁵⁶ This is the only initiative that is formerly agreed on by state governments and applicable to corporate entities located in countries that adopted it.⁵⁷ The OECD guidelines are also applicable to corporate entities in territories of states that do not adopt the guidelines where such corporations are registered in OECD state.⁵⁸ It comprises of the National Contact Points (NCPs) which is instituted by member states as

⁵⁰ D.M. Chirwa, 'Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights Under the South African Constitution,' in Human Rights and Corporate Social Responsibility, International Conference Mediterranean Masters Programme in Human Rights and Democratisation, Malta, November 13-14, 2002 p.38.

⁵¹ D. Aguirre n 41 above.

⁵² Ibid, p. 77

⁵³ Ibid.

⁵⁴ OECD Guidelines for Multinational Enterprises, OECD Publishing 2011, www.oecd.org/corporate/mne/48004323.pdf, 3 (accessed on 23 June, 2015)

⁵⁵ L.C. Jernej, n 3 above p. 78.

⁵⁶ OECD Guidelines for Multinational Enterprises, OECD Publishing 2011.

⁵⁷ L.C. Jernej, n 3 above p. 78.

⁵⁸ Ibid.

part of the responsibility.⁵⁹ The NCPs in OECD countries follows up on the guidelines in these states⁶⁰ and also investigates allegations against companies that breach the guidelines.⁶¹ They are principles and standards that are not binding and are provided for business conduct⁶² in such areas as HR, transparency, corruption, taxes, labour and environmental relations and consumer protection, on a strictly voluntary basis.⁶³ The major gap in respect of the guidelines is if corporations neglect to follow these guidelines it then becomes short of a strong enforcement mechanism.⁶⁴ The National Contact Point and the Committee on International Investment and Multinational Enterprises are relied on to implement these principles although they lack the power to enforce since the mechanisms only perform functions like advisory, consultative and clarification functions.⁶⁵

4.2 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises

In 1998, a Working Group on the Methods and Activities of Transnational Corporations was formed by the Sub-Commission on the Promotion and Protection of Human Rights. In order to protect human rights, its main purpose was to raise suggestions relating to the activities of transnational corporations (TNCs).⁶⁶ It was then directed to prepare the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises as it regards to Human Rights.⁶⁷ In 2003, it submitted the Norms to the Human Rights Commission. It consists of twenty-three Articles. The Norms were distilled from other initiatives on the conduct of corporate actors in some aspects.⁶⁸ Firstly, reflected and consists of previous international codes. Secondly, it articulated indigenous human rights standards as the Universal Declaration on Human Rights. Thirdly, it

⁵⁹ A.J. de Regil, n 10 above p 18.

⁶⁰ L.C. Jernej, n 3 above p. 77.

⁶¹ J. Bonnitcha, 'The UN Guiding Principles on Business and Human Rights: the implications for enterprises and their lawyers' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165221 (accessed September 2017).

⁶² OECD Guidelines for Multinational Enterprises, OECD Publishing 2011, p. 3.

⁶³ A.J. de Regil, n 10 above p 18.

⁶⁴ S. Deva, n 27 above p.5.

⁶⁵ Ibid.

⁶⁶ Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations, ESCOR, 50th sess, 26th mtg, UN Doc E/CN.4/Sub.2/1998/45 (20 August 1998), cited in P.M. Pini, B. Sascha-Dominik, 'The UN 'Norms On The Responsibility Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights: A Requiem' <http://ssrn.com/abstract=1958537> (accessed 18 April 2017).

⁶⁷ A.J. de Regil, n 10 above p 18.

⁶⁸ D.G. Arnold, 'Transnational Corporations and the Duty to Respect Basic Human Rights', *Business Ethics Quarterly*, 20(3) p.5 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612296&rec=1&srcabs=1317263&alg=1&pos=2 accessed on 11 September 2014.

drafters of the Norms claim that they are non-voluntary and thus they are legally binding. The non-voluntary nature of the Norms is said to be reflected in the implementation of provisions that require reporting and oversight of human rights violation by corporations.⁶⁹ It enlisted an extensive list on the duties of human rights. Apart from providing for the general duty to respect, protect and promote human rights as acknowledged by both international and national law, specific duties were also included. They include the right to equal opportunity and non-discriminatory treatment; the right to security of person, the right of workers; the respect for national sovereignty and human rights; and the obligations with regard to consumer and environmental protection.⁷⁰ The Norms were drawn up in a mandatory language intended to impose the same duties of States which is to promote, respect and fulfill human rights on companies⁷¹ that is a binding human rights obligation. It also included provisions for their implementation. The scope of the Norms is not limited just to TNCs, but also covers "other business enterprises", that is, any business entity, regardless. It was accepted particularly by non-governmental organizations like Amnesty International, Human Rights Watch and criticized by the business organizations. Hence, the Norms precipitated a debate between these two groups and governments also hardly supported it.⁷² According to the developed states, sovereignty and the present international law was endangered by the Norms.⁷³ The issue of it imposing a binding obligation was one of the reasons for its being criticized because it is against international practices.⁷⁴ Eventually, the drafted Norms was deserted⁷⁵ and till now it serve as a reference point of the effort to develop a framework.⁷⁶

4.3 The ILO Tripartite Declaration

The Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Tripartite Declaration) was released by the ILO in 1977.⁷⁷ These are principles for governments, corporations, employers' organizations, and workers' organizations⁷⁸ in

⁶⁹ Ibid. p. 8.

⁷⁰ S. Deva, n 27 above.

⁷¹ Human Rights Council Seventeenth Session, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises A/HRC/17/31 21 March 2003 www.ohchr.org/EN/Issues/TransnationalCorporations/Pages/Reports.aspx (accessed 2 June 2017).

⁷² Ibid.

⁷³ L. C. Backer, 'On the Evolution of the United Nations' "Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in A Global Governance Context' *Santa Clara Journal of International Law* 2 (2010) p. 111. <http://ssrn.com/abstract=1619939> (accessed 20 February 2017).

⁷⁴ P. Simons, 'International law's invisible hand and the future of corporate accountability for violations of human rights', 30(1)2012 *Canada Journal of Human Rights and the Environment*, p.1 papers.ssrn.com/sol3/papers.cfm?abstract_id=1933426 (accessed 20 February 2017).

⁷⁵ L.C. Backer, n 73 above.

⁷⁶ A. J. de Regil n 10 above p.18.

⁷⁷ S. Deva, n 27 above.

⁷⁸ Ibid.

fields like employment, training, conditions of work and life and industrial relations⁷⁹ which they are expected to be monitored voluntarily.⁸⁰ Corporations are encouraged to the Declaration "to voluntarily bear in mind and apply its principles to the greatest extent possible".⁸¹ Some of these principles reflects the Universal Declaration of HR⁸² and more of the guidelines also deals with labour rights in areas such as employment, training, industrial relations, and conditions of work and life.⁸³ According to the declaration specifically in paragraph 8, parties concerned are expected to respect the Universal Declaration of Human Rights and also the International Covenants.⁸⁴ The Tripartite Declaration also lacks monitoring process and implementation mechanism.⁸⁵ Its provisions are reinforced by core and priority ILO Conventions and Recommendations.

4.4 The United Nations Global Compact

The UN Global Compact was launched at the World Economic Forum on January 31, 1999. It was proposed by the former UN Secretary General, Kofi Annan. Initially, it consisted of nine principles but the principle against corruption was later included.⁸⁶ These nine principles evolve around human rights such as labour rights and the environmental rights.⁸⁷ The purpose of these principles is to restate standards as that of the Universal Declaration of Human Rights, the ILO's Tripartite Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.⁸⁸ Hence, it received strong support from developing countries.⁸⁹ It is "not a regulatory instrument or code of conduct, but a value-based platform designed to promote institutional learning".⁹⁰ Being a voluntary initiative, the Global Compact seeks to encourage reliable corporate practices through different methods which can involve learning, dialogue and projects. Furthermore, its participants are not compelled to adhere to the principles although it is a UN's principle.⁹¹ The initiative's core comparative advantages are the universality of

⁷⁹ J. de Regil n 10 above p.18-19.

⁸⁰ S. Deva, n 27 above.

⁸¹ J. de Regil n 10 above p.18-19

⁸² Ibid.

⁸³ S. Deva, n 27 above.

⁸⁴ Ibid.

⁸⁵ S. Deva, n 27 above.

⁸⁶ United Nations Organisation. The Civil Responsibility of Business in the World Economy. The Global Compact. May 2005. A. J. de Regil n 10 above p.18.

⁸⁷ S. Deva, n 27 above.

⁸⁸ J. Nolan, "The United Nations' Compact With Business: Hindering Or Helping The Protection Of Human Rights?", *The University Of Queensland Law Journal*, 24(2) (2000) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003702 (accessed 11 September 2017)

⁸⁹ The UN Global Compact and the Oecd Guidelines for Multinational Enterprises: Complementary And Distinctive Contributions. Un Global Compact Office And The OECD Secretariat 26 April 2009 <http://www.oecd.org/corporate/Mne/34873731.pdf> (accessed 1 January 2015)

⁹⁰ Ibid.

⁹¹ United Nations Office of the High Commission on Human Rights, Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business

principles, the international legitimacy that only the United Nations embodies, and the Compact's potential to be a truly global platform with great appeal to companies all over the world. More than half of the participants of the Global Compact are from non-OECD countries, reinforcing the credibility of the initiative and promise of positive social impact where the need is greatest.⁹² Corporations are relied on to implement the principles on the basis of 'enlightened self-interest, public accountability and transparency'.⁹³ The major activities of the Global Compact includes furthering initiatives that supports the Global Compact at universal and national levels, taking part in dialogues on policy with corporations, a forum for learning to be developed by labour and civil society organizations and establishing development projects on the basis of public-private partnerships.⁹⁴

4.5 The United Nations Framework on Business and Human Rights

In 2005, Professor John Ruggie was appointed as the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises by the former Secretary General of the United Nations, Kofi Annan. This was in response to a request by the U.N. Commission on Human Rights which is now known as the Human Rights Council.⁹⁵ The SRSG was given a mandate to search and verify standards particularly for business enterprises on the issue of responsibility and accountability as regards human rights. In addition, he was given the task to expatiate on the duty of States in controlling the acts of businesses adequately in this regard.⁹⁶ The mandate was renewed in 2007 to enable the SRSG give recommendations.⁹⁷ In 2008, the SRSG presented his recommendation on the 'Protect, Respect, Remedy' Framework after three years of research.⁹⁸ The Framework was unanimously approved by the Human Rights Council. The mandate was further extended for three years and he was required to furnish concrete suggestions on practical ways to implement the framework.⁹⁹ Hence, the Guiding Principles were the result of six years of the work of the SRSG.¹⁰⁰ The framework is of three pillars. The first pillar refers to the duty of the State to protect citizens against human rights violations by third parties including companies. This pillar reflects international human rights law, such that states that are parties to human rights principles are under the obligation to prevent human rights abuses particularly by third parties that engage in activities which violate human

enterprises with regard to human rights, 61st session, Agenda item 16, 5, UN Doc. E/CN.4/2005/91 (2005) (OHCHR), J. Nolan, n 88 above.

⁹² Ibid.

⁹³ J. Nolan, n 88 above.

⁹⁴ S. Deva, n 27 above.

⁹⁵ L. C. Backer, n 73 above p.110.

⁹⁶ A/HRC/17/31 para. 4 n 5 above.

⁹⁷ A/HRC/17/31 para. 5 n 5 above.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ J. Bonnitcha, n 61 above.

rights. States should proactively take a variety of measures to prevent violations.¹⁰¹ The second is the corporate responsibility to respect human rights.¹⁰² The implication of this is that business enterprises should also protect human rights and avoid infringing the rights of others. The third pillar is to the effect that victims should have access to effective remedy either judicial or non-judicial.¹⁰³ The Guiding Principles involves standards and practices that are in existence under international human rights laws for states and corporations and do not necessarily consists of new legal obligations.¹⁰⁴ The focus of the framework is to address the impact of corporate conduct in various states.¹⁰⁵ This framework has received support from workers' organizations, national human rights institutions, companies and investors.¹⁰⁶

Despite the support, the GPs are criticised for its non-binding nature. Authors that examined the developments as regards the Second Pillar of the GPs from 2011, argued that though the GPs addressed the impacts of business, there are doubts about their effectiveness due to their non-binding characteristics.¹⁰⁷ They are referred to as 'incomplete', as Ruggie indicated that the endorsement of the Guiding Principles by the Council will not terminate the challenges of business and human rights but it indicates the end of the beginning.¹⁰⁸ The GPs is also criticised in their failure to recognize the role and participation of NGOs.¹⁰⁹ Furthermore, the GPs is opposed in support of a treaty.¹¹⁰

These international standards are voluntary initiatives non-binding on businesses. In the demand for a binding treaty, certain requests emanated from Ecuador including international Non-governmental organizations for the establishment of an international treaty on Business and Human Rights to hold businesses accountable in instances of their

¹⁰¹ T. Lambooy, M. Varner, A. Argyrou, 'The Corporate Responsibility to Remedy (3rd Pillar Ruggie Framework) Analysis of the corporate responses in three major oil spill cases: Shell - Nigeria; BP - US (the Gulf); Chevron - Ecuador' <http://ssrn.com/abstract=1953190> (accessed 9 July 2017).

¹⁰² A/HRC/17/31 para. 6 n 5 above.

¹⁰³ Ibid para 6

¹⁰⁴ Human Rights Council, 'Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' <http://www.unhcr.org/cit/0.ohchr.org/Documents/Issues/Business/A.HRC.21.21.AEV.pdf> (accessed 18 April 2017).

¹⁰⁵ P. Simmons, n 74 above.

¹⁰⁶ A/HRC/17/31 para. 7 n 5 above.

¹⁰⁷ Brien & Dhanarajan n 35 above.

¹⁰⁸ J.M. Amerson, 'The End Of The Beginning?: A Comprehensive Look At The U.N.'S Business And Human Rights Agenda From A Bystander Perspective' (2012) 17 *Fordham Journal Of Corporate & Financial Law* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2487348 (accessed 2 June 2017)

¹⁰⁹ R.J. Gerard, 'Regulating Multinationals: The UN Guiding Principles, Civil Society, and International Legalization' (2015) Regulatory Policy Program Working Paper RPP

¹¹⁰ R. Dumbuya, 'Corporate responsibility to respect human rights: Is the UN Guiding Principles on Business and Human Rights up to the task or is there a need for a Treaty on Business and Human rights?' <http://ssrn.com/abstract=2541420> (accessed 25 April 2017) Draft Resolution for 'Elaboration of an international legally binding instrument on Transnational Corporations and other business enterprises with respect to Human Rights' A/HRC/26/L.22/Rev.1, 24 June 2014

failure to respect human rights.¹¹¹ As a result, the UN Human Rights Council adopted a Resolution for a treaty on business and human rights on 26 June 2014.¹¹² A legal mechanism that offers solutions for claimants against businesses is the United States Alien Tort Claims Act (ATCA). The ATCA grants federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the US".¹¹³ Cases like *Wiwa v. Royal Dutch Shell Petroleum Co.*¹¹⁴ and *Aguinda v. Texaco*¹¹⁵ were instituted in US courts through the ATCA. However, these cases were dismissed by the courts for lack of jurisdiction. Businesses now have codes for their conducts or policies and processes in place to prevent and redress certain adverse human rights impacts.¹¹⁶ For instance, Shell in response to the criticisms of its activities particularly in Nigeria, incorporated a model of corporate human rights responsibilities.¹¹⁷

5. Conclusion

It is important to note that the international standards that address business and human rights are not legally binding on States. They are general initiatives of human rights. Although they indicate that corporations respect and protect human rights, these initiatives are mere guidelines to government and business organizations to control and regulate the activities of corporations in their territories. The awareness on the fact that corporations can violate human rights is increasing. Since there is no agreement on a standard that relates directly to corporations, most countries are yet to develop one. As a result, there is no responsibility, accountability and transparency and so they either abuse rights directly or in complicity with others to commit crime. It is suggested that States develop a policy to reflect the international standards to prevent human rights violations committed by businesses. States should also ensure that business enterprises within their territories are in compliance with human rights laws. Furthermore, businesses should equally adopt a policy to respect and protect international human rights within their sphere of influence.

¹¹¹ Dumbuya n 110 above.

¹¹² Ibid.

¹¹³ 28 U.S.C. 1350 (1994).

¹¹⁴ *Kiobel v. Royal Dutch Petroleum* n 31 above.

¹¹⁵ *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1999) (ATCA) on remand, 139 F. Supp. 2d 139 F. Supp. 2d 438 (S.D.N.Y. 2000).

¹¹⁶ J. Bonnitche, n 61 above.

¹¹⁷ C. Kaeh n 29 above p. 338.

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